

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DARDEN RESTAURANTS, INC.; GMRI,
INC.; YARDHOUSE USA, INC.; and
YARDHOUSE NORTHRIDGE, INC.,

Case: 31-CA-158487

and

FILBERTO MARTINEZ, An Individual,

**RESPONDENTS' BRIEF IN SUPPORT OF EXCEPTIONS TO
ADMINISTRATIVE LAW JUDGE JOEL P. BIBLOWITZ'S
DECISION AND REQUEST FOR ORAL ARGUMENT**

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INTRODUCTION

This case provides the National Labor Relations Board (the “Board”) the opportunity to overrule its decisions in *D.R. Horton, Inc.*, 357 NLRB 2277 (2012) (“*D.R. Horton*”), *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), and all subsequent cases holding that an employer violates the Act when it requires employees covered by the Act, as a condition of employment, to sign an arbitration agreement precluding the filing of joint, class, or collective claims concerning wages, hours, or other working conditions. Here, Administrative Law Judge Joel P. Biblowitz concluded that (a) the maintenance of a Dispute Resolution Program (“DRP”) by Respondent GMRI, Inc. which required employees to resolve labor disputes in individual arbitrations violated the Act; (b) that by bringing a court action to enforce the DRP, all Respondents violated the Act; and (c) that the unfair labor practice complaint was timely. However, as has been held by numerous state and federal courts, *D.R. Horton* was wrongly decided and should be overruled. Therefore, the decision below should be overturned.

STATEMENT OF THE CASE AND SUMMARY OF THE FACTS

The unfair labor practice charge underlying this case was filed by Filiberto Martinez (“Martinez”), the Charging Party, on August 20, 2015 alleging that an arbitration agreement entered into by Martinez, and the enforcement of that agreement by Respondents, violated Section 8(a)(1) of the Act. Jt. Stip. at 1; *see also* Jt. Ex. A.¹ On February 26, 2016, the Regional Director issued a Complaint and Notice of Hearing. Jt. Ex. C. On March 11, 2016, each Respondent separately filed Answers to the Complaint. *See* Jt. Exs. E-H. On June 28, 2016, all

¹ References to the Parties’ Stipulation of Facts will be cited herein as “Jt. Stip. at ___”; and references to the Parties’ agreed-upon exhibits will be cited as “Jt. Ex. ___.” References to the Administrative Law Judge’s Decision will be as “D.____.”

parties filed a Joint Motion and Submission of stipulation of Facts and Exhibits, which was granted on June 29, 2016.

The facts underlying the charge are straightforward. Martinez had been employed by Respondent GMRI from November 8, 2012 until he voluntarily quit his employment on May 28, 2013 (there is no allegation that the circumstances of Martinez's voluntary quit were in any way contrary to the Act). While employed, he worked in the Yard House Restaurant located in Northridge, California. Jt. Stip. at 13. While employed by GMRI², Martinez signed an agreement to be bound by GMRI's Dispute Resolution Program ("DRP"). A true copy of the agreement and the details of the DRP are contained in the record as Exhibit M and in the ALJ's decision at pages 2-3. *See also* Jt. Stip. at 9-12.

On or about March 2, 2015, some nineteen months after the termination of his employment, Martinez filed a class action wage-and-hour claim in the California Superior Court for the County of Los Angeles, Case No. BC-574043, captioned *Filiberto Martinez, et al. v. Darden Restaurants, Inc., et al.*, against the Respondents. In that litigation, Martinez alleged that Respondents violated certain aspects of California wage-and-hour law (the "California action"). Jt. Stip. at 15, Jt. Ex. O. On or about May 7, 2015, Respondents removed the California action to the Federal District for the District of Southern California, pursuant to 28 U.S.C. §§ 1332, 1441, and 1446. Jt. Stip. at 17; Jt. Ex. Q.

After removal, the California action was assigned to Judge George Wu. On May 8, 2015, Respondents filed with Judge Wu a Motion to Compel Arbitration of Martinez' claims pursuant to the terms of the DRP, to which Martinez filed an Opposition. Jt. Stip. 18, 19, 20; Jt. Ex. R, S,

² As acknowledged by the ALJ, the General Counsel did not allege, nor did the parties stipulate, that the four named Respondents constitute a "joint employer" under current Board law. Jt. Stip. at fn. 3. Moreover, the ALJ expressly did not make a finding about joint employer in his Decision.

T. On August 13, 2015, Judge Wu issued an Order granting the Respondents' Motion. Jt. Stip. at 21; Jt. Ex. U. Under Judge Wu's Order, the matter was to proceed to arbitration under the Rules of the American Arbitration Association before Arbitrator Jan Frankl Schau. In February 2016, after motion and hearing, Arbitrator Schau affirmed the validity of the class action waiver. Jt. Stip. at 22 and Jt. Ex. X.

On August 10, 2016, the parties submitted their briefs to the Administrative Law Judge. Just eight days later, the ALJ issued his decision.

LEGAL ARGUMENT

I. THE ALJ ERRED IN REJECTING RESPONDENTS' ARGUMENT THAT THE COMPLAINT FAILED TO STATE A LEGALLY COGNIZABLE CLAIM REGARDING THE CHARGING PARTY (Exceptions 5, 12 to 15)

Respondents argued in their brief that the Complaint does not state a legally cognizable claim under the Act on multiple grounds. In the decision, the ALJ cursorily rejected Respondents' arguments in just four short lines, citing only a passing reference to a footnote to a recent decision of the NLRB, *Employers Resource*, 363 NLRB No. 59 (2015).

The ALJ's terse rejection of Respondents' arguments was flawed. The critical facts are as follows: The parties jointly stipulated that Martinez's employment with GMRI ended on May 28, 2013. Jt. Stip. at 13. There is no evidence that Martinez became re-employed by any Respondent following his May 28, 2013 voluntary separation from employment. Martinez's unfair labor practice charge was not filed until August 20, 2015. Jt. Ex. A.

Regardless of how one approaches Martinez's charge, it is improper, as is the subsequent Complaint. If the charge or Complaint relies on an act or occurrence that purportedly took place while Martinez was employed (e.g., from November 8, 2012 – May 28, 2013), such a claim is time-barred under Section 10(b) since these acts occurred more than six months before the

charge was filed. 29 U.S.C. § 160(b). Further, the charge was filed more than six months after Martinez signed the DRP. *See Bowen Prods. Corp.*, 113 NLRB 731 (1955).

Fundamentally, the ALJ's findings of Section 8(a)(1) violations appear to be based on actions purportedly taking place after May 28, 2013, Martinez was no longer an "employee" after this date. Under Sections 2(2) and 2(3) of the Act, Martinez stopped being an "employee," and GMRI stopped being an "employer," as of May 28, 2013. *See* 29 U.S.C. § 152(2) and (3). Section 7 of the Act grants rights to employees. Section 8(a)(1), the portion of the Act on which the Complaint is based, contains proscriptions about employer conduct towards employees.

Respondents argued, and the ALJ failed to address, that the Board's sometimes broad construction of the term "employee" is limited by *Allied Chem. & Alkali Workers of Am., Local Union No. 1v., Pittsburgh Plate Glass Co., Chem. Div.*, 404 U.S. 157 (1971), in which the Supreme Court noted that "No decision under the Act is cited, and none to our knowledge exists, in which an individual who has ceased to work without expectation of further employment has been held to be an 'employee.'" In *Employers Resource*, cited by the ALJ, the NLRB rejected a similar argument saying that the broad definition of employee "covers former employees," citing to *Briggs Mfg. Co.*, 75 NLRB 569, 571 (1947).³

But, *Briggs* addressed a situation in which a former employee challenged his termination as discriminatory under Section 8(b)(4) of the Act. There is a material, fundamental difference between a lack of "employee" status due to allegedly discriminatory conduct by a putative

³ In *Employers Resource*, the NLRB also cited Section 102.9 of the Board's regulations, which states that "A charge that any person has engaged in or is engaging in any unfair labor practice affecting commerce may be made by *any person*." (emphasis added). *See* 363 NLRB No. 59 n.2. This regulation does not go as far as the Board intimates in *Employers Resource* as this regulation is still circumscribed by the language of the Act. Indeed, while any person may have the ability to file a charge, the legal merit of the charge, the statutory right to prosecute a given action, and the statutory responsibility for a given action are different matters entirely. In other words, while Section 102.9 may confer the procedural ability to file on any "person," it does not confer on any "person" a substantive right to succeed.

employer, and a lack of “employee” status due to a voluntary separation from employment. In the first scenario, it is logical and equitable to construe the term “employee” broadly enough to encompass individuals who were possibly denied employee status due to wrongful conduct. In the second scenario, at issue in this matter, there is no logical or equitable basis to convert a true former employee to a statutory “employee” when that individual separated employment in admittedly lawful circumstances.

The ALJ failed to address these fundamental differences or to provide any analysis of why Martinez is an “employee” with a viable claim under the Act. Even if the hurdle of “employee” status could be overcome – which it cannot – the charge still was improper because this matter does not involve, as the ALJ concluded, a “continuing violation.” Martinez was aware of the DRP at the time he executed the DRP. The policy applied to him at that point, as he acknowledged when he signed the DRP. The Section 10(b) clock begins to run from the applicability of the policy to the charging party, not from some effect that occurs years later. Indeed, for example, if an employer promulgates an unlawful policy and places the employee on notice that he or she is subject to the policy, the 10(b) period begins to run at that point. *Bowen Prods. Corp.*, 113 NLRB 731 (1955). It is irrelevant to the claims in this case whether, after February 23, 2013, when Martinez signed the DRP, Respondents required others to sign a similar contract. Martinez’ contractual obligation, and any alleged legal infirmity surrounding it, were fixed on February 23, 2013.

In sum, the ALJ failed to consider or address Respondents’ arguments concerning the legal infirmity of Martinez’s claims. For this reason alone, his decision should be rejected.

II. THE ALJ ERRED IN REFUSING TO CONSIDER OR ACCEPT RESPONDENTS' ARGUMENT THAT HE LACKED STATUTORY AUTHORITY TO ISSUE AN ADVISORY OR DECLARATORY OPINION IN THIS MATTER (Exceptions 2 and 9)

Concluding, wrongly, that this matter survived a Section 10(b) analysis, the ALJ ignored Respondents' argument that he lacked the authority to issue an advisory or declarative opinion. As Board law clearly establishes, when a charge is filed outside the 10(b) limitations period, the underlying matter must be dismissed. *See, e.g., Sheet Metal Workers' Int'l Ass'n*, 290 NLRB 381 (1988) (dismissing allegations that are time-barred by 10(b)); *Am. Automatic Fire Prot., Inc.*, 302 NLRB 1014 (1991) (finding charge barred as outside the 10(b) limitations period). As Respondents argued, and the ALJ ignored, the charging party's claim is barred under Section 10(b), any decision in this matter would be an improper advisory opinion.

There are no other charging parties and no other allegations in the Complaint to suggest that Respondents have enforced the DRP against other employees. *See In re Townley Sweeping Serv. Inc.*, 339 NLRB 301 (2003) (dismissing case as seeking an improper advisory opinion); *Decoster*, 325 NLRB 350 (1998) (dismissing case as seeking an improper advisory opinion); *see also Metro. Taxicab Bd. of Trade, Inc.* 342 NLRB 1300 (2004) (Liebman, concurring) (noting that, in that matter, "[t]he Board's decision – an advisory opinion, for all practical purposes – . . . can provide the public with only limited useful guidance. We have better things to do.").

The processes of the NLRA do not authorize either the Board or its General Counsel to act on their own motion with respect to the initiation of unfair labor practice proceedings. While, in some circumstances, the Board may find an initial charging party's charge meritless, but properly issue a complaint on the basis of claims uncovered in an ensuing investigation, this is not such a case. In those circumstances, the initial charging party is a statutory "employee", or a representative of "employees" at the time the charge is filed. As an employee, or the

representative of employees, the prosecution of even initially unasserted claims is nonetheless one pursued on behalf of employees. Martinez, however, was not a statutory employee, nor is there any suggestion that he acting as the representative of any statutory employees of the Respondents in filing his charge.

Since there was never a jurisdictionally proper Charge upon which to predicate the pursuit of this claim, this matter was, is, and should have been found by the ALJ to be jurisdictionally infirm *ab initio*. In similar cases, the Board has routinely remanded cases for an administrative law judge's failure to address an argument or legal issue. *See In re Stevens Creek Chrysler Jeep Dodge, Inc.*, 353 NLRB 1294, 1296 (2009) (holding that administrative law judge failed to address an allegation, thereby warranting a remand to the administrative law judge to make the necessary resolutions and determine whether an 8(a)(1) violation has been established); *Sears Roebuck & Co. v. NLRB*, 349 F.3d 493, 514 (citing *Scivally v. Sullivan*, 966 F.2d 1070, 1076 (7th Cir. 1992) ("ALJ must minimally articulate his reasons for crediting or rejecting" evidence or arguments)). Accordingly the Board should overturn or remand the ALJ's decision in this case.

III. THE ALJ ERRED IN REFUSING TO CONSIDER OR ACCEPT RESPONDENTS' ARGUMENT THAT THE CHARGING PARTY AND GENERAL COUNSEL WERE ESTOPPED FROM PURSUING THEIR CLAIMS IN THIS ACTION (Exception 1)

In his decision, the ALJ set out a list of the issues in dispute. D. 4-5. Number seven on that list is "[w]hether the Board and/or Martinez are estopped from pursuing this particular matter." D. 5:6. Despite acknowledging at the outset of the decision that the question of estoppel and/or waiver were critical to the resolution of the case, the ALJ never addressed this issue or analyzed Respondents' briefing of this question. On its face, this was clear error.

This is particularly true since, as Respondents argued in their brief, the procedural history of the instant matter reveals that both the General Counsel and Martinez have effectively waived the instant unfair labor practice claims, and/or should be estopped from asserting or pursuing them.

“A waived claim or defense is one that a party has knowingly and intelligently relinquished.” *Wood v. Milyard*, 132 St. Ct. 1826, 1834 n. 4 (2012). Estoppel is a flexible equitable doctrine that may be used to avoid injustice. Generally, estoppel may be invoked when a party has relied on an adversary’s conduct “in such a manner as to change his position for the worse,” and that reliance must have been reasonable. *See Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 59, 60 (1984).

Here, on August 13, 2015, Judge Wu granted Respondents’ Motion to Compel Arbitration. The General Counsel did not, however, seek to intervene in the District Court proceedings, to seek reconsideration by Judge Wu of his Order, and/or to appeal Judge Wu’s Order. In fact, the General Counsel did nothing with respect to the federal court proceedings. Moreover, despite knowing that the underlying matter was proceeding to arbitration pursuant to the DRP, which the General Counsel contends is facially unlawful under extant Board, the General Counsel did not seek to intervene in the arbitral proceeding. Martinez was also well aware of the claim that the DRP contravened extant Board law at a point in time well within the applicable period to either seek reconsideration or appellate review of Judge Wu’s Order; or, in the alternative to seek the General Counsel’s intervention in the proceedings before Judge Wu, or in the subsequent arbitration proceedings. But he took none of these actions.

Rather, both the General Counsel and Martinez seek to utilize the Board process to conduct an end-run around federal courts; using an administrative proceeding in an effort to

retroactively oust the federal court of jurisdiction and to circumvent valid federal and arbitral orders. Having failed to seize the opportunity to raise their claims before the federal court and arbitral forum, both the General Counsel and Martinez should be estopped from attempting to raise their claims in this proceeding, long after the District Court has acted.

IV. THE ALJ ERRED IN REFUSING TO CONSIDER OR ACCEPT RESPONDENTS' ARGUMENT THAT THE COMPLAINT IN THIS MATTER VIOLATE RESPONDENTS' CONSTITUTIONAL RIGHT TO PETITION (Exceptions 3, 6, 10 to 11)

Consistent with his pattern of ignoring Respondents' arguments, the ALJ failed to address Respondents' position that the Complaint in this matter, as well as the remedies sought by the General Counsel and awarded by the ALJ, violate Respondents' constitutional rights. This was also in error.

The ALJ's conclusion that Respondents' filing of the motion to compel independently violated the Act deprived Respondents of their constitutional rights. It is well-settled that the NLRB cannot use its unfair labor practice processes to interfere with or punish an employer for exercising its constitutional right to petition the federal courts. *Venetian Casino Resort, LLC v. NLRB*, 484 F.3d 601 (D.C. Cir. 2015). Here, when Respondents invoked the authority of the federal courts to compel arbitration, they were engaged in protected "petitioning" for the redress of grievances. *Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 US 508 (1972). Such petitioning is fully protected by the First Amendment. *E. R.R. Presidents v. Noerr Motor Freight, Inc.*, 365 US 127 (1961).

The Supreme Court has explained the limits on the Board's power to deem employer litigation an unfair labor practice. As recently summarized by the Fifth Circuit,

To be enjoined . . . the lawsuit prosecuted by the employer must (1) be "baseless" or "lack[ing] a reasonable basis in fact or law," and be filed "with the intent of retaliating against an employee for the exercise of rights protected by" Section 7, or (2) have "an objective that is illegal under federal law."

Murphy Oil II, 808 F.3d at 1021 (quoting *Bill Johnson's Rests.*, 461 U.S. at 737 n.5, 744, 748).)

As in *Murphy Oil II*, there is no basis to find that Respondents' enforcement of its DRP was baseless, retaliatory, or with an objective that is illegal under federal law. Respondents merely, in reliance on extensive federal case law, defended itself by seeking to enforce the DRP. Indeed, Respondents' position in the underlying California action was clearly well-grounded since it was successful before the Court.⁴ Further, there is no evidence in the stipulated record that Respondents' actions in the California action were in any way retaliatory. Further still, the California action is completed - - the underlying matter is currently in the arbitration process. Accordingly, the *Bill's Johnson's* exceptions simply do not apply here.

The ALJ's conclusion that Respondents' motion to compel arbitration was unlawful appears to be based entirely on the Board's decision in *D.R. Horton I*. However, the Fifth Circuit recently rejected a similar finding in *Murphy Oil II*. There, the Fifth Circuit explained:

[T]he Board's holding is based solely on *Murphy Oil's* enforcement of an agreement that the Board deemed unlawful because it required employees to individually arbitrate employment-related disputes. Our decision in *D.R. Horton* forecloses that argument in this circuit. 737 F.3d at 362. Though the Board might not need to acquiesce in our decisions, it is a bit bold for it to hold that an employer who followed the reasoning of our *D.R. Horton* decision had no basis in fact or law or an "illegal objective" in doing so. The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders.

808 F.3d at 1021. Here, Respondents likewise relied on multiple federal and state court decisions in moving to compel arbitration under the DRP. Although the Board may ultimately disagree with those decisions, that disagreement does not mean that Respondents had no basis in

⁴ The California action was dismissed based on the class action waiver before the Ninth Circuit issued its decision in *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016). That decision, by its own terms, is not retroactive. *Id.*

fact or law or an “illegal objective” in relying on them. Those decisions, including *D.R. Horton II* and *Murphy Oil II*, remain good law that has not been overruled by the Supreme Court.

Because Respondents had a constitutional right to petition the courts, and its motions did not fall under any *Bill Johnson’s* exception, the remedies based on a finding of an 8(a)(1) violation with respect to the motion to compel are misplaced.

V. THE ALJ ERRED IN REFUSING TO FOLLOW SUPREME COURT PRECEDENT INTERPRETING THE FAA AND MANDATING THAT ARBITRATION AGREEMENTS BE ENFORCED, AS WELL AS IGNORING RESPONDENTS’ ARGUMENTS REGARDING OTHER FEDERAL LAWS (Exceptions 6 to 7)

The ALJ likewise erred by failing to discuss, recognize, or address Respondents’ arguments regarding Supreme Court precedent interpreting the FAA and Respondents’ arguments concerning other federal laws that conflict with the NLRB’s ban on arbitration agreements like the DRP.

A. The FAA Mandates Enforcement of the DRP

The FAA requires that agreements like the DRP be enforced. It provides that arbitration agreements “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. As the Supreme Court has held, the statute reflects an “emphatic federal policy” in favor of arbitration. *KPMG LLP v. Cocchi*, 565 U.S. ___, 132 S. Ct. 23, 25 (2011).

Under the FAA, parties are generally free, as a matter of contract, to agree to the procedures governing their arbitrations. *Volt Info. Scis, Inc. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (parties to an arbitration may “specify by contract the rules under which that arbitration will be conducted”); *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994). (“Indeed, short of authorizing trial by battle or ordeal or, more

doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes.”).

Arbitration agreements implicating federal statutory rights, including those containing class action waivers, are enforceable “unless Congress itself has evinced an intention,” when enacting the statute, to “override” the FAA mandate by a “clear congressional command.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymoth, Inc.*, 473 U.S. 614 (1985); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013). A congressional intent to override the FAA may be “deducible from [the statute’s] text or legislative history” or “from an inherent conflict between arbitration and the statute’s underlying purposes.” *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987).

Applying these principles, and as Respondents argued in their brief, numerous courts have enforced mandatory employment arbitration agreements containing class action waivers under the FAA. *See Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002); *see also Vilches v. The Travelers Cos., Inc.*, 413 Fed. Appx. 487, 494 & n.4 (3d Cir. 2011) (class action waiver was not unconscionable); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005) (same); *Horenstein v. Mortg. Mkt., Inc.*, 9 Fed. Appx. 618, 619 (9th Cir. 2001) (“Although plaintiffs who sign arbitration agreements lack the procedural right to proceed as a class, they nonetheless retain all substantive rights under the statute.”).

Various courts – including at least three federal Courts of Appeals – have enforced mandatory employment arbitration agreements containing class action waivers under the FAA while explicitly declining to follow the Board’s holding in *D.R. Horton I*. These courts have reasoned that there is nothing in the NLRA itself or its legislative history that remotely suggests

that Congress sought to override the FAA’s mandate. While the Seventh Circuit and Ninth Circuits recently concluded that the employer’s arbitration agreement containing a class action waiver violated Sections 7 and 8 of the NLRA, *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, (7th Cir. May 26, 2016) and *Morris v. Ernst & Young, LLP*, --- F.3d ---, 2016 WL 4433080 (9th Cir. Aug. 22, 2016), the weight of federal court precedent has rejected *D.R. Horton I*. See *D.R. Horton II*, *supra*, 737 F.3d at 362 (“The NLRA should not be understood to contain a congressional command overriding application of the FAA.”); *Murphy Oil II*, 808 F.3d 1013, 1016 (5th Cir. 2015) (“[A]n employer does not engage in unfair labor practices by maintaining and enforcing an arbitration agreement prohibiting employee class or collective actions and requiring employment-related claims to be resolved through individual arbitration.”); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir. 2013) (rejecting plaintiff’s “invitation to follow the NLRB’s rationale in *D.R. Horton*” and enforcing arbitration agreement containing class action waiver); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2nd Cir. 2013) (declining to follow the Board’s decision in *D.R. Horton*).

D.R. Horton I was wrong to conclude its ban on class action waivers is allowable under the FAA. *Id.* at 9. In *Concepcion*, the Supreme Court expressly rejected the same attempt to circumvent the FAA and struck down a nearly identical California rule prohibiting class action waivers. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). The *Concepcion* Court held that a rule mandating the availability of class procedures is incompatible with arbitration. *Id.* Arbitration is intended to be less formal than court proceedings; such informality makes arbitration poorly suited to conducting class litigation with its heightened complexity, due process issues, and stakes. *Id.* The Court held:

The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate

streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.

Id. at 344.

D.R. Horton I attempted to distinguish *Concepcion* by arguing its decision did not require class arbitration. *D.R. Horton I, supra*, slip op. at 12. Rather, the panel claimed it required only the availability of class procedures in some forum, thus forcing employers to *either* (i) permit class arbitration, *or* (ii) waive the arbitral forum to the extent an employee seeks to invoke class procedures in court. *Id.* But this is a transparently meaningless distinction. Like the California law, *D.R. Horton I* “condition[s] the enforceability of certain arbitration agreements” on the availability of class procedures. *Concepcion*, 563 U.S. at 336. *D.R. Horton I*’s addition of the option of avoiding class arbitration only by agreeing *to forgo arbitration* does not reduce the degree to which its ban on class action waivers “interferes with fundamental attributes of arbitration” and “creates a scheme inconsistent with the FAA.” *Concepcion*, 563 U.S. at 334. To the contrary, requiring a party to abandon the arbitral forum altogether as the only way to avoid class arbitration is an even greater obstacle to the FAA’s policies than mandating class arbitration alone.

D.R. Horton I incorrectly interpreted the FAA in two additional ways:

- *D.R. Horton I* asked whether another federal statute might manifest a public policy that would void an arbitration agreement irrespective of the FAA. *D.R. Horton I, supra*, slip op. at 11-12. But “[t]here is not a single decision, since [the Supreme] Court washed its hands of general common-lawmaking authority, in which [it has] refused to enforce on ‘public policy’ grounds an agreement that did not violate, or provide for the violation of, some positive law.” *E. Associated Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 68 (2000) (Scalia, J., concurring). Because the FAA reflects an “emphatic federal policy in favor of arbitral dispute resolution,” *KPMG LLP*, 132 S. Ct. at 25, an administrative agency cannot deviate from the congressional commands in the FAA based on the agency’s own assessment of public policy and absent an equally clear congressional directive in another statute to the contrary. *See CompuCredit Corp.*

v. Greenwood, 132 S. Ct. 665, 672 (2012) (when Congress restricts the use of arbitration, it does so clearly).

- *D.R. Horton I* also concluded the Norris-LaGuardia Act (NLGA) voided employment arbitration agreements with class action waivers and partially repealed the FAA so that it does not apply to employment arbitration agreements containing class action waivers. *D.R. Horton I, supra*, slip op. at 5-6, 12. However, the NLGA is “outside the Board’s interpretive ambit,” *D.R. Horton*, 737 F.3d at 362 n.10, and as *Murphy Oil I* conceded, the Board is not entitled to deference in interpreting the NLGA, *Murphy Oil I, supra*, slip op. at 10. Moreover, *D.R. Horton I* failed to cite any court decision treating the NLGA as repealing the FAA. *D.R. Horton I*’s reliance on its novel interpretation of the NLGA should be rejected.

B. Other Federal Laws Compel Enforcement of the DRP

The ALJ also ignored Respondents’ arguments that *D.R. Horton I* and *Murphy Oil I* conflict with other federal laws in addition to the FAA.

For example, *D.R. Horton I* and *Murphy Oil I* are at odds with the Rules Enabling Act (“REA”), in which Congress delegated authority to the Supreme Court to promulgate the Federal Rules of Civil Procedure. 28 U.S.C. § 2072(b). The REA expressly provides that the Federal Rules “shall not abridge, enlarge or modify any substantive right.” *Id.* Thus, Rule 20 (permissive joinder) and Rule 23 (class actions) regulate only procedure and do not impact substantive rights. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408. In *D.R. Horton I*, the Board held employees possess a *substantive* right under the NLRA to class action procedures. *D.R. Horton I, supra*, slip op. at 10 (“Any contention that the Section 7 right to bring a class or collective action is merely ‘procedural’ must fail.”). However, since the NLRA does not create class action procedures, employees could not have any purported right to bring a class action in federal court *but for* Rule 23 of the Federal Rules. *D.R. Horton I*’s holding thus treats Rule 23 as expanding employee’s rights under Section 7 to engage in protected concerted activity. Thus, the Board’s interpretation conflicts with the REA by construing the Federal Rules to enlarge substantive rights.

D.R. Horton I and *Murphy Oil I* are also at odds with courts' interpretation of Rule 23, the Federal Rules generally, and other standards governing procedures for adjudication. Courts have held repeatedly and expressly that litigants do not have a substantive right to class action procedures under Rule 23 and such procedures are waivable. *E.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997); *Deposit Guar. Nat'l Bank, Jackson, Miss. 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.”); *Frazar v. Gilbert*, 300 F.3d 530, 545 (5th Cir. 2002) (“A class action is merely a procedural device; it does not create new substantive rights.”), *rev'd on other grounds*, *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431 (2004). *D.R. Horton I* disregarded this substantial body of precedent interpreting rules and statutes outside the Board's jurisdiction and expertise. The treatment of procedures as non-negotiable is also inconsistent with Supreme Court and other case law holding parties are generally free, as a matter of contract, to agree to the procedures that will govern their arbitrations. *E.g.*, *Volt Info. Scis.*, 489 U.S. at 479; *Baravati*, 28 F.3d at 709.

Moreover, *D.R. Horton I* and *Murphy Oil I* also conflict with the FLSA's collective action procedures. Courts regularly hold those procedures, like Rule 23's class action procedures, do not provide substantive rights and are waivable.⁵ The FLSA does not establish any procedures for identifying and notifying putative collective action members of their

⁵ See *Long John Silver's Restaurants, Inc. v. Cole*, 514 F.3d 345, 350–51 (4th Cir. 2008); *Caley*, 428 F.3d at 1378; *Carter*, 362 F.3d at 298 (holding that arbitration agreement was not unenforceable under the FAA where it required employees to arbitrate their FLSA claims individually because “the inability to proceed collectively” did not “deprive[] them of substantive rights available under the FLSA.”); *Adkins* 303 F.3d. at 503; *Horenstein*, 9 Fed.Appx. at 619; *Copello v. Boehringer Ingelheim Pharms. Inc.*, 812 F.Supp.2d 886, 894 (N.D. Ill. 2011) (“[W]hile FLSA prohibits substantive wage and hour rights from being contractually waived, it does not prohibit contractually waiving the procedural right to join a collective action.”); *Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 164-65 (S.D.N.Y. 2008) (holding that the opt-in procedures of FLSA are procedural, not substantive); *Sjoblom v. Charter Commc'ns., LLC*, 2007 WL 4560541, at *5-6 (W.D. Wis. Dec. 19, 2007) (concluding that the opt-in provisions of § 216(b) are not clearly substantive); *Westerfield v. Washington Mut. Bank*, 2007 WL 2162989, at *1 (E.D.N.Y. July 26, 2007) (“Section 216(b) by its terms governs procedural rights.”).

opportunity to opt-in to an FLSA collective action. Rather, such procedures have been developed by courts through their inherent authority to manage their cases. *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165 (1989). The various ad hoc procedures for “certifying” a Section 216 collective action have thus been developed by federal courts applying their discretionary authority.⁶ *D.R. Horton I* holds that employees have a substantive right under the NLRA to invoke these ad hoc procedures without explanation. The NLRA cannot reasonably be construed to provide employees a substantive right to invoke notification and certification procedures developed by courts in the exercise of judicial discretion.

The ALJ’s failure to address these arguments was a fatal error.

VI. THE ALJ ERRED IN CONCLUDING THAT D.R. HORTON IS CONSISTENT WITH, AND AN EXTENSION OF, EXTENT BOARD LAW (Exceptions 6 to 8)

The ALJ failed to address another basic reason that *D.R. Horton I* was wrongly decided and that, therefore, the Complaint in this matter should have been rejected -- the NLRA does not provide employees a non-waivable right to invoke class procedures.

First, while the NLRA may protect the rights of employees to collectively *assert* that they have certain legal rights in an attempt to obtain concessions concerning the terms and conditions of their employment, NLRB precedent does not establish a right to seeking and obtaining a collective *adjudication* of employment-related legal claims. Indeed, the cases cited by *D.R. Horton I* show only that Section 7 protects employees from retaliation for concertedly asserting they have certain legal rights against their common employer with respect to the terms and conditions of their employment, not that employees have a right under the NLRA to seek a

⁶ See, e.g., *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1212-16 (5th Cir. 1995) (describing various methods used by district courts to determine whether employees are similarly situated in a collective action under the ADEA, which incorporates § 216(b)), *overruled on other grounds by Desert Palace, Inc. v. Costa*, 539 U.S. 90, 90-91 (2003).

collective adjudication of their individual legal claims. *D.R. Horton I, supra*, slip op. at 2-3 & n.3.⁷

Second, the NLRA cannot mandate certification of a class action. *D.R. Horton I* correctly recognized that under the Federal Rules, a court may deny an employee’s motion for class certification irrespective of the NLRA. *D.R. Horton I, supra*, slip op. at 10. Consequently, *D.R. Horton I* held that Section 7 can only guarantee employees a more limited right: “to take the collective action inherent in seeking class certification, whether or not they are ultimately successful under Rule 23” and “to act concertedly by invoking Rule 23, Section 216(b), or other legal procedures.” (*Id.* (emphasis added))

D.R. Horton I holds that employees can exercise their alleged Section 7 right to seek class certification even if certification fails, unless certification fails based on a class waiver. But *D.R. Horton I* never explains why the reason for the denial of class certification matters for the purposes of the NLRA. *D.R. Horton I* does not, and cannot, rationally explain why an employee’s failure to obtain class certification—which according to *D.R. Horton I* is not guaranteed by the NLRA—becomes an NLRA violation if the failure is based on a class action waiver but does not if the failure is based on an employer’s opposition to class certification on

⁷ See *Mohave Elec. Co-op, Inc. v. NLRB*, 206 F.3d 1183 (D.C. Cir. 2000) (employer violated NLRA by discharging employee for filing petition jointly with co-worker); *Brad Snodgrass, Inc.*, 338 NLRB 917 (2003) (employer violated NLRA by laying off employees in retaliation for union’s filing grievances on their behalf); *Le Madri Rest.*, 331 NLRB 269 (2000) (employer violated NLRA by discharging two employees who were named plaintiffs in lawsuit against employer); *Uforma/Shelby Bus. Forms*, 320 NLRB 71 (1985) (employer violated NLRA by eliminating third shift in retaliation for union’s pursuit of a grievance); *United Parcel Serv., Inc.*, 252 NLRB 1015 (1980) (employer violated NLRA by discharging employee for initiating class action lawsuit, circulating petition among employees, and collecting money for retainer, among other activities); *Clara Barton Terrace Convalescent Ctr.*, 225 NLRB 1028 (1976) (employer violated NLRA by suspending employee without pay for submitting letter to management complaining on behalf of other employees about job assignments); *Trinity Trucking & Materials Corp.*, 221 NLRB 364 (1975) (alleging employer violated NLRA by discharging three employees who had filed suit against employer); *El Dorado Club*, 220 NLRB 886 (1975) (employer violated NLRA by discharging employee in retaliation for testifying at fellow employee’s arbitration hearing); *Spandsco Oil & Royalty Co.*, 42 NLRB 942 (1942) (employer violated NLRA by discharging three union members for filing a lawsuit); see also *Brady v. Nat’l Football League*, 644 F.3d 661 (8th Cir. 2011) (noting in *dicta* that filing lawsuit concerning terms and conditions of employment was protected activity).

other grounds. The reason for the denial of class certification should be irrelevant if the Section 7 right at issue is simply the right to concertedly *seek* class certification and *invoke* Rule 23 or similar rules.

D.R. Horton I failed to demonstrate that class action procedures, in practice, serve the NLRA's purposes. The core purpose of Section 7's right to engage in concerted activity is to allow employees, if they so choose, to join together in an attempt to increase their bargaining power over the terms of their employment. *See NLRB. v. City Disposal Sys. Inc.*, 465 U.S. 822, 835, 104 S.Ct. 1505, 1513 (1984) (“[I]n enacting § 7 of the NLRA, Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment.”) Class action procedures are rarely suitable for litigation over the bargained-for terms of non-unionized employees’ employment. Class certification is routinely denied with respect to breach of contract and similar claims by at-will employees because such claims are inherently individualized. *See, e.g., Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1272 (11th Cir. 2009).⁸

Moreover, most employment claims amenable to class treatment involve fixed, *statutory* rights, not obligations dependent on employees’ individual or collective bargaining power. *See,*

⁸ *See also Cutler v. Wal-Mart Stores, Inc.*, 927 A.2d 1, 10 (Md. App. 2007) (affirming denial of class certification in missed-breaks case, in part, because “absent a contract applicable to the entire class of Wal-Mart employees, the existence, formation, and terms of any implied employment contract would vary among employees” and “the alleged breaches of these implied contracts by supervisors and managers at individual Wal-Mart stores also give rise to individual, not common, factual and legal issues”); *Wal-Mart Stores, Inc. v. Lopez*, 93 S.W.3d 548, 557 (Tx. Ct. App. 2002) (reversing trial court’s certification of class action as abuse of discretion in missed-breaks case because, among other things, “[a]ny determination concerning a ‘meeting of the minds’ [on a breach of oral contract claim] necessarily requires an individual inquiry into what each class member, as well as the Wal-Mart employee who allegedly made the offer, said and did”); *Cohn v. Massachusetts Mut. Life Ins. Co.*, 189 F.R.D. 209, 215 (D. Conn. 1999) (no predominance where the resolution of plaintiffs’ breach of contract claims was dependent upon the representations made to each plaintiff individually); *Brooks v. S. Bell Tel. & Tel. Co.*, 133 F.R.D. 54, 57 (S.D. Fla. 1990) (finding that commonality was not met where “[i]t [was] not only conceivable, but probable, that [the] court [would] be required to hear evidence regarding the existence, terms, modifications and limitations of each alleged contract of the over 5,000 prospective class members”).

e.g., 42 U.S.C. § 2000e–2 (prohibited practices under Title VII); 42 U.S.C. § 12112 (prohibited practices under the ADA); 29 U.S.C. § 215 (prohibited acts under FLSA); 29 U.S.C. § 623 (prohibited practices under the ADEA). Such statutes mandate certain terms and conditions of employment as a matter of law. These same employment statutes almost universally contain anti-retaliation provisions and one-way fee-shifting provisions to permit employees to pursue their claims effectively on an individual basis. *See, e.g.*, 42 U.S.C. § 2000e-3(a) (Title VII anti-retaliation provisions). Such anti-retaliation and fee-shifting provisions adequately protect employees and give sufficient incentive to employees (and their counsel) to pursue their claims individually.

Third, to the extent there is such a thing as “concerted legal activity,” *D.R. Horton I* wrongly equated it with class action, collective action, and joinder procedures. *D.R. Horton I, supra*, slip op. at 10. However, there are many ways in which employees may act concertedly in asserting legal claims that do not depend on, and have nothing to do with, collective adjudication procedures. For example, irrespective of individual arbitration agreements, employees can work together in asserting their common legal rights by pooling their finances, making settlement demands and negotiating as a group, sharing information, and seeking safety in numbers.

Fourth, the Supreme Court has already held that unions may waive Section 7 rights pursuant to collective bargaining agreements, including the right to strike and an individual employee’s right to a judicial forum. The effect of *D.R. Horton I* is that a union can waive an individual’s rights, **but that same individual cannot do so**. This is illogical under contract law principles and contrary to *14 Penn Plaza*, which found “[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative.” *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258

(2009). Whatever employees' right might be under the NLRA to access class procedures, there is no reasonable basis to prohibit employees from agreeing to waive such access as one component of a legitimate, good-faith arbitration agreement.

Sixth, *D.R. Horton I* ignored the substantial interests weighing *in favor* of individual employment arbitration and failed to recognize the harm that its holding might do to those interests. *D.R. Horton I* did not acknowledge that individualized arbitration provides benefits to both parties – the employer and the employee – by providing a relatively low-cost and quick method of adjudicating disputes. *E.g.*, *Stolt-Nielsen S.A. v. AnimalFeeds Int'l. Corp.*, 559 U.S. 662, 685 (2010) (“In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.”). The Supreme Court has recognized that class arbitration is antithetical to the advantages parties expect when they agree to arbitrate and impairs the use of arbitration to achieve efficiency, confidentiality, and informality. *Concepcion*, 563 U.S. at 348 (“[C]lass arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.”).

Seventh, as potential defendants, employers have additional legitimate interests in agreeing to individual arbitration that *D.R. Horton I* failed to acknowledge and consider. An employee's filing of a class action may impose significant costs and burdens on an employer, for example, by placing it under a duty to identify, collect, and preserve potentially relevant evidence relating to an entire putative class. Such duties may arise without certification ever being granted. *See, e.g.*, *Pippins v. KPMG LLP*, 2011 WL 4701849, at *3 & 6 (S.D.N.Y. Oct. 7,

2011) (employer incurred over \$1.5 million to preserve putative class members' hard drives prior to any certification decision). The Supreme Court has recognized class actions in an arbitral forum pose even greater risks to defendants due to the more limited procedures in arbitration. *See Concepcion*, 563 U.S. at 350 (explaining that “class arbitration greatly increases risks to defendants” due to the absence of multilayered review” and that “[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims”).

Employers thus have a legitimate interest in agreeing to procedures – such as individualized arbitration – allowing the parties to obtain an adjudication of the employee’s claim on its merits while also avoiding substantial costs and risks unrelated to the strength of that claim. *D.R. Horton I* makes no mention of any of these valid concerns and legitimate interests underlying the use of individual arbitration agreements, and the ALJ failed to consider Respondents’ arguments in this regard.⁹

⁹ To the extent *D.R. Horton I* attempted to grant employees a substantive right under the NLRA to deploy judicial procedures *as an economic weapon* in negotiating settlement agreements – a use that has nothing to do with the intended purposes of those procedures – that was beyond the Board’s authority. So, too, would be the Board’s attempt to bar employers from using individual arbitration agreements simply because they may have the effect of blunting that economic weapon. *See, e.g., Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965) (“Sections 8(a)(1) and (3) do not give the Board a general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party’s bargaining power.”); *NLRB v. Brown*, 380 U.S. 278, 283 (1965) (“[T]here are many economic weapons which an employer may use that . . . interfere in some measure with concerted employee activities . . . and yet the use of such economic weapons does not constitute conduct that is within the prohibition of either § 8(a)(1) or § 8(a)(3). Even the Board concedes that an employer may legitimately blunt the effectiveness of an anticipated strike by stockpiling inventories, readjusting contract schedules, or transferring work from one plant to another, even if he thereby makes himself ‘virtually strikeproof.’”); *NLRB v. Ins. Agents’ Int’l Union*, 361 U.S. 477, 497-498 (1960) (“[W]hen the Board moves in this area . . . it is functioning as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands. . . . [T]his amounts to the Board’s entrance into the substantive aspects of the bargaining process to an extent Congress has not countenanced.”). Just as the NLRA permits employers to blunt the effectiveness of an employee strike, so, too, does it permit an employer to implement an arbitration agreement even though it may blunt employees’ ability to impose higher litigation costs on the employer to extract higher cost-of-defense settlements.

VII. THE ALJ ERRED IN FAILING TO CONSIDER OR ACCEPT RESPONDENTS' ARGUMENT THAT RESPONDENTS, BASED ON THE CIRCUMSTANCES AT ISSUE HERE, DID NOT VIOLATE THE ACT (Exception 4)

The ALJ also erred in concluding that, on the facts of this case, there is a violation of the Act. Indeed, the facts of this case can readily be distinguished from *D.R. Horton*.

As an initial matter, there is no support for a position that employees would read the DRP as restricting their access to file charges with the Board. If a work rule does not explicitly restrict activities protected by Section 7 of the Act, the Board will find the rule or policy unlawful only if (1) employees would reasonably construe the language to prohibit protected 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 activity. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004).

Here, none of these three circumstances exists. The Company did not promulgate the DRP in response to union activity. Nor has the rule been applied to restrict the exercise of Section 7 activity. Finally, no employee could reasonably misinterpret the DRP as prohibiting Section 7 activity, including the filing of unfair labor practice charges with the Board. *See, e.g., Tiffany & Co.*, 200 L.R.R.M. 2069 (BNA) ¶ 2069 (NLRB Div. of Judges Aug. 5, 2014) (finding a confidentiality clause lawful when it expressly excluded protected concerted activity from its coverage). Since no employee could reasonably misconstrue the DRP as limiting his or her right to file a ULP charge with the Board, there is no 8(a)(1) violation.

Moreover, the ALJ erred in concluding that Martinez was engaged in protected concerted activity under Section 7 of the Act. Protected concerted activity is any activity that is “engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.” *Meyers Indus., Inc.*, 268 NLRB 493 (1984). Concerted activity occurs when

“individual employees seek to initiate or to induce or prepare for group action.” *Meyers Indus., Inc.*, 281 NLRB 882 (1986).

Concerted activity cannot be presumed, and must, instead, be established by some evidence of group activity, or an individual seeking to initiate or invoke group activity, or an individual raising a group complaint. Whether an employee has engaged in concerted protected activity is a factual question based on the record evidence. *Meyers*, 281 NLRB at 886. There is no evidence of concerted activity in this case. While Martinez filed a putative collective action, he was not a current employee at the time of the filing, he had no co-plaintiff, and there is no evidence that any other current or former employee of Respondents was involved in the action. The mere fact that the action was a putative collective action does not result in a presumption of concerted activity. *See Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304, 309 (4th Cir. 1980). The ALJ erred by failing to consider these arguments and the absence of evidence in the record of concerted activity. *See Sears, Roebuck & Co.*, 349 F.3d at 509-10 (“This was error, because the ALJ was obligated to consider all relevant evidence, not just the evidence that favored her ultimate conclusion.”).

VIII. THE REMEDIES SOUGHT BY AND AWARDED TO THE GENERAL COUNSEL ARE INVALIDATED BY THE FAA AND THE ALJ ERRED IN AWARDING THEM (Exceptions 16 to 18)

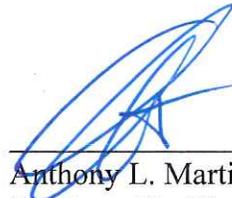
The ALJ ordered broad remedies, including the rescission of the DRP, the notification to all current and former employees that the DRP has been rescinded or revised, and reimbursement to Martinez of litigation expenses incurred in opposing Respondents’ Motion to Compel. D. 9-10. These remedies were improperly awarded in light of the broad preemptive effect of the FAA.

The relief sought by the General Counsel and awarded by the ALJ imposes obstacles to the enforcement of arbitration agreements and conflicts with the language and purpose of the FAA. The ALJ's ordered remedies would not only require Respondents to cease using arbitration agreements, but would additionally impose penalties for enforcement of an agreement that was upheld by a federal district court judge. This relief is contrary to the Supreme Court's mandate that arbitration agreements be enforced. *See Concepcion*, 563 U.S. 352 (holding that rules that present an obstacle to the accomplishment of congressional objectives under the FAA cannot stand).

CONCLUSION AND REQUEST FOR ORAL ARGUMENT

For the reasons identified above, the ALJ erred in concluding that Respondents violated the Act. Respondents respectfully request oral argument.

Respectfully submitted, this 15th day of September, 2016



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of September, 2016, the foregoing **BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE JOEL P. BIBLOWITZ'S DECISION AND REQUEST FOR ORAL ARGUMENT** was filed electronically and that true and correct copies of the same were sent via facsimile and email to the following:

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Respectfully submitted, this 15th day of September, 2016.



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