

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

ARISE VIRTUAL SOLUTIONS, INC.
Respondent

and

MATTHEW RICE, an Individual
Charging Party

CASE NO. 12-CA-144223

**RESPONDENT ARISE VIRTUAL SOLUTIONS INC.'S EXCEPTIONS TO DECISION
OF ADMINISTRATIVE LAW JUDGE**

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RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

Respondent Arise Virtual Solutions Inc. ("Arise" or "Respondent"), by and through counsel and pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board (the "Board"), submits the following exceptions to the August 12, 2016 Decision (the "Decision") of Administrative Law Judge ("ALJ"), Charles J. Muhl, JD-76-16.

Respondent takes exception to:

1. (ALJD 11/8-12/2).¹ The ALJ's finding on page 11 of the Decision that Certified Client Solutions ("CCS") is not a necessary party to this case. As argued in Arise's brief, filed concurrently herewith, and Arise's Motion to Dismiss for Failure to Join a Necessary Party, complete relief cannot be accorded in the absence of CCS. If the ALJ granted relief to Matthew Rice, the Charging Party, Arise would not be able to comply with any order rescinding any agreements signed by Client Support Professionals ("CSPs") because only an independent business ("IBs")² (in this case, CCS) is a party to an agreement with a CSP. Arise has no agreements with CSPs requiring them to "waive the right to maintain class or collective actions." Moreover, because CCS is not a party to this action, it could not protect its interests unless it participated in this action.

2. (ALJD 13/5-13). The ALJ's reliance on CSP certification materials, to the extent he relied on such materials. As argued in Arise's brief, filed concurrently herewith, the General Counsel presented no evidence that Mr. Rice ever saw those particular materials; accordingly, the ALJ should have afforded them little to no weight.

¹ Citations to the Decision are formatted as follows: (ALJD 1/1) refers to page 1, line 1 of the Decision.

² Arise refers to the business with which it contracts as call center companies, but has in the past referred to them as independent businesses. The ALJ referred to the call center companies as "IBs" in his Decision, so for the purposes of consistency, Arise will refer to these companies as "IBs."

3. (ALJD 19/9-10). The ALJ's decision to extrapolate his findings regarding Mr. Rice's employment status to the employment status of all CSPs. As argued in Arise's brief, filed concurrently herewith, the ALJ did not have the authority to issue decisions regarding individuals that are not the Charging Party before him and about which neither party presented any evidence. Arise also excepts to the ALJ's decision to extrapolate his findings to all CSPs because he was presented with no evidence regarding the factual circumstances of any other CSPs and he did not attempt any analysis showing why his findings regarding Mr. Rice can apply equally to all CSPs across the country.

4. (ALJD 4/9-10). The ALJ's failure to note that CCS was established in 2001, seven years before CCS became affiliated with Arise in 2008. As argued in Arise's brief, filed concurrently herewith, this fact supports the conclusion that CCS was an independent company and operated independent of Arise.

5. (ALJD 6/32-34). The ALJ's factual finding on page 6 of the Decision that "[b]ecause of the structure of Arise's process, Mr. Rice's work hours in 2014 and 2015 often were scattered throughout the day." The record before the ALJ does not support this finding. In fact, as argued in Arise's brief, filed concurrently herewith, Arise's witness Robert Padron testified that based on a review of General Counsel Exhibit 47, it appears that roughly sixty percent of the time that Mr. Rice serviced was between the hours of 1:30pm and 6:00pm. (Tr. 278:1-22.)

6. (ALJD 7/36-37). The ALJ's findings on page 7 of the Decision that it is the job of Arise's Performance Compliance Leads "to monitor CSP performance and insure they are adhering to the performance requirements in the SOWs." As argued in Arise's brief, filed concurrently herewith, Performance Compliance Leads monitor whether IBs are providing the

services they agreed to provide in the SOWs, which is not inconsistent with an independent contractor relationship.

7. (ALJD 1-19). The ALJ's failure throughout the Decision to consider evidence relating to CCS, its operation as an independent business, the revenue it generated from servicing clients completely disconnected from Arise and/or Arise's platform, the significant control it retained over important business decisions (such as how to compensate its personnel, including Mr. Rice), and overall that it rendered service as an independent business.

8. (ALJD 14/10-11). The ALJ's finding on page 14 of the Decision that "CSPs lack the infrastructure and support to operate as a separate entity, absent their affiliation with" Arise. The record before the ALJ does not support this finding. In fact, as argued in Arise's brief, filed concurrently herewith, the ALJ failed to consider evidence relating to CCS, the IB that retained Mr. Rice, that shows that CCS did operate as a separate entity independent of any contracts with Arise.

9. (ALJD 16/ 27-30). The ALJ's finding on page 16 of the Decision that "CSPs are not subjected to any genuine financial risk, except for the minimal expenditure for equipment necessary to perform the work." Arise also excepts to the finding on page 16 of the Decision that "CSPs also do not have any potential for entrepreneurial gain, unless they choose to work simultaneously as an IBO" and that "the only method CSPs have to increase compensation is to work more hours." As argued in Arise's brief, filed concurrently herewith, the ALJ erred in failing to consider evidence relating to CCS which established that CCS, the IB that retained Mr. Rice, was subjected to financial risk, did have potential for entrepreneurial gain, and could increase compensation by other methods beyond just working more hours.

10. (ALJD 18/4, 7-9). The ALJ’s findings on page 18 of the Decision that “CSPs do not have a significant actual entrepreneurial opportunity for gain or loss through their work,” that CSPs “do not operate a business,” that their “work does not involve risk,” that “the only ability they have to affect their earnings is to work more hours or negotiate a higher wage rate with their IBOs.” As argued in Arise’s brief, filed concurrently herewith, the ALJ erred in failing to consider evidence related to CCS, the IB that retained Mr. Rice, that showed that CCS in fact did have significant actual entrepreneurial opportunity for gain or loss, did operate its own business, did take on risk, and did have an ability to affect its earnings because such evidence was necessary to understanding all circumstances of the working tripartite relationship.

11. (ALJD 18/20-25). The ALJ’s finding on page 18 of the Decision that “CSPs do not have the ability to control important business decisions,” including the finding that “CSPs do not hire or select employees” and that Arise “set all of the terms of CSP work, through either its agreements with IBs or agreements it requires IBs and CSPs to execute.” As argued in Arise’s brief, filed concurrently herewith, the ALJ failed to consider significant and undisputed evidence that CCS, the company that Mr. Rice worked for, had exclusive control over business decisions important to it and Mr. Rice, engaged a large number of other CSPs to work for it, and decided their compensation. Evidence in the record establishes that Patricia Rice, the owner of CCS, made all business decisions related to her company. Moreover, the ALJ failed to consider the fact that Patricia Rice was a CSP that had complete control over business decisions related to her company, and that she contracted with other companies—completely independent of Arise and/or Arise’s platform—to provide call center services.

12. (ALJD 13/Footnote 6). The ALJ’s finding on page 13 in footnote 6 of the Decision that the relationship between IBs and Arise is not relevant to this case. As argued in

Arise's brief, filed concurrently herewith, the specific structure of the IBs that contract with Arise and the nature of the relationship between IBs and CSPs required that the ALJ also consider the relationship between Arise and the IBs when considering all factors, especially whether the IB rendered services as an independent business and whether CSPs are engaged in a distinct business.

13. (ALJD 13/19-20). The ALJ's finding on page 13 of the Decision that "as a practical matter, the Company imposes a number of restrictions on" the rights of CSPs to control their work hours. The record before the ALJ does not support this finding. In fact, as argued in Arise's brief, filed concurrently herewith, the record evidence shows that Arise does not impose restrictions on the rights of CSPs to control their work hours.

14. (ALJD 13/35). The ALJ's finding on page 13 of the Decision that Arise retains "significant control" over CSPs' work hours. The record before the ALJ does not support this finding. In fact, as argued in Arise's brief, filed concurrently herewith, the record shows that Arise does not retain any control—let alone "significant control"—over CSPs' work hours and the limitations on work hours are not caused by any control that Arise exerts.

15. (ALJD 13/5-36). The ALJ's failure to consider other aspects of CSPs' servicing, beyond just work hours and certification courses, that Arise does not control in deciding that Arise exerts control over the work of CSPs on page 13 of the Decision. As argued in Arise's brief, filed concurrently herewith, the fact that CSPs take certification courses does not indicate employee status, and Arise does not control what projects CSPs choose to service or from where CSPs choose to provide services, in addition to not controlling CSPs' work hours or compensation.

16. (ALJD 14/14-15). The ALJ's finding on page 14 of the Decision that "the sporadic nature of [CSPs] work hours on certain days would make it difficult for them to obtain other employment." The record before the ALJ does not support this finding. In fact, as argued in Arise's brief, filed concurrently herewith, the record shows that Mr. Rice choose his work schedule within what is available and, per Exception No. 5, these schedules tend to occur within compressed time periods.

17. (ALJD 14/25-26, 33-34). The ALJ's finding on page 14 of the Decision that Arise "directs [CSPs'] performance via the enforcement of performance metrics and tracking mechanisms." Arise also excepts to the finding on page 14 of the Decision that Arise controls the means by which CSPs provide call center services rather than just the ends to be achieved. The record before the ALJ does not support this finding. In fact, as argued in Arise's brief, filed concurrently herewith, Arise does not control how CSPs provide call center services, but only monitors results-oriented metrics (most of which are set by clients, not by Arise), and conducts quality control on the work performed to ensure it satisfies those results-oriented metrics. In other words, Arise merely monitors whether the IBs are actually providing the results they agreed to provide, which is completely consistent with an independent contractor relationship.

18. (ALJD 14/46-47). The ALJ's finding on page 14 of the Decision that Arise's right to terminate a Statement of Work ("SOW") for failure to satisfy performance metrics constitutes a "disciplinary measure." As argued in Arise's brief, filed concurrently herewith, a company's decision to terminate another company's contract based on its failure to satisfy its obligations under the contract (including failure to provide the agreed-upon end product) is not a disciplinary measure, but is within the normal course of business between two companies.

19. (ALJD 15/17-19). The ALJ's finding on page 15 of the Decision that "[a]ll of the skills required to perform work as a CSP are obtained through training the Respondent provides, through the CSP 101 and client certification courses." The record before the ALJ does not support this finding. In fact, as argued in Arise's brief, filed concurrently herewith, many programs require special skills or experience that are not obtained through certification courses, and Mr. Rice even testified that he decided not to choose certain projects because he did not have the requisite skill or experience for that project. (Tr. 161:16-162:7.)

20. (ALJD 16/6-8). The ALJ's finding on page 16 of the Decision that the factor of the length of time for which a worker is employed was neutral. As argued in Arise's brief, filed concurrently herewith, each contract Arise entered into with an IB to perform services for a project was typically for 90 days (and in this case was 60 days), which shows that the contracts are not long term or indefinite.

21. (ALJD 17/10-11). Arise excepts to the finding on page 17 of the Decision that "[w]ithout the revenue derived from the CSPs' work, the Respondent essentially would be out of business." As argued in Arise's brief, filed concurrently herewith, while connecting IBs with other companies is a primary source of revenue for Arise, Arise still provides other services such as IVR services, automated voice attendants, or could transition into providing other services. Moreover, IBs are clients of Arise as well, as they pay for access to the Arise platform.

22. (ALJD 14/11-12). The ALJ's finding on page 14 of the Decision that "the services provided by CSPs are essential to [Arise's] operations." As argued in Arise's brief, filed concurrently herewith, CSPs are not essential to Arise's operations, as Arise's operations consist of providing technology and network services that connect IBs to large companies. CSPs

are not essential to – and, indeed, play no role whatsoever in – the creation or maintenance of said technology and network services.

23. (ALJD 17/13-14). The ALJ’s finding on page 17 of the Decision that Arise’s “regular business is providing call center services through its website using CSPs.” As argued in Arise’s brief, filed concurrently herewith, Arise is not a call center and does not and has never provided call center services.

24. (ALJD 17/34-35). The ALJ’s finding on page 17 of the Decision that the factor of whether or not the parties believe they are creating an independent contractor relationship was neutral. As argued in Arise’s brief, filed concurrently herewith, this factor should have weighed in favor of independent contractor status because the ALJ did not attribute proper weight to the agreements that clearly showed the parties believed they entered into an independent contractor relationship and the ALJ failed to consider evidence showing that CCS operated in practice as an independent contractor.

25. (ALJD 17/39-40). The ALJ’s finding on page 17 that Arise’s “regular business is to provide call center services to its clients” and that Arise “is in the same business as the CSPs.” As argued in Arise’s brief, filed concurrently herewith, Arise is not a call center itself and has never provided call center services.

26. (ALJD 18/11-12). The ALJ’s finding on page 16 that CSPs’ ability to work for other companies is “somewhat unrealistic.” As argued in Arise’s brief, filed concurrently herewith, the relevant question is what control Arise exerts over CSPs, and the way that Arise’s clients choose to release intervals and what intervals the clients choose to release are not indicia of control that Arise exerts over CSPs’ work schedules.

27. (ALJD 13-19). The ALJ's conclusion that nine out of the ten factors weighed either in favor of employee status or were neutral, as shown on pages 13-19 of the Decision. The record before the ALJ does not support this finding. In fact, as argued in Arise's brief, the record evidence shows that each of those factors should have weighed in favor of independent contractor status.

28. (ALJD 18/37-19-10). The ALJ's finding on page 18 of the Decision that Arise has failed to carry its burden to show that Mr. Rice is an independent contractor and that a majority of the traditional common-law factors support a finding of employee status. As argued in Arise's brief, filed concurrently herewith, the ALJ failed to consider evidence of CCS and Patricia Rice's significant entrepreneurial activity and opportunity for profit or loss, the significant control CCS exerted over its own business, and CCS's history of providing call center services completely independent of Arise and/or Arise's platform, which all support a finding of independent contractor status. The ALJ also misinterpreted other evidence that indicated that certain factors should have weighed in favor of independent contractor status.

29. (ALJD 1). The ALJ's observation in the first paragraph of his Decision that Arise, as opposed to Certified Client Solutions ("CCS"), required Charging Party Matthew Rice and other client support professionals ("CSPs") to sign an "Acknowledgement Waiver Agreement" as a condition of working for the Arise's clients.

30. (ALJD 19/35-36). The ALJ's conclusion that, "[I]n order to perform any work for the Respondent under an SOW, CSPs are required to sign the waiver agreement," because the work was being performed for CCS, and ultimately for the client, not for Arise.

31. (ALJD 19/38-40). The ALJ's finding that Mr. Rice engaged in protected, concerted activity by filing the opt-in consent form to join the *Heather Steele* FLSA class action

lawsuit, because he consciously and lawfully waived his right to join the *Heather Steele* FLSA class action lawsuit.

32. (ALJD 19/43-47). The ALJ's conclusion that savings provisions in the class action waiver permitting Mr. Rice to file unfair labor practice charges with the Board, and also permitting him to challenge the enforceability of the waiver in state or federal court, rendered the class action waiver language unlawful under Section 8(a)(1) of the Act.

33. (ALJD 20/4-17). The ALJ's legal conclusion rejecting United States Supreme Court decisions enforcing class action waivers in arbitration agreements under the Federal Arbitration Act ("FAA"), the decision of the United States Court of Appeals in *Walthour v. Chipio Windshield Repair*, 745 F. 3d 1726 (11th Cir. 2014) finding that a provision in an arbitration agreement which waived the parties' ability to bring a collective action was enforceable under the FAA, and instead deciding to follow the Board's own precedent finding to the contrary in *D.R. Horton*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F. 3d 344 (5th Cir. 2013), petition for rehearing *en banc* denied (5th Cir. No. 12-60031, April 16, 2014) and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014) enf. denied in relevant part 808 F. 3d 1013 (5th Cir. 2015) pet. for cert. filed (No16-307) (U.S. Sept. 9, 2016).

34. (ALJD 20/27-31). The ALJ's Conclusion of Law No. 2 that on or about November 13, 2014 Mr. Rice engaged in concerted activities for the purpose of mutual aid and protection with other employees of Arise by filing an opt-in consent form as a plaintiff in the class [sic] action in *Heather Steele, et al. v. Arise Virtual Solutions Inc.*, Case No. 13-cv-62823 in the U.S. District Court for the Southern District of Florida.

35. (ALJD 20/33-37). The ALJ's Conclusion of Law No. 3 that Arise violated Section 8(a)(1) of the Act by maintaining the class action waiver provision in its

Acknowledgement and Waiver Agreement, by requiring employees to sign the Waiver Agreement as a condition of employment, and by enforcing the Waiver Agreement against Mr. Rice by requesting that Mr. Rice withdraw his consent form by which he opted into the *Heather Steele* FSLA class [sic] action complaint.

36. (ALJD 21/15-35). The ALJ's Order that Arise cease and desist from maintaining and/or enforcing any agreement or rule which requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial, and the ALJ's Order that Arise rescind the Acknowledgement and Waiver Agreement, or revise the Agreement so that the Agreement does not constitute a waiver of employees' rights to file or maintain employment-related joint class or collective actions, and to notify all current and former CSPs who were required to sign, or otherwise agree to, the Acknowledgement and Waiver Agreement that the Agreement has been rescinded or revised, and, if revised, provide them a copy of the revised Agreement.

37. (ALJD 21/37 – 22/2). The ALJ's Order requiring Arise to reimburse Mr. Rice for any reasonable attorneys' fees and litigation expenses incurred in opposing Arise's efforts to enforce the Acknowledgement and Waiver Agreement in violation of the Board's authority under Sections 8 and 10 of the National Labor Relations Act, and in derogation of the authority of the district court in the Heather Steele litigation.

Dated: September 23, 2016

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that ARISE VIRTUAL SOLUTIONS INC.'S EXCEPTIONS TO DECISION OF ADMINISTRATIVE LAW JUDGE in the matter of *Arise Virtual Solutions Inc.* and *Matthew Rice*, Case 12-CA-144223 was duly served electronically upon the following individuals on September 23, 2016:

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