

**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 BRIEF IN SUPPORT OF ITS
EXCEPTIONS TO DECISION OF ADMINISTRATIVE LAW JUDGE**

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TABLE OF CONTENTS

	Page
I. STATEMENT OF THE CASE.....	1
II. BRIEF FACTUAL BACKGROUND.....	3
III. ISSUES.....	6
IV. ARGUMENT.....	7
A. The ALJ Erred in Finding that CCS Is Not a Necessary Party to this Action.....	7
B. The ALJ Erred in Relying on Certification Materials That Mr. Rice May Have Never Seen.....	9
C. The ALJ Erred in Extrapolating His Findings Regarding Mr. Rice to All CSPs.....	10
D. The ALJ Erred in Finding that CSPs, Including Mr. Rice, Are Statutory Employees of Arise and Not Independent Contractors.....	13
1. The ALJ Erred in Declining to Find that CCS and Mr. Rice Were Engaged in a Distinct Occupation or Business.....	15
2. The ALJ Erred in Finding that CCS and Mr. Rice Do Not Render Services As an Independent Business.....	20
3. The ALJ Erred in Finding That the Call Center Services Performed by CCS and Mr. Rice Were Part of the Regular Business of Arise and that Arise Is In the Same Business as CSPs.....	26
4. The ALJ Erred in Finding that Arise Exerts Control Over the Work of CSPs.....	28
5. The ALJ Erred in Finding that CSPs Perform Work Under Supervision of Arise.....	32
6. The ALJ Erred in Finding that All Skills Necessary to Perform Work as a CSP Are Obtained Through Training Arise Provides.....	36
7. The ALJ Erred in Finding That the Factor of the Length of Time For Which the Individual Is Employed Was Neutral.....	37
8. The ALJ Erred in Finding That The Factor of Whether the Parties Believe They Are Creating an Independent Contractor Relationship Was Neutral.....	38
E. The ALJ Erred In His Reliance On The Board’s Erroneous Decision In D.R. Horton.....	39
F. The ALJ Erred In Adhering To The Board’s “Non-Acquiescence Policy”.....	43
G. The ALJ Erred In Failing To Consider The Acknowledgement And Waiver’s Carve Out Provision For Filing Charges With An Administrative Agency.....	45

TABLE OF CONTENTS
(continued)

	Page
H. The ALJ Erred In Concluding That Arise Violated Section 8(a)(1) By Requesting That Rice Withdraw His Consent Form Opting Into The Steele Litigation.....	46
I. The ALJ Erred In Awarding Expenses, Attorneys’ Fees, And Interest To Mr. Rice For Arise’s Successful Efforts To Enforce The Acknowledgement and Waiver Agreement.....	47
V. CONCLUSION.....	48
CERTIFICATE OF SERVICE	50

TABLE OF AUTHORITIES

	Page(s)
<u>Federal Cases</u>	
<i>Adkins v. Labor Ready, Inc.</i> , 303 F.3d 496 (4th Cir. 2002)	42
<i>Am. Express Co. v. Italian Colors Rest.</i> , 133 S.Ct. 2304 (2013).....	40, 45
<i>Amchem Prods, Inc. v. Windsor</i> , 521 U.S. 591 (1997).....	42
<i>AT&T Mobility, LLC v. Concepcion</i> , 131 S.Ct. 1740 (2011).....	40, 45
<i>Bill Johnson’s Rests. v. NLRB</i> , 461 U.S. 731 (1983).....	47
<i>Brackin Tie, Lumber & Chip Co. v. McLarty Farms, Inc.</i> , 95 F.R.D. 328 (S.D. Ga. 1982)	8
<i>Caley v. Gulfstream Aerospace Corp.</i> , 428 F.3d 1359 (11th Cir. 2005)	42
<i>Capitol Med. Ctr., LLC v. Amerigroup Maryland, Inc.</i> , 677 F. Supp. 2d 188 (D.D.C. 2010).....	7, 8
<i>Caribbean Telecomms., Ltd. v. Guyana Tel. & Tel. Co.</i> , 594 F. Supp. 2d 522 (D.N.J. 2009).....	7, 8
<i>Carrell v. Sunland Const., Inc.</i> , 998 F.2d 330 (5th Cir. 1993)	29
<i>Carter v. Countrywide Credit Indus. Inc.</i> , 362 F.3d 294 (5th Cir. 2004)	42
<i>Chesapeake Energy Corp. v. NLRB</i> , 633 F. App’x 613 (5th Cir. 2016).....	41
<i>Citi Trends, Inc. v. NLRB</i> , No. 15-60913, 2016 WL 4245458 (5th Cir. Aug. 10, 2016)	41
<i>Clinton v. Babbitt</i> , 180 F.3d 1081 (9th Cir. 1999)	7, 8
<i>CompuCredit Corp. v. Greenwood</i> , 132 S.Ct. 665 (2012).....	40, 41, 42

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>CP Sols. PTE, Ltd. v. GE</i> , 470 F. Supp. 2d 151 (D. Conn. 2007).....	7, 8
<i>Deposit Guar. Nat'l Bank v. Roper</i> , 445 U.S. 326 332 (1980).....	42
<i>Gilmer v. Interstate/Johnson Lane Corp.</i> , 500 U.S. 20 (1991).....	42
<i>Grabowski v. C.H. Robinson</i> , 817 F. Supp. 2d 1159 (S.D. Cal. 2011).....	44
<i>Gruma Corp.</i> , No. 21-RC-20685, 2003 WL 25907509 (NLRB Div. of Judges Nov. 21, 2003).....	22
<i>HDR Eng'g, Inc. v. R.C.T. Eng'g, Inc.</i> , No. 08-81040-CIV, 2010 WL 2402908 (S.D. Fla. June 15, 2010).....	7, 8
<i>Hoffman Plastic Compounds, Inc. v. NLRB</i> , 535 U.S. 137 (2002).....	44
<i>Hornstein v. Mortg. Mkt., Inc.</i> , 9 Fed. Appx. 618 (9th Cir. 2001).....	42
<i>Janney Montgomery Scott, Inc. v. Shepard Niles, Inc.</i> , 11 F.3d 399 (3d Cir. 1993).....	7
<i>Lechmere, Inc. v. NLRB</i> , 502 U.S. 527 (1992).....	43
<i>Lee v. NLRB</i> , 393 F.3d 491 (5th Cir. 2005)	46
<i>Lewis v. Epic Sys. Corp.</i> , 823 F.3d 1147 (7th Cir. 2016)	44
<i>Mack v. Talasek</i> , No. V-09-53, 2012 WL 1067398 (S.D. Tex. Mar. 28, 2012).....	29
<i>Morris v. Ernst & Young, LLP</i> , 2016 WL 4433080 (9th Cir. Aug. 22, 2016).....	44, 45
<i>Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.</i> , 460 U.S. 1 (1983).....	40

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>Mullane v. Centr. Hanover Bank & Trust Co.</i> , 339 U.S. 306 (1950).....	47
<i>Nelsen v. Legacy Partners Residential, Inc.</i> , 207 Cal. App. 4th 1115 (Cal. Ct. App. 2012).....	44
<i>NLRB v. Drivers, Chaffeurs, Helpers, Local Union No. 639</i> , 362 U.S. 274 (1960).....	46
<i>NLRB v. Fin. Inst. Emps. Of Am., Local 1182</i> , 475 U.S. 192 (1986).....	43
<i>NLRB v. United Insurance Co.</i> , 390 U.S. 254 (1968).....	14
<i>North American Van Lines, Inc. v. NLRB</i> , 869 F.2d 596 (D.D.C. 1989).....	<i>passim</i>
<i>Otis v. Arise Virtual Sols., Inc.</i> , Case 0:12-cv-62143-KMW, Doc. No. 41 (S.D. Fla. Aug. 5, 2013).....	46
<i>Owen v. Bristol Care, Inc.</i> , 702 F.3d 1050 (8th Cir. 2013).....	42
<i>PJ Cheese, Inc. v. NLRB</i> , No. 15-60610, 2016 WL 3457261 (5th Cir. June 16, 2016).....	41
<i>Shearson/Am. Express, Inc. v. McMahon</i> , 482 U.S. 220 (1987).....	41
<i>Slawienski v. Nephron Pharm. Corp.</i> , Civil Action No. 1:10-CV-0460-JEC, 2010 WL 5186622 (N.D. Ga. 2010).....	44
<i>Southern S.S. Co. v. NLRB</i> , 316 U.S. 31 (1942).....	43
<i>Steele v. Arise Virtual Sols., Inc.</i> , Case 0:13-cv-62823-WJZ, Doc. No. 51 (S.D. Fla. Feb. 25, 2015).....	46
<i>Stolt-Nielsen S.A. v. Animal Feeds Int’l Corp.</i> , 559 U.S. 662 (2010).....	40
<i>Sutherland v. Ernst & Young, LLP</i> , 726 F.3d 290 (2d Cir. 2013).....	42

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>Velu v. Velocity Express, Inc.</i> , 666 F. Supp. 2d 300 (E.D.N.Y. 2009)	30
<i>Vilches v. Travelers Cos.</i> , 413 Fed. Appx. 487 (3d Cir. 2011)	42
<i>Walthour v. Chipio Windshield Repair, LLC</i> , 745 F.3d 1326 (11th Cir. 2014), <i>cert. denied</i> , 134 S.Ct. 2886 (2014)	46, 48
 <u>NLRB Decisions</u>	
<i>Ace Doran Hauling & Rigging Co.</i> , 214 NLRB 798 (1974)	17
<i>Argix Direct</i> , 343 NLRB No. 1017	25, 35, 38
<i>Argix Direct, Inc.</i> , 343 NLRB 1017 (2004)	15, 23
<i>Argix Direct, Inc.</i> , 343 NLRB N1017	34
<i>Arvin Indus., Inc.</i> , 285 NLRB 753 (1987)	43
<i>Container Transit</i> , 281 NLRB No. 141 (1986)	17
<i>D.R. Horton</i> , 357 NLRB 2277 (2012), <i>enf. denied in relevant part</i> 737 F.3d 344 (5th Cir. 2013), <i>pet. for reh'g en banc denied</i> (5th Cir., April 16, 2014)	<i>passim</i>
<i>Dial-A-Mattress Operating Corp.</i> , 326 NLRB 884 (1998)	<i>passim</i>
<i>FedEx Home Delivery</i> , 361 NLRB No. 55, 2014 NLRB LEXIS 753 (Sept. 30, 2014)	14, 15, 19, 20
<i>Metropolitan Taxicab Board of Trade</i> , 342 NLRB 1300 (2004)	18, 19
<i>Murphy Oil USA, Inc.</i> , 361 NLRB No. 72 (2014), <i>enf. denied in relevant part</i> 808 F.3d 1013 (5th Cir. 2015)	<i>passim</i>

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>NV Resort Assn.</i> , 250 NLRB 626 (1980)	33
<i>O’Charley’s, Inc.</i> , Case No. 26-CA-19974, 28 NLRB AMR 3809 (Apr. 16, 2001)	45
<i>Operating Engineers, Local 701 (Lease Co.)</i> , 276 NLRB 597 (1985)	14, 28, 29, 33
<i>Porter Drywall, Inc.</i> , 362 NLRB No. 6, 2015 NLRB LEXIS 51 (Jan. 29, 2015)	<i>passim</i>
<i>Robbins Motor Transp.</i> , 225 NLRB 761 (1975)	17
<i>Slay Transportation Company, Inc.</i> , 331 NLRB 1292 (2000)	29
<i>Supershuttle DFW, Inc.</i> , Case No. 16-RC-10963, 2010 NLRB LEXIS 547 (Aug. 16, 2010)	15
<i>Twin City Freight, Inc.</i> , 221 NLRB 1219 (1975)	32
 <u>Statutes</u>	
9 U.S.C. § 2	40
29 U.S.C. § 152(3)	1, 14
National Labor Relations Act § 7	44
National Labor Relations Act § 8(a)(1)	<i>passim</i>
National Labor Relations Act § 8(a)(4)	1
 <u>Rules</u>	
L.R. 7.1(a)(3)	47
 <u>Other Authorities</u>	
Restatement (Second) of Agency, § 220(2)	14

I. STATEMENT OF THE CASE

Matthew Rice, a Client Support Professional (“CSP”) who works for Certified Client Solutions LLC (“CCS”), filed a charge in the above-referenced matter alleging that Arise engaged in unfair labor practices within the meaning of Section 8(a)(1) and (4) the of the National Labor Relations Act (“NLRA”) by requiring him to enter into an arbitration agreement that contained a class action waiver. The Complaint was heard before Administrative Law Judge Charles J. Muhl (the “ALJ”) on May 2 and 3, 2016. On August 12, 2016, the ALJ issued his decision (the “Decision”) and, based on evidence relevant to only Mr. Rice, concluded that all CSPs, including Mr. Rice, are employees of Arise and that the class action waiver between Mr. Rice and CCS violated the NLRA. The ALJ erred in his conclusion for three main reasons. **First**, CSPs, including Mr. Rice, are not employees of Arise. They are instead independent contractors or employees of separate companies that contract with Arise to provide call center services to large corporations. Independent contractors are specifically excluded from coverage of the NLRA, 29 U.S.C. § 152(3) (“The term ‘employee’ . . . shall not include . . . any individual having the status of an independent contractor”), so Mr. Rice cannot maintain a claim against Arise as an independent contractor of Arise. **Second**, regardless of how the ALJ thought Mr. Rice should be classified, the ALJ had no basis or authority to issue a blanket ruling regarding all CSPs, which are subject to different contracts, are affiliated with different Independent Businesses, work on different projects, and are in all ways uniquely situated in comparison with each other. Despite his lack of authority, the ALJ issued such a blanket ruling regarding all CSPs based on a record that had no evidence showing the factual circumstances of other CSPs or whether other CSPs were similarly situated to Mr. Rice for purposes of the independent contractor analysis. The ALJ did not even attempt to make a finding that Mr. Rice was similar to other CSPs when he extrapolated his findings about Mr. Rice to all CSPs. **Third**,

even assuming, *arguendo*, that Mr. Rice had an employment relationship with Arise, arbitration provisions with class action waivers do not violate the NLRA. The ALJ also erred in awarding expenses, attorneys' fees, and interest to Mr. Rice in light of Arise's successful efforts to enforce the Acknowledgement and Waiver Agreement (the "Waiver Agreement") in federal district court.

In his Decision, the ALJ makes factual and legal findings that ignore volumes of significant and undisputed evidence. For example, the ALJ ignored considerable evidence establishing that the company for which Mr. Rice worked—Certified Client Solutions LLC ("CCS")—was an independent business with entrepreneurial opportunity that operated as a call center separate and apart from any affiliation with Arise. In fact, undisputed evidence in the record established that CCS existed before any affiliation with Arise, serviced and sought out other clients besides those affiliated with Arise, and generated considerable revenue providing call center services separate from any affiliation with Arise. The ALJ erred in concluding that this evidence was not relevant to his decision and omitting any consideration of this evidence in his analysis. Many of the ALJ's errors, such as his failure to find that certain factors of the relevant test weighed in favor of independent contractor status, were based on this error that evidence relating to CCS was not relevant. This finding was the genesis of several subsequent analytical errors, more fully described herein, which led to the ALJ's erroneous conclusion that CSPs are employees of Arise. Moreover, the ALJ also erred in concluding that the class action waiver between Mr. Rice and CCS violated the NLRA.

II. BRIEF FACTUAL BACKGROUND¹

Arise is a leading facilitator of virtual business services. (Tr. 250:22-251:4.)² Arise is a technology company and not a call center, and as such it has invested in software and other infrastructure which allows third-party vendor call centers or independent businesses (“IBs”)³ to connect, for a fee, to the internal systems of large companies in order to provide customer service, technical support, and sales services (“call center services”) to those companies. (Tr. 35:5-6, 250:22-251:8; 251:9-253:1.) These IBs, which are all independently incorporated companies ranging from small businesses to entities with over a hundred employees, then become outsourced call centers for Fortune 500 companies. (Tr. 253:2-12.) In order to provide call center services, the IBs retain customer service agents known as CSPs to provide services on various projects (also called “programs”). (Tr. 27:13-18.) Arise never engages or contracts with individuals to provide call center services, and Arise itself never provides call center services. (Tr. 251:7-8.)

CCS is an IB that purchases access to Arise’s infrastructure in order to provide call center services to Fortune 500 companies. (See GC Ex. 2; Tr. 23:15-24:20, 250:11-21.) CCS, like all IBs that use the Arise platform, is an independent call center business that can, and does, shape and operate its business however it chooses. (Tr. 253:2-12, 261:18-263:2.) As with every other IB contracting with Arise, CCS was free to advertise itself, market itself to any other entity while

¹ A complete Factual Background is set forth in the Respondent’s Post-Hearing Brief to the ALJ. It is incorporated herein by reference. This brief factual background explains Arise’s business and sets forth the evidence relating to CCS that the ALJ failed to incorporate into its Decision. The facts relating to Arise’s relationship with CCS, and CCS’s relationship with Mr. Rice is set forth in the Post-Hearing Brief.

² Citations to “Tr.” refers to the transcript of proceedings conducted on May 2, 2016 and May 3, 2016.

³ 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.”

using the Arise platform (including competitors of Arise), and engage in any other business it chose—and CCS did just that. (*See* GC Ex. 3 & 4 § 2.6, 3.4; Resp. Ex. 16; Tr. 122:9-19 (“Q: Do you remember if CCS had any other clients that year? . . . A: I worked for other clients, yes.”), 131:16-18, 135:20-137:7, 136:13-17 (“Q: The next page says ‘CCS began working with small businesses selling merchant services and then moved on to working with Fortune 500 companies.’ Was that accurate at the time you wrote it? A: Yes.”), 136:22-137:3 (“Q: The last paragraph, ‘Because we’ve been doing this for so long, we specialize in assisting small businesses with setting up and maintaining a great customer service base. We manage, do quality checks and assist in any way possible to make your business run smoothly.’ Was that accurate at the time you wrote it? A: Yes.”), 261:18-262:16.)

In 2001, long before Mr. Rice began working for CCS and using the Arise platform, CCS established itself as a company that provides customer service and began servicing small businesses.⁴ (Tr. 136:13-17; Resp. Ex. 16 at 1.) Soon after, CCS advanced to providing services for Fortune 500 companies. (*Id.*) In 2008, Patricia Rice, CCS’s President, registered CCS as a for profit limited liability company in the state of Florida. (Tr. 132:3-25; Resp. Ex. 10.)⁵ Over the course of time, CCS has engaged at least 100 individuals to work on its behalf, and at least fifty of those individuals have provided services on behalf of CCS using the Arise platform. (Tr. 135:20-24 (“A: I had a team of people in my IBO, so I probably had like 100 people in there.”); 141:3-12 (“Q: How many provided services? A: Okay. Over the years, I would say at least 50.”).) In 2012, Ms. Rice stopped providing services herself using the Arise platform, but still managed up to five employees servicing on behalf of CCS. (Tr. 146:2-5.)

⁴ The ALJ failed to recognize this fact in his findings.

⁵ Ms. Rice’s ownership interest in CCS is separate from the presence or absence of a contractual relationship with Arise. (*See* Resp. Ex. 10; GC Ex. 2 at 11 (certifying that Patricia Rice owns at least 49% of the outstanding capital stock of CCS).)

At all times, CCS has operated an independent business. It has provided services to multiple clients, including to companies unaffiliated with Arise, and has invested heavily in marketing and advertising to expand its client base. (Tr. 127:4-14; *see* Resp. Ex. 11.) CCS maintains a website that promotes itself to businesses in the market for customer services. (Resp. Ex. 16 at 4.) The website states that CCS has hired contractors that provide “excellent customer services to your customers” and further touts its fifteen years of experience working with “big & small businesses alike.” (Resp. Ex. 16 at 3, 4.) The website also highlights the “excellent team” of “over 100 contractors” it has built to provide customer services, and lists the qualifications of the team: three to five years’ experience, college educated, and able to provide bi-lingual services. (Resp. Ex. 16 at 2; Tr. 135:20-136:12.) CCS also has a LinkedIn page that describes itself as a “virtual call center” whose contractors provide “world class service.” (Resp. Ex. 17.) In addition, CCS has dedicated funds to develop its social media presence on websites like Facebook. (Tr. 128:21-23, 131:16-18.) In further efforts to expand its clientele, CCS has tried to obtain government contracts to provide services, as well as attempted to win business from American Bullion Brokers. (Tr. 146:6-20.)

CCS’s success over the years has fluctuated—in some years it has generated over \$100,000 in revenue, and in other years it has generated less.⁶ (*See* Resp. Ex. 11.) Further, it has earned revenue from multiple sources. For instance, in 2013, CCS earned \$88,823.00 in total gross receipts. (Resp. Ex. 18; Tr. 125:18-22.) Out of that \$88,823.00, CCS earned \$42,937.66 from Arise and \$45,885.34 from other sources for providing call center services. (Resp. Ex. 18

⁶ Arise served a subpoena on Ms. Rice to obtain the following information regarding CCS’s finances. Accordingly, Arise only has data regarding CCS’s revenue and income for two years.

& 11; Tr. 127:4-14.)⁷ In 2014, CCS earned \$52,838.00 in total gross receipts. (Resp. Ex. 19.) Out of that \$52,838.00, CCS earned \$40,936.45 from Arise for services rendered and \$11,901.55 from other sources for providing call center services. (Resp. Ex. 19 and 11; Tr. 130:3-131:3).⁸ Depending on the number of clients CCS chose to service that year, and the number of agents CCS chose to retain, CCS's revenue varied, providing Ms. Rice with the opportunity to influence CCS's profit or loss. In addition, CCS's profit varied, depending on its expenses, exhibiting another opportunity for Ms. Rice to utilize her managerial skill to increase CCS's profits or loss. (See Resp. Ex. 18 & 19 at 3.)

The remaining factual background is set forth in Arise's Post-Hearing brief and is incorporated herein by reference.

III. ISSUES

1. Whether the ALJ erred in finding that CCS is not a necessary party to this action. (R.E. 1.)⁹
2. Whether the ALJ erred in finding that Mr. Rice is a statutory employee of Arise and not an independent contractor. (R.E. 4-28.)
3. Whether the ALJ has the power to rule on the employment status of CSPs who were not before him in this matter. (R.E. 3.)

⁷ ("And what services was CCS providing for Micoré? A: Customer service. Q: What do you mean by that? A: Answering the phone. They -- answering the phone.")

⁸ ("Q: So that number -- so what does that mean in terms of what CCS received in gross revenue in 2014? A: So that means, according to this, that like almost \$41,000 came from Arise, and then the rest came from Micoré. Q: Okay. Great. And at this time in 2014, what type of services was CCS providing to Micoré? A: Same thing, customer service.")

⁹ (R.E. 1) refers to Respondent's Exception 1. This format is used throughout when referring to Respondent's Exceptions to the Decision of the ALJ.

4. Whether the ALJ erred in applying his finding as to Mr. Rice to all CSPs, without hearing any evidence regarding whether other CSPs were similarly situated to him and without making any findings as to whether other CSPs were similarly situated to him. (R.E. 3.)

5. Whether the ALJ erred in finding that Arise violated Section 8(a)(1) of the National Labor Relations Act by maintaining its class action waiver in its Acknowledgement and Waiver Agreement. (R.E. 29-36.)

6. Whether the ALJ erred in ordering 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. (R.E. 37.)

IV. **ARGUMENT**

A. **The ALJ Erred in Finding that CCS Is Not a Necessary Party to this Action**

As initially argued in its Motion to Dismiss for Failure to Join a Required Party, Arise maintains the position that this matter cannot be fully resolved without CCS—the only party that contracted with Mr. Rice in this litigation. (Decision at 11:8-16). Despite the axiom that contracting parties are “indispensable” when the terms of the contract are at issue, the ALJ merely sidestepped the appropriate analysis and concluded that the terms of the Master Services Agreement (“MSA”) afforded Arise the ability to effect “complete relief” should an order be entered against it. (*Id.* at 11:34-40); *see Caribbean Telecomms., Ltd. v. Guyana Tel. & Tel. Co.*, 594 F. Supp. 2d 522, 532 (D.N.J. 2009).¹⁰

However, a plaintiff is only free to exclude parties to the contract as potential defendants when the suit is brought against another co-obligor. *Janney Montgomery Scott, Inc. v. Shepard*

¹⁰ *HDR Eng'g, Inc. v. R.C.T. Eng'g, Inc.*, No. 08-81040-CIV, 2010 WL 2402908, at *2 (S.D. Fla. June 15, 2010); *Clinton v. Babbitt*, 180 F.3d 1081, 1088 (9th Cir. 1999); *Capitol Med. Ctr., LLC v. Amerigroup Maryland, Inc.*, 677 F. Supp. 2d 188, 192-93 (D.D.C. 2010); *CP Sols. PTE, Ltd. v. GE*, 470 F. Supp. 2d 151, 157-58 (D. Conn. 2007).

Niles, Inc., 11 F.3d 399, 411-13 (3d Cir. 1993); *Brackin Tie, Lumber & Chip Co. v. McLarty Farms, Inc.*, 95 F.R.D. 328, 330-32 (S.D. Ga. 1982). In the instant matter, CCS and Mr. Rice executed the Waiver Agreement which contained the class action waiver. (GC Exh. 5). Arise was not a party to and did not undertake any obligations to Mr. Rice under the terms of the Waiver Agreement; rather, Arise was merely a third-party beneficiary. (*Id.*) The ALJ's analysis as to whether CCS was an indispensable party should have stopped there. However, the ALJ went one step further and pointed to the terms of a completely separate document to which Mr. Rice was never a party—the MSA. (Decision at 11:30-45.) The ALJ noted that the terms of the MSA provided Arise with the ability to “unilaterally” amend the MSA, or any SOW thereunder. (Decision at 11:35-40.) The ALJ's use of the term “unilateral” is incorrect, as CCS had the option of terminating the MSA if it did not agree with any amendment from Arise. (Decision at 4:1-5.) Accordingly, should an order require that Arise amend the MSA, as the ALJ recommends, CCS still has no obligation to adhere to such an amendment. Indeed, it is likely that Arise would have to bring a completely separate contract action to enforce the terms of the Board's Order should CCS refuse, or else risk termination of its business relationship with CCS in its entirety. While such an Order may accomplish the ALJ's goals, it is far beyond the specific relief that would be afforded if CCS were a party here. It is for precisely this reason that courts have consistently held that, when a dispute arises over the terms of a contract, the party-obligor is an indispensable party under Rule 19. *Caribbean Telecomms.*, 594 F. Supp. 2d at 532; *HDR Eng'g*, 2010 WL 2402908, at *2; *Clinton* 180 F.3d at 1088 (9th Cir. 1999); *Capitol Med. Ctr.*, 677 F. Supp. 2d at 192-93; *CP Sols. PTE*, 470 F. Supp. 2d at 157-58.

The Board's refusal to treat CCS as an indispensable party is an improper attempt to exact the broadest scope of relief, even where that approach disregards the contractual relationships between Mr. Rice and his actual employer.

B. The ALJ Erred in Relying on Certification Materials That Mr. Rice May Have Never Seen

The ALJ relied on certification materials¹¹ presented by the General Counsel to show that Arise exerted control over Mr. Rice and to show that CSPs obtain all necessary skills from certification courses. (Decision at 13, 15.) While these documents are admissible, they are not persuasive as to the dispositive issue—that is, the actual relationship between Arise, CCS, and Mr. Rice. These exhibits¹² should be accorded little weight as to the extent of control Arise exerts over Mr. Rice for two reasons. First, the General Counsel presented no evidence showing that Mr. Rice ever saw or was exposed to these documents. Second, none of the exhibits listed above show that Arise controlled the way that Mr. Rice performed services on behalf of CCS. They do, however, show other facts. For example, the CSP 101 and certification documents show that Arise recognizes the complexity of its telephony systems and its clients' systems, and thus offers courses on those systems to give IBs and their CSPs the information they need to use the Arise platform successfully. (Tr. 269:15-270:4, 281:5-14.) The analysis of whether a worker should be classified as an independent contractor examines the actual relationship between the

¹¹ CSPs took CSP 101 courses to familiarize them with Arise's system. CSPs also complete certification courses for a particular client. (Tr. 60:18-22.) These courses provide information on the client's tools and systems so that the CSPs can apply their own skills in servicing the client's customers. (Tr. 62:20-22, 63:8-13, 64:5-6, 201:11-15, 269:15-270:4.) The clients generate the content of the certification courses—not Arise. (Tr. 269:23-270:4.)

¹² While it is not exactly clear which particular exhibits the ALJ relied on in making these decisions, the Exhibits that Arise objects to on these grounds are General Counsel Exhibits 9-23, 42-46, 48-51, 63-64, 66-72, 75-77.

parties. Accordingly, Arise requests that the Board requires the examination of the actual interactions and relationships between the parties, and not the exhibits highlighted above.

C. The ALJ Erred in Extrapolating His Findings Regarding Mr. Rice to All CSPs

During the hearing on the Complaint, the parties presented evidence regarding whether Mr. Rice was an employee of Arise. Virtually all of the evidence presented related to just three parties: Mr. Rice, CCS, and Arise. Yet in his Decision, the ALJ relied on the evidence regarding Mr. Rice to—without basis or authority—issue a decision finding that *all CSPs* were employees of Arise. The ALJ further ordered relief that would impact all CSPs—based purely on evidence related to just one CSP. This was improper for several reasons.

The ALJ did not have the authority to issue such a broad-reaching decision about individuals that were not currently a Charging Party before him. Even if the ALJ did have power to issue an order deciding the employment status of individuals other than the Charging Party in the action, the ALJ did not even attempt to provide any analysis explaining *why* his findings regarding Mr. Rice would or should apply to all CSPs. He relied on evidence specific to Mr. Rice to support his conclusion that all CSPs are employees of Arise without trying to show how that evidence applied to any CSP other than Mr. Rice. The ALJ clearly erred in omitting such an analysis or explanation.

Even if the ALJ had attempted to provide such an analysis, the record lacks evidence showing that Mr. Rice was similar to any or all CSPs for purposes of the independent contractor analysis or that the facts bearing on Mr. Rice's employment status bear on the employment status of any other CSP. The facts regarding all CSPs' working relationships with their IBs and Arise vary greatly in many different aspects. This is particularly true given the nature of the relationship Arise maintains with IBs—specifically, a relationship wherein Arise exerts no

control over the IB's work conditions or business functions. Accordingly, although Arise maintains that all IBs are independent contractors, there is inherent material variation among the IBs and CSPs with respect to the traditional common law factors. This inherent material variation should preclude a decision regarding one CSP from binding and applying equally to all CSPs.

First, CSPs are not similar in terms of the control that Arise allegedly exercised over them, or to what extent, if any, Arise supervised their work. Rather, the level of alleged control varies significantly based on a number of factors, such as whether the CSP owns his or her own IB and dictates rules for his or her CSPs, or what projects the CSP serviced. For instance, the record here shows that Mr. Rice worked on the Barnes & Noble project,¹³ but does not show how that project, including the hours it required, the certification it required, the performance metrics, or the compensation it provided, was similar to any other project worked on by any other CSP. Further, the record shows that Patricia Rice had discretion over how to run her business, including discretion regarding Mr. Rice's compensation, his hours and his projects etc., (Tr. 143:3-144:11, 150:9-151:4), but there is no evidence in the record showing that the way she ran CCS is similar to the way any other IB ran its business, or that CCS's decisions impacted Mr. Rice the same way that other IBs' decisions impacted their CSPs.

Second, CSPs are not similar regarding their opportunity for profit or loss or as to whether they render services as an independent business. This factor will vary greatly amongst CSPs depending on whether a CSP has his or her own IB or is providing services through another IB. Other factors that could impact whether and to what extent a CSP renders services as an independent business include the nature of company he or she works for (such as the number

¹³ (Tr. 150:12-15.)

of clients it has, the number of employees retained, and its efforts to seek out new business), and the nature of the company owner (such as her entrepreneurial spirit, business acumen, and background). All of these facts vary amongst CSPs and IBs. Just the variation between the entrepreneurial opportunity for Ms. Rice (who was a business owner, as well as a CSP (Tr. 145:20-146:5)), and for Mr. Rice (also a CSP) shows the extreme dissimilarity possible amongst CSPs with respect to these factors. Ms. Rice ran her own independent business and provided call center services to other companies absent any affiliation with Arise, showing significant entrepreneurial opportunity, whereas Mr. Rice worked for Ms. Rice, showing less entrepreneurial opportunity. No evidence in the record indicates that Mr. Rice's opportunity for profit or loss was similar to that of any other CSP.

Third, whether or not a CSP runs a distinct occupation or business will vary significantly depending on the particular CSP, including whether he or she runs an IB, and how that IB chooses to operate the business. As discussed above, the huge variation between two CSPs that presented testimony in this case (Ms. Rice and Mr. Rice) regarding this factor is a telling example of the differences between CSPs with respect to facts relevant to the independent contractor analysis. No evidence in the record indicates that Mr. Rice's or CCS's ability to run a distinct business was similar to that of any other CSP or IB.

Fourth, CSPs are not similar regarding the degree of permanency and duration of their work on projects using the Arise platform. Some CSPs service projects for very short periods while others may continue to service projects for longer. (Tr. 267:7-9.) No evidence in the record indicates that all CSPs work on projects for the same period of time or are otherwise equivalent in terms of the permanency of their work.

Fifth, CSPs will invariably have different backgrounds and different sets of skills which they will all apply differently while providing call center services. For instance, the ALJ cited the fact that Mr. Rice “had obtained a GED, but did not have any work experience when he became a CSP.” (Decision at 15.) No evidence in the record shows that Mr. Rice and all CSPs have similar educational backgrounds, or similar skill sets.

Overall, it is clear that the record lacked substantial evidence regarding whether CSPs are actually similar with respect to the factors for the independent contractor analysis. Without such evidence, the ALJ erred in simply concluding that based on evidence specific to Mr. Rice, and only Mr. Rice, all CSPs are employees of Arise. Indeed, the differences between Mr. Rice and Ms. Rice alone highlight the extreme variation possible across all CSPs that use the Arise platform and underlines why the ALJ was wrong to extrapolate his findings regarding the relationship between Arise and Mr. Rice to all CSPs. That error extended to his ordered relief, which depended on a conclusion that applies to all CSPs. To the extent that the Board finds that the evidence shows that Mr. Rice was an employee of Arise (which Arise denies), Arise requests that the Board recognize the considerable differences amongst CSPs when considering what relief to order and that it accordingly limit any such relief to just Mr. Rice and CCS.

D. The ALJ Erred in Finding that CSPs, Including Mr. Rice, Are Statutory Employees of Arise and Not Independent Contractors

Mr. Rice alleges that Arise “has engaged in unfair labor practices and interfered with and restrained *employees* in the exercise of the rights guaranteed by Section 7” of the NLRA. Mr. Rice, however, never had any relationship with Arise whatsoever. He was *never* an employee of Arise and, instead, worked for CCS—an independent contractor. Independent contractors are specifically excluded from coverage of the NLRA, 29 U.S.C. § 152(3) (“The term ‘employee’ . . . shall not include . . . any individual having the status of an independent contractor . . .”), and,

therefore, Mr. Rice cannot maintain his claim under the NLRA. *See Porter Drywall, Inc.*, 362 NLRB No. 6, 2015 NLRB LEXIS 51, at *24 (Jan. 29, 2015) (“The Employer had the burden of establishing that the crew leaders are independent contractors, and it has carried that burden.”). The ALJ found otherwise, in error, and accordingly, Arise respectfully requests that the Board reject the Decision of the ALJ and dismiss the Complaint.

The Board has recognized that there is no “shorthand formula or magic phrase that can be applied” to determine independent contractor status, so the Board assesses a number of common law factors in order to determine the applicable inquiry, which is “whether the putative independent contractor is *rendering services as part of an independent business.*” *Operating Engineers, Local 701 (Lease Co.)*, 276 NLRB 597 (1985) (quoting *NLRB v. United Insurance Co.*, 390 U.S. 254, 258 (1968)); *see also Porter Drywall*, 2015 NLRB LEXIS 51, at *3-4 (emphasis added); *FedEx Home Delivery*, 361 NLRB No. 55, 2014 NLRB LEXIS 753, at *10 (Sept. 30, 2014); Restatement (Second) of Agency, § 220(2). “[I]n evaluating independent-contractor status in light of the pertinent common-law agency principles,” “all of the incidents of the relationship must be assessed and weighed with no one factor being decisive.” *Porter Drywall*, 2015 NLRB LEXIS 51, at *3 (quoting *FedEx Home Delivery*, 361 NLRB No. 55, 2014 NLRB LEXIS 753, at *3 (Sept. 30, 2014)). The Board and courts often conclude that individuals are independent contractors despite finding that only some of the factors support independent contractor status. *See id.* at *24-25; *see Argix Direct, Inc.*, 343 NLRB 1017, 1022 (2004).¹⁴

The ALJ considered each of the factors of the traditional common law test, finding some neutral, some in favor of independent contractor status and some in favor of employee status.

¹⁴ Due to the similarities between the some of these factors, Arise will re-order and consolidate some of the factors. *See Supershuttle DFW, Inc.*, Case No. 16-RC-10963, 2010 NLRB LEXIS 547, at *24-32 (Aug. 16, 2010).

Among other errors, the ALJ's overarching error was his complete failure to consider the *significant*—and *undisputed*—evidence regarding CCS, the relationship between Arise, CCS and Mr. Rice, and CCS's completely separate business functions, CCS's ability to operate absent any affiliation with Arise, CCS's significant opportunity for profit or loss, CCS's complete control over important business decisions, and overall, CCS's autonomy as an independent business. As explained further below, this error is the basis for many of the ALJ's other errors in finding that some of the factors weighed in favor of employee status. Based on this and other errors, the ALJ incorrectly concluded that CSPs are employees of Arise.

1. The ALJ Erred in Declining to Find that CCS and Mr. Rice Were Engaged in a Distinct Occupation or Business

Independent contractors engage in a distinct occupation or business from the purported employer. Here, as acknowledged by the ALJ, CCS and Mr. Rice did not “do business in the name of” Arise. *Cf. FedEx Home Delivery*, 2014 NLRB LEXIS 753, at *60-61 (2014); *see also Dial-A-Mattress Operating Corp.*, 326 NLRB 884, 891 (1998) (“The owner-operators have a separate identity from Dial that suggests independent contractor status.”). Instead, CCS is an independently incorporated third-party IB duly incorporated in the state of Florida by Patricia Rice, which advertises and markets itself as a virtual call center. (*See* Resp. Ex. 10, 16.) The contractual relationship and the actual relationship among Arise, CCS, and Mr. Rice show that CCS and Mr. Rice were engaged in a distinct business from Arise.

The ALJ, however, erred when it concluded that CSPs “lack infrastructure and support to operate as a separate entity absent their affiliation from Arise.” *Id.* This finding failed to consider substantial and undisputed evidence showing that CCS did, in fact, operate as a separate entity absent its affiliation with Arise. As noted above, the ALJ erred throughout its Decision in omitting evidence related to CCS and failing to recognize the significance of the relationship

between CCS and Arise (and between CCS and Mr. Rice). This error caused the ALJ to find that many factors, including this one, were either neutral or weighed in favor of employee status when they should have weighed in favor of independent contractor status. Also, the ALJ specifically noted in footnote 6 that he did not find the relationship between IBs and Arise to be relevant to this case. The structure of the relationship between these three parties shows that the ALJ's omission of this evidence was in error. To fully understand whether a worker is an independent contractor or an employee of Arise, the ALJ was obligated to consider the totality of the circumstances surrounding this working relationship—which includes the relationship of CCS and Arise and CCS and Mr. Rice. By ignoring CCS's status as a separate and independently functioning business—as discussed in detail in this section and Sections IV.D.2 and 3, *infra*—the ALJ did not consider all relevant evidence to this relationship.

The ALJ noted that “the only issue presented by the General Counsel’s complaint is whether CSPs are employees” of Arise and that it did not agree “that if CCS were found to be an independent contractor as to Arise, that same status automatically would be conveyed upon Matthew Rice.” (Decision at n.6.) Arise does not, however, argue that the status of CCS must automatically be the status of Mr. Rice nor does it dispute that the issue presented is whether Mr. Rice is an employee of Arise¹⁵ (although it does dispute that the issue is whether all CSPs are employees of Arise). Rather, it argues that the test for independent contractor status is a

¹⁵ Even if Arise did argue that the status of CCS must automatically be the status of Mr. Rice, this principle is supported in NLRB case law. In *Container Transit*, 281 NLRB No. 141, at *30 (1986), the NLRB adopted the ALJ's decision in which he first concluded the owner-operators were independent contractors of March, the purported employer. The ALJ next concluded that the non-owner drivers were employees of the owner-operators, but had to decide whether the non-owners were employees of March. Recognizing a number of other cases that attributed the status of the owner-operator as independent contractors to the non-owner drivers, the ALJ similarly attributed the status of the owner-operators here as independent contractors to the non-owner drivers and found they were not employees of March. Accordingly, if it were Arise's position that CCS's status as an independent contractor should be automatically conveyed upon Mr. Rice, it would be supported. *Id.* (citing *Robbins Motor Transp.*, 225 NLRB 761 (1975); *Ace Doran Hauling & Rigging Co.*, 214 NLRB 798 (1974)).

multifactor balancing test which is designed to review the totality of the circumstances, and this cannot be done if CCS is completely ignored—especially for factors relating to whether the independent contractor renders services as an independent business. Given the tripartite relationship between these parties, and the fact that Mr. Rice was retained by CCS to work for it, it makes no sense to ignore the facts of CCS’s business when considering those factors as they apply to Mr. Rice. Mr. Rice worked for CCS and personnel of a separate company will not have the same kind of entrepreneurial opportunity as the business owner him or herself, nor can he be said to be running his own distinct business.

The ALJ cited *Porter Drywall* for the proposition that the status of CCS should not automatically be conveyed upon Mr. Rice, as the Board in *Porter Drywall* analyzed independently the question of whether crew leaders and crew members were employees. In *Porter Drywall*, however, it made sense for the Board to analyze evidence relating to crew members and crew leaders separately because there were actually two separate questions at issue: (1) whether the crew leaders were independent contractors of the purported Employer and (2) whether the crew members were employees of the crew leaders. Conversely, the only relevant inquiry in the instant matter is whether Mr. Rice is an employee of Arise. Notably, when the Board quickly analyzed whether the crew members were employees of the crew leaders rather than of the purported employer, the Board *did* consider evidence relating to the crew leaders. In fact, it *only* considered evidence relating to the crew leaders, such as the fact that crew leaders alone determined who they were going to hire and did not report this information to the Employer, and that the crew leaders set all terms and conditions of employment for their crews, directed the work of their crews, carried insurance for their crews, and handled all aspects of their payroll. *See Porter Drywall*, 362 NLRB No. 6 (Jan. 29, 2015). Accordingly, *Porter*

Drywall does not support the idea that the Board should only analyze evidence relating to the alleged employee and the alleged employer when determining the employment status of alleged employee that works for a third party entity. It actually supports the contrary position—that, when considering the status of the alleged employee, the Board *should* consider evidence as it relates to the third party entity that the alleged employee works directly for. Other Judges have recognized the difficulty in assessing a worker’s status when the worker is not the typical businessman operating a separate company. In *Metropolitan Taxicab Board of Trade*, 342 NLRB 1300, 1308 (2004), the ALJ assessed whether taxis drivers were employees or independent contractors of the fleet owners. The ALJ noted initially: “[t]o call the fleet taxi drivers independent businessmen, is in my opinion to use a category that has little or no application to these people.” *Id.* He explained that they do not own the cabs and do not own the licenses to operate the cabs, and the only way “to realistically maximize their earnings is to stay on the road for as long as possible.” *Id.* But, examining the relationship between the fleet owner and the drivers, the ALJ saw no control by the fleet owner over how the driver completed his rides. Ultimately, the ALJ saw “too much independence of the drivers from the fleet owners [a]nd whether or not one would characterize these people as independent business persons, [he could not] escape the conclusion that they are not employees of the fleets.” *Id.* at 1310. This shows that a ALJ must assess every facet of the relationship, and take into account special circumstances of how that relationship operates, to determine whether a worker is an employee or independent contractor—even if a worker is not a typical “businessman.”

Because a full analysis of whether Mr. Rice, and other CSPs, are independent contractors of Arise requires consideration of evidence relating to the IB for which they work, the ALJ erred in ignoring the substantial record of undisputed evidence establishing that CCS, and Mr. Rice as

a part of CCS, engaged in a distinct occupation or business. Indeed, CCS operated as its own independent business since 2001 (long before partnering with Arise), and has detailed the development of its business on its own website. (*See* Resp. Ex. 16.) Through its website, CCS marketed itself to businesses seeking call center services, presented itself and its contractors as providing such services, and did all this independent of Arise. Accordingly, CCS exists as a separate entity and provides services to other clients without any support or infrastructure from Arise. *Cf. FedEx Home Delivery*, 2014 NLRB LEXIS 753, at *18. CCS also took steps to expand its business and increase its client base by reaching out to other businesses like American Bullion Brokers, by trying to obtain government contracts, and by investing in marketing and advertising services. (Tr. 128:21-23, 131:16-18, 146:6-20.)¹⁶ CCS was, in fact, successful at attracting clients; in at least 2013 and 2014, CCS earned revenue from multiple sources by providing call center services, exhibiting its independent operations as a distinct business. (*See* Resp. Ex. 18, 19.) In addition, CCS and Mr. Rice, on the one hand, and Arise, on the other, engaged in different businesses from each other (as explained further below): Arise is a technology company that provides access to software and telephony infrastructure, whereas CCS is a call center that utilizes the Arise platform to perform *some* of its services. The businesses are, thus, completely distinct from each other. Moreover, if some CSPs do experience “sporadic” hours as the ALJ stated, that does not preclude them from obtaining other employment. In any event, Arise’s witness Robert Padron testified that based on a review of

¹⁶ Tr. 146:11-20 (“Q: Were there any other situations that you marketed CCS to, you know, entities, successfully or unsuccessfully? A: Yes, I tried. Q: Give me some examples. A: I tried to get like government contracts. I tried with different companies around Atlanta, but nothing ever came of it. Q: When you say tried, what exactly did you do? A: I would go to them and tell them what I offered and tell them what they needed and just try to market to them.”)

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. (*See* GC Ex. 47; Tr. 278:14-22.)

The undisputed facts establish that CCS (and Mr. Rice, through working for CCS) is a distinct business that operates independently from Arise. Thus, this factor should have weighed in favor of independent contractor status.

2. The ALJ Erred in Finding that CCS and Mr. Rice Do Not Render Services As an Independent Business

Independent contractors render services as part of an independent business. This factor considers whether the putative contractors (1) have control over important business decisions “such as the scheduling of performance,” the hiring, selection, and assignment of employees, the purchase and use of equipment, and commitment of capital; (2) have a significant entrepreneurial opportunity, and (3) have a realistic ability to work for other companies. *See FedEx Home Delivery*, 2014 NLRB LEXIS 753, at *54. The Board should consider whether there is any evidence that Arise has “effectively imposed constraints on an individual’s ability to render services as part of an independent business” which could include limitations placed by the putative employer on the individual’s ability to work for other companies and restrictions on important business decisions. *Id.* at *55. (emphasis in original.) The ALJ erred in concluding that this factor weighed in favor of employee status. The most significant error in the ALJ’s analysis of this factor was his failure to consider any of the undisputed evidence showing that CCS rendered services as an independent business. As explained above, to fully understand whether a worker is an independent contractor or an employee, the Board must consider the totality of the circumstances surrounding this working relationship, which includes evidence relating to whether Arise placed any constraints on CCS’s or Mr. Rice’s ability to render services as an independent business. The evidence in the record shows that Arise placed no such

constraints on CCS or Mr. Rice. In fact, substantial evidence in the record shows that CCS, and Mr. Rice as part of CCS, did render services as part of an independent business to multiple clients and was a separately operating independent business.

The ALJ should have considered that CCS is an independently incorporated entity, and Ms. Rice's ownership interest in CCS is separate from and unaffected by the presence or absence of a contractual relationship between Arise and CCS. Indeed, CCS's website represents that it has been in business since 2001, *though it has only been registered to use the Arise platform since 2008 as CCS and since 2004 as a predecessor company.* (See Resp. Ex. 16.) CCS was operating an independent business that provided services to clients both using the Arise platform, as well as outside of the Arise platform. (Tr. 127:4-14, 146:6-20; Resp. Ex. 16.) The undisputed evidence shows that Ms. Rice was running a legitimate business, earning revenue from different sources, advertising her services to a broad audience, and strategizing about how to expand her client base—all the hallmarks of an independent company.

The evidence also showed that CCS has complete control over important business decisions—and that Arise places no constraints on an IB's ability to make those decisions. Ms. Rice stopped servicing as a CSP on the Arise platform herself in 2012, but continued to run her business and manage other CSPs that still provided services on behalf of CCS to various clients (only sometimes using the Arise platform). (Tr. 145:20-146:5.) As owner of CCS, Ms. Rice exercised independent judgment in her managerial decisions, including: the number and type of projects on which its CSPs would work; the work to accept from companies separate from the Arise platform; the hiring, supervision, payment, and selection of its personnel, including its CSPs; and the decision of whether to pay for its CSPs' certification courses and/or equipment. *See Dial-a Mattress*, 326 NLRB at 893; (Tr. 144:25-145:15, 150:9-17, 153:22-154:6, 166:16-17

209:23-210:7, 261:18-263:2, 270:18-21, 280:15-25; *see also* GC Ex. 3 & 4 § 2.6, 3.3, 3.4, 3.5.) The ALJ found that CSPs do not have the ability to control important business decisions. (Decision at 18.) While it may be true that Mr. Rice did not control all important business decisions of CCS, that was because he *worked for* CCS—no individual retained to work *for* a company will control the business decisions of that company. If the test for whether a worker is an employee requires an individual to control business decisions of the company for which he works, then any time there is a tripartite relationship such as the one here, the worker will be deemed an employee of both the company he works for and the entity that contracts with that company—but that cannot be the rule. The tripartite relationship must be considered as a whole, and when considering the evidence relating to CCS, it is clear that CCS—the entity Mr. Rice worked for—did control managerial decisions related to its own company. That is highly relevant to the decision as to whether Mr. Rice was or was not an employee of Arise.

The freedom to make all of the above important managerial decisions opened CCS up to significant entrepreneurial opportunity for profit or risk of loss. *See Porter Drywall*, 2015 NLRB LEXIS 51, at *23; *see Gruma Corp.*, No. 21-RC-20685, 2003 WL 25907509 (NLRB Div. of Judges Nov. 21, 2003) (“Based upon their decisions and execution, distributors may operate at a profit or loss, and make entrepreneurial decisions in their day-to-day activities, further evidencing independent contractor status.”) First, CCS had discretion to choose client projects within the Arise platform that provided the best service revenue structure or that would likely provide opportunity for incentives based on the skills and expertise of CCS and its CSPs, *i.e.* higher service revenue when certain performance metrics are met or when intervals are not picked up. (Tr. 260:7-261:13.) Second, certain projects available through the Arise platform have revenue structures that offer IBs the opportunity to increase revenue based on the number

of calls its CSPs can service, which can translate into higher profits to the company if its CSP can complete more calls. (See GC Ex. 3, Program Specific Appendix § 6.1 (basing service revenue off of number of calls serviced).) Third, CCS could—and indeed did—determine the compensation of its CSPs, without any input or control from Arise, and could include any terms it chose. For example, for some of its CSPs, CCS retained a portion of the service revenue generated by their servicing, but with respect to Mr. Rice, Ms. Rice, as the owner of CCS, chose to pass on all service revenue generated by his servicing to him. (Tr. 150:22-151:3.) Fourth CCS marketed itself in an attempt to gain more clients, exhibiting its opportunity to boost profits. Not only did Ms. Rice create a company website and LinkedIn profile for CCS that touted the experience of her company’s customer service agents, but she also advertised her company on websites such as Facebook. (Resp. Ex. 16, 17; Tr. 128:21-23, 131:16-18.) In further attempts to expand her business, CCS also tried to obtain work from American Bouillon Brokers, and tried to win government contracts. (Tr. 146:6-20.) CCS’s ability to market to a broad array of clients in any way it saw fit exhibits the entrepreneurial opportunity it has to increase profits. Last, Arise also did not guarantee a minimum level of income to either CCS or Mr. Rice, which exhibits the opportunity for loss in engaging in this business. See *Argix Direct*, 343 NLRB 1017, 1021; see also *Porter Drywall*, 2015 NLRB LEXIS 51, at *23; see also *Dial-a Mattress*, 326 NLRB 884, 892 (1998) (no guaranteed minimum compensation for the owner-operators to minimize risk is indicator of independent contractor status). Arise imposed no constraints on CCS’s ability to make the important business decisions described above that impacted CCS’s profit or loss.

CCS’s actual entrepreneurial opportunity is further evident in the varying revenue it earned throughout its relationship with Arise, both from Arise and from other clients. CCS’s

annual service revenue earned from investing in access to the Arise platform has ranged from about \$40,000 to \$140,000— based on the way Ms. Rice operated her business, the number of personnel CCS had, the project and clients chosen, etc. Such revenue fluctuation and uncertainty is a risk inherent in any independent business. (*See* Resp. Ex. 11 & 12; Tr. 130:3-25, 142:6-12.) In fact, some IBs have been successful using the Arise platform, and some have not been as financially successful—this depends on an owner’s managerial skill and highlights the opportunity for profit or loss. Aside from the revenue it earned from Arise, CCS also earned revenue from other sources. (Resp. Ex. 18, 19; Tr.127:4-14, 130:3-131:3.) For example, CCS earned \$88,823.00 in 2013, and \$45,885.34 of that amount was earned by providing call center services to clients other than through the Arise platform. (Resp. Ex. 18, 11; Tr. 127:4-14.)

The ALJ concluded that CSPs do not have opportunity for gain or loss through the work because they don’t operate a business, their work does not involve risk and they generally do not have the ability to affect their earnings. While this conclusion may be true as to Mr. Rice in this limited instance, those facts are only true because he *worked for* another company that did render services as an independent business. Put differently, Mr. Rice did not have opportunity for profit or loss because he was working for CCS, a company that owned and controlled the opportunity for profit or loss. Mr. Rice also did not operate a business, hire or fire workers, or take risks because he worked for a company that operated a business, hired and fired workers, and took risks. Mr. Rice’s status as a worker of CCS, which limited his “entrepreneurial opportunity,” does not mean that Arise was Mr. Rice’s employer. It just means that working for another company limits one’s ability to operate independently and restricts how much freedom one has to impact profit or loss. This highlights the importance of examining CCS in this context. The

ALJ's failure to do so was in error because when evidence relating to CCS is considered, it is clear that CCS rendered services as independent business.

In addition, the ALJ did not consider the other opportunities for profit or loss that CSPs experience, as Mr. Rice did, which hinged on his skill, initiative, ability to cut costs, and his understanding of the business. First, Mr. Rice had and still has the option to run his own IB. Instead, he made the choice to work for CCS. Arise had no input into that decision. If Mr. Rice started his own call center company and retained individuals to perform call center services as CCS did, he would have had significant opportunity for profit or loss. Second, Arise does not dictate which projects or how many projects CSPs like Mr. Rice will service. That is up to the IB. Subject to Ms. Rice's management, Mr. Rice was free to express interest in more or different opportunities in order to seek greater profit. *See Porter Drywall*, 2015 NLRB LEXIS, at *23 ("They decide which work to accept or decline based on their assessment of the job."). Third, if Mr. Rice were responsible for his own equipment instead of CCS, Mr. Rice could have boosted his profits by managing these expenses. Fourth, Mr. Rice could have increased his overall profits by effectively managing external factors—*e.g.*, by taking additional jobs.

Lastly, both CCS and Mr. Rice had a realistic ability to work for other companies. *See Argix Direct*, 343 NLRB No. 1017, 1021 ("Because they are free to elect not to work for the Employer at particular times based on their own schedule and because the Employer's volume of work varies, owner-operators can choose to maximize or minimize their income."). None of the agreements at issue here—the MSA nor the SOWs—contain a covenant not to compete. As explained above, Arise imposed no constraints on CCS's ability to compete with Arise or to expand and service other clients. In fact, CCS did provide services to other companies. (Tr. 127:4-14, 128:21-23, 131:16-18, 146:6-20; *see also* GC Ex. 3 & 4 § 2.6.) Similarly, Arise did

not restrict Mr. Rice’s ability to obtain other employment or compete with Arise. (See GC Ex. 3 & 4 § 2.6; Tr. 210:19-25.) Mr. Rice could have worked on anything he wanted to in addition to servicing clients for CCS using the Arise platform. While Mr. Rice testified that he did not feel that the service intervals available allowed him an opportunity to have another job, Mr. Padron testified based on GC Exhibit 47 that Mr. Rice’s servicing hours were rather consistent, with about sixty percent of his servicing hours falling between roughly 1:30pm and 6:30pm—far from the scattered schedule Mr. Rice stated he worked. (See GC Ex. 47; Tr. 278:14-22.) Regardless, the important question is whether *Arise imposed any constraints* on CCS’s or Mr. Rice’s ability to work for other companies—the undisputed evidence demonstrates that it did not.

This factor supports a finding that CCS’s and Mr. Rice’s “opportunities for gain are more than merely theoretical.” *Porter Drywall*, 2015 NLRB LEXIS 51, at *24. Accordingly, this factor should have weighed in favor of independent contractor status.¹⁷

3. The ALJ Erred in Finding That the Call Center Services Performed by CCS and Mr. Rice Were Part of the Regular Business of Arise and that Arise Is In the Same Business as CSPs¹⁸

Independent contractors perform functions that are not merely a regular or essential part of an alleged employer’s business. *Porter Drywall*, 2015 NLRB LEXIS 51, at *21. Arise’s business is providing a technology infrastructure through which small- to medium-sized independent companies can provide outsourced call center services to large companies. (Tr.

¹⁷ The ALJ similarly concluded, in error, in his section on “Method of Payment” that “CSPs are not subjected to any genuine financial risk, except for the minimal expenditure for equipment,” and that “CSPs do not have any potential for entrepreneurial gain,” and that “the only method for CSPs have to increase compensation is to work more hours.” (Decision at 16.) These statements suffer from the same error as do the statements throughout the Decision, especially the ALJ’s final section on whether CSPs render services as an independent business. The ALJ did not consider evidence relating to CCS that undisputedly established that CCS is subjected to financial risk, that CCS does have potential for entrepreneurial gain, and CCS does have other methods to increase compensation.

¹⁸ This section combines discussion of two factors: whether the work is part of the regular business of the employer and whether the principal is or is not in the business.

250:11-251:8.) The ALJ focused on the “perspective of [Arise’s] clients” to determine that Arise’s business is providing call center services. (Decision at 16.) It concluded that Barnes & Noble, Disney and Sears pay Arise “to obtain call center services from CSPs, not access and use the Company’s platform.” But the ALJ misconstrues this point, as for those large companies, obtaining call center services and using the Arise platform are one in the same—and these companies do pay to access the platform and obtain call center services. These large companies come to Arise seeking call center services, which are provided to them by the IBs through the connections Arise has created with its telephony platform.¹⁹ So, in fact, the clients *are* paying for use of the platform and for this technology. The ALJ also noted that “[w]ithout the revenue derived from the CSPs’ work, the Respondent essentially would be out of business.” (Decision at 17.)²⁰ The ALJ misunderstands that IBs are clients as well—they pay Arise for access to the platform. (Tr. 274:13-18.) Thus, the ALJ is correct that without its customers, any company is out of business. Arise is a connector between IBs and the large companies, and if it cannot make one side of that connection, it has no business. 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.²¹ (Tr. 290:9-291:9.)

Throughout its corporate existence, no Arise employee has provided call center services. (Tr. 251:5-8.) Arise identified a need in the industry—large companies seeking better quality

¹⁹ IBs and their CSPs connect to the systems of Arise’s clients using Arise’s portal, but ultimately are connected and plugged in to the client’s systems. (Tr. 202:2-203:2, 255:11-256:16.)

²⁰ The ALJ similarly found on page 14 of the Decision that “the services provided by CSPs are essential to [Arise’s] operations.” (Decision at 14.) For the reasons explained above, this finding was also incorrect.

²¹ In fact, in the time since the hearing was held, Arise has begun providing a new SaaS scheduling platform to clients for use outside of the call center industry.

and more flexible call center services and small companies seeking to provide call center representatives without a huge infrastructure investment—and created a product to satisfy that need. Arise is not a call center merely because it has created software that allows other companies to be call centers, any more than AT&T is a call center because it provides phone service for call centers. For all of these reasons, Arise’s regular business is not providing call center services, but instead is providing the connective tissue for call center companies to provide those services. Accordingly, Arise is not in the same business as IBs or their CSPs.

4. The ALJ Erred in Finding that Arise Exerts Control Over the Work of CSPs

Employers reserve the right to control the “means and manner” of the workers’ performance. *North American Van Lines, Inc. v. NLRB*, 869 F.2d 596, 599 (D.D.C. 1989). An independent contractor relationship exists when the contractor “complete[s] the scope of the work awarded to them without any close supervision,” and is “obligated to meet general” criteria for the work in whatever manner they see fit. *Porter Drywall, Inc.*, above at *13-14; *see also Operating Engineers, Local 701 (Lease Co.)*, 276 NLRB 597, 601 (1985) (finding independent contractor status when the employer set parameters for the work but left details of the work to the contractors). Here, the ALJ erred in three ways.

First, the ALJ erred in concluding that a CSPs’ completion of certification courses renders them employees. (Decision at 13.) The ALJ explained that Arise “trains, tests, and approves individuals to become both CSPs and to provide services on a particular client.” *Id.* The ALJ cites *Slay Transportation Company, Inc.*, 331 NLRB 1292, 1293-94 (2000) for the proposition that testing and approving individuals supports employee status, but the drivers in that case were subject to significantly more control by the purported employer than CSPs are by Arise, including being subject to the employer’s employee manual and being held to the same

performance, safety and attendance standards as the employers' employees. That case is, thus, inapposite. Moreover, as a technology company, Arise must ensure that IBs and their CSPs are familiar with Arise's systems and the clients' systems so that the IBs can provide quality service to client using that platform. (Tr. 62:20-22, 63:8-13, 64:5-6, 201:11-15, 269:15-270:4.) Requiring that the CSPs be certified to use these systems and technology does not equate to control over the means and manner of the workers' performance. Moreover, requiring client-driven specifications, such as those provided in certification, does not suggest that Arise exerted control over the manner of method of Rice's servicing. *See Mack v. Talasek*, No. V-09-53, 2012 WL 1067398, at *2 (S.D. Tex. Mar. 28, 2012); *Carrell v. Sunland Const., Inc.*, 998 F.2d 330, 332-33 (5th Cir. 1993). Arise recognizes the complexity of these systems, so it offers certification courses to promote the success of the IBs that choose to use Arise's platform. Thus, requiring that the CSPs be certified on the technology does not indicate employer status.

Second, the ALJ erred in concluding that Arise exerts control over a CSP's work hours. The ALJ incorrectly concluded that "the Company imposes a number of restrictions on" the CSPs' rights to control their work schedules, such as providing only thirty minute intervals, releasing all the intervals at one time, or permitting top performing CSPs to select shifts first. To the contrary, Arise imposes no restrictions on a CSPs' ability to select his own work hours or to create his own schedule.²² (Tr: 260:4-6) ("Q: And does Arise ever dictate what intervals need to be selected by a given independent business or CSP? A: No."). As testified to at the hearing and as acknowledged by the ALJ, Mr. Rice was free to select the thirty-minute intervals he wanted to

²² "Q: Okay. So within that universe of what was available, were there any - - was anyone exerting any pressure on you or trying to control which ones you selected to service, other than you? A: No. I mean, like I said, there was people who got to pick their hours first, and other than that, yeah, that was it. Q: No other limitations other than what was available? A: That's right."

service without input from Arise.²³ (Tr. 150:18-21, 211:18-212:1, 260:4-6, 261:8-13.) Moreover, each alleged limitation the ALJ listed is not a “limitation” or restriction imposed by Arise on a CSP’s schedule, but rather an outside influence on what hours are available. Arise does not control the number of hours or which intervals become available for servicing—those decisions are made by the client. (Tr. 254:15-21.) Clients inform Arise of their expected call volume during a particular time. (Tr. 254:3-14.) Independent contractors such as IBs have to work within the boundaries provided by their clients and subject to the demands of their clients. *See Velu v. Velocity Express, Inc.*, 666 F. Supp. 2d 300, 308 (E.D.N.Y. 2009) (“Plaintiff worked at his own convenience, subject to the demands of the clients.”). The necessity to work within these boundaries does not change the fact that Arise exerted no control over a CSP’s schedule or the hours he chose to service out of those available. Further, a decision to release all of the hours at once or a decision to allow top-performing IBs to select intervals first is not a *limitation* on a CSP’s work schedule. The operative question is whether Arise exerts control over when a CSP chooses to work and Arise exerts no such control. Further demonstrating the lack of control Arise exerts over the hours a IB and its CSPs work, Arise cannot require any IB to service any particular interval; Arise does not have that kind of control over the IBs or CSPs. The only mechanism by which Arise can influence IBs to select certain intervals is to offer incentive service revenue above and beyond what is outlined in the SOW. (Tr. 260:7-261:13) (“We have no control over the time that they select. So the only way to, if you will, encourage or incent them to pick up that time is to pay more money.”) In addition, as the ALJ acknowledged, CSPs retain the right to release or swap their hours without Arise’s input or approval, further exhibiting the lack of control Arise had over CSPs’ schedules. (Decision at 13; Tr. 204:2-205:12, 216:15-

²³ In fact, it appears that roughly sixty percent of the time that Mr. Rice serviced, he chose to service between 1:30pm and 6:00pm. (Tr. 278:1-22.)

217:2, 259:3-260:6.) This evidence establishes that Arise, in fact, imposes no *limitations* on a CSP's work hours or schedule.

Third, the ALJ failed to consider other evidence showing a lack of control over CSPs work. (Decision at 13.) The analysis requires a balancing of the facts, and the ALJ should have viewed "all of the incidents of the relationship" to assess whether an employment relationship exists. *Porter Drywall*, 2015 NLRB LEXIS 51, at *3. By focusing on only the purported control Arise exerted over CSPs' work hours (which was in error) and the fact that CSPs take certification courses, to the exclusion of other evidence showing what Arise did *not* exert control over, the ALJ did not properly balance the evidence in the record. Other evidence establishes that Arise does not exert control over the work of the CSPs. First, the governing agreements—the MSA and the relevant SOWs—explicitly state that Arise did not exert control over Mr. Rice and that CCS retained all control over the manner and method of Mr. Rice's servicing. (GC Ex. 2 § 1.2, 1.3; see e.g., GC Exs. 3 & 4 § 4.3.) Second, Arise did not select the projects CSPs, including Mr. Rice, chose to service; rather, CCS and Mr. Rice had the ability to pick and choose which projects to service as well as which SOWs to turn down. (Tr. 144:25-145:15, 150:9-17, 153:22-154:6.) Third, Arise never dictates nor knows the location from which any CSPs service, and CSPs are never required to report to any location designated by Arise. (Tr. 31:11-20, 157:21-22.) Fourth, Arise did not control the manner and method of any CSP's servicing, as discussed more below in Section III.D.5.

The ALJ erred in finding that this factor weighed in favor of employee status because he failed to consider the record evidence showing the lack of control over CSPs while misinterpreting evidence regarding certification courses and CSPs' work hours.

5. The ALJ Erred in Finding that CSPs Perform Work Under Supervision of Arise

Employers reserve the right to control and exercise actual supervision over the “means and manner” of the workers’ performance. *North American Van Lines, Inc. v. NLRB*, 869 F.2d at 599. An independent contractor relationship still exists when the contractor must satisfy certain criteria set for the work but the contractor controls the manner in which he meets the criteria. *Porter Drywall*, 2015 NLRB LEXIS 51, at *14-15; *Twin City Freight, Inc.*, 221 NLRB 1219, 1220 (1975) (“On the other hand, where the employer has reserved only the right to control the ends to be achieved, an independent contractor relationship exists.”). A purported “employer[’s] efforts to monitor, evaluate, and improve the results or ends of the worker’s performance do not make the worker an employee.” *North American Van Lines*, 869 F.2d at 599. The ALJ erred in finding that Arise’s decision to set parameters for the end-result of a project and to conduct quality control on the work performed indicated employee status for the following reasons.

The ALJ highlighted the fact that IBs agreed to meet certain performance metrics in their SOWs as evidence of employee status. (Decision at 14.) But setting parameters for the work to be performed is consistent with an independent contractor relationship, especially when the purported employer leaves the details of the work to the contractor. *Operating Engineers Local 701 (Lease Co.)*, 276 NLRB at 601. Here, the majority of the performance requirements are set by the client—not Arise—and measure a range of metrics that are expected of the IBs that contract to provide services, but none of them dictate the manner or method of servicing. (Tr. 87:8-13, 89:17-21, 258:1-18, 265:12-18.) These metrics include how an IB’s CSPs (like Mr. Rice) adhered to their own commitments to service intervals, how many intervals they actually serviced, the quality of servicing as compared to the client’s standards, the time it took to handle calls, and whether customers were satisfied with the servicing. (*See, e.g.*, GC Exs. 3 & 4,

Program Specific Appendix; Tr. 265:12-18.) None of these performance requirements dictate the manner and method of his servicing, *i.e.* none dictate how he should adhere to his committed intervals, satisfy customers, or handle calls efficiently, but rather focus on whether these results were met. *See NV Resort Assn.*, 250 NLRB 626, 642 (1980). Ultimately, because Arise cares only about whether the IB provides the results a client dictated, ***without dictating the means and methods used to achieve said results***, the performance requirements in the SOWs do not support a finding of employee status.

The ALJ also relied on the fact that Arise and support resources such as Performance Facilitators (“PFs”) communicated the results of the CSPs’ performance against the metrics to the CSPs. (Decision at 14.) But conducting quality control on the work performed—and communicating those results to the contractors—does not create an employer-employee relationship. *See Porter Drywall*, 2015 NLRB LEXIS 51, at *14 (performing quality control inspections on contractors’ work, and ensuring work proceeded as scheduled and to customer’s satisfaction did not create employer-employee relationship); *see also Dial-a-Mattress*, 326 NLRB at 892-893 (2004) (taking measures to ensure customer desires are satisfied, such as penalizing an independent contractor-driver for a late delivery after deviating from the suggested route, does not change independent contractor relationship); *see also Argix Direct, Inc.*, 343 NLRB N1017, 1022 (finding that an independent contractor relationship existed even when the alleged employer demanded that its contractors perform to its clients’ demands and discussed contractors’ failure to meet obligations with them, and noting that the alleged employer may terminate a contract for the contractors’ failure to meet contractual obligations). Some degree of quality control is merely incidental to a principal ensuring that its contractor delivers appropriate results. *North American Van Lines*, 869 F.2d at 599; *see Porter Drywall*, 2015 NLRB LEXIS 51,

at *14; *see Dial-a-Mattress*, 326 NLRB at 892-93. CCS agreed to meet specific performance requirements in the SOW that focus on the end-results without dictating how Mr. Rice or any other of CCS's agents meets those results. (*See, e.g.*, GC Exs. 3 & 4, Program Specific Appendix.) Arise and PFs provided measurements of Mr. Rice's performance against the metrics to CCS and Mr. Rice to ensure CCS was aware of Mr. Rice's performance so that it could make appropriate business decisions based on that information.²⁴ (*See id.*; Tr. 265:21-267:6, 273:3-17.) Any quality auditing performed on Mr. Rice's servicing as a CSP of CCS was intended to promote adherence to these agreed-upon, results-oriented metrics. (Tr. 265:19-266:12.) The ALJ stated that the "client results team" provided feedback that was "subjective, specific and went beyond merely reporting results." (Decision at 14.) Even assuming that some feedback did go beyond merely reporting results, and further assuming it was an Arise employee providing such feedback,²⁵ discussing failures to meet expectations and taking steps to improve results are fully consistent with independent contractor status. *See Argix Direct, Inc.*, 343 NLRB No. 1017, at *1022; *see also North Am. Van Lines*, 869 F.2d at 599.

Moreover, the fact that IBs and their CSPs can leverage Performance Facilitators ("PFs") for assistance or that PFs provide IBs and their CSPs the results of a quality audit does not change the fact that Arise does not dictate the manner or method of how the work was to be performed. The ALJ relied on the fact that chat PFs can monitor CSP calls and may advise

²⁴ *See also* Tr. 267:4-6: ("Q: Why does Arise provide [information about meeting the performance requirements to the vendors]? A: So they can make informed decisions about how to run their business.").

²⁵ In the exhibits submitted, almost every single email that went beyond mere reporting of results was sent from a Performance Facilitator ("PF") which is not an employee of Arise and does not control or supervise CSPs. PFs have no control over a CSP or his or her work. This weakens any argument that communications between PFs and CSPs are an indicator of control by Arise.

Quality Assurance PFs (“QAPFs”) of CSPs’ “performance issues.”²⁶ (Decision at 15.) This does not indicate employee status because PFs, either chat or QAPFs, are not Arise employees, do not supervise CSPs nor do they direct the work of the CSPs (as the ALJ acknowledged).²⁷ (Tr. 271:9-16.) Moreover, even if a chat PF listens to a CSPs’ recorded calls or provides feedback beyond merely stating results, as stated above, “efforts to monitor, evaluate, and improve results or ends of the worker’s performance do not make the worker an employee.” *North American Van Lines*, 869 F.2d at 599.

Last, the ALJ seemed to rely on the fact that Arise can terminate an SOW based on a lack of performance by the IB and its CSPs because it viewed Arise’s right to do so as a “disciplinary measure.” (Decision at 14.) To the extent the ALJ equated a “disciplinary measure” of this nature with employment status, this was in error. In company-to-company relationships, one company’s decision to terminate another company’s contract based on its failure to satisfy its obligations under the contract is not a disciplinary measure, but is an expected contractual entitlement within the normal course of business. Arise, just as any other company that contracts with third parties, has the right to terminate a contract when the third party breaches it or fails to satisfy it. Such a right does not create an employment relationship.

The contractually-agreed upon, results-oriented metrics intended to ensure customer satisfaction do not show that Arise exerted control over Mr. Rice’s servicing, do not show that Mr. Rice worked under Arise’s direction, and do not change the fact that Mr. Rice could control

²⁶ To the extent this occurs, this amounts only to monitoring of performance to ensure that the IBs are providing the service they agreed to provide in their contract with Arise.

²⁷ PFs are not employees of Arise, and they are not “supervisors” of CSPs. (Tr. 271:9-16.) Arise has never once called a PF a “supervisor” or considered them “supervisors,” nor do PFs refer to themselves as supervisors. (Tr. 195:25-196:8, 197:24-198:6.) PFs have limited roles that relate to (1) supporting IBs using the Arise platform at the IB’s request and (2) auditing whether IBs are delivering the results they agreed to deliver in the SOWs. (Tr. 77:1-20, 271:23-272:11, 292:12-25.) They are passive resources that an IB or CSP may choose to engage at his or her own discretion. (Tr. 270:1-8.)

the means of achieving those results. *See North American Van Lines*, 869 F.2d at 599; *see Porter Drywall*, 2015 NLRB LEXIS 51, at *14; *see Dial-a-Mattress*, 326 NLRB 884, 891. This factor weighs in favor of independent contractor status, and the ALJ erred in finding otherwise.

6. The ALJ Erred in Finding that All Skills Necessary to Perform Work as a CSP Are Obtained Through Training Arise Provides

Independent contractors have special skills, beyond basic occupational skills, and utilize those skills in the performance of their work. Mr. Rice merely completed Barnes & Noble-specific certification to learn (i) the requirements of the projects and (ii) how to use the Barnes & Noble phone and e-mail support systems. (Tr. 164:10-13.) Once he began servicing, however, Mr. Rice used his own judgment, knowledge, and abilities on a broad range of different issues while providing services. This shows that Mr. Rice's services required special skills, beyond basic occupational skills, that he used in performance of his work.

Despite this evidence that Mr. Rice utilized special skills, the ALJ concluded that this factor weighed in favor of employee status because he found that “[a]ll of the skills required to perform work as a CSP are obtained through training [Arise] provides, through the CSP 101 and client certification courses.” (Decision at 15.) The evidence in the record establishes otherwise. If all skills required to perform this job were obtained through certification courses, then Mr. Rice would not have shied away from certain projects based on the qualifications required for that particular project that he lacked. Mr. Rice indeed testified that he did not have the requisite skill or experience for some projects, and thus did not choose those projects. (Tr. 161:16-162:7.) Moreover, the fact that Mr. Rice was not offered an additional SOW with Barnes & Noble due to his failure to meet Barnes & Noble's metrics further indicates that not everybody is able to perform all call center services using the Arise platform, even if they do complete certification. *See Porter Drywall*, 2015 NLRB LEXIS 51, at *16 (“They performed skilled work, as evidenced

by the fact that not all crew leaders are able to perform all phases of drywall installation.”). For these reasons, the ALJ erred in concluding that this factor weighed in favor of employee status.

7. The ALJ Erred in Finding That the Factor of the Length of Time For Which the Individual Is Employed Was Neutral

The ALJ erred in finding that the length of time for which a CSP performs a project using the Arise platform is a neutral factor. Independent contractors tend to work on a “project basis rather than for an indefinite time period.” *Porter Drywall*, 2015 NLRB LEXIS 51, at *17. Arise contracts with IBs that provide call center services on a project-by-project basis, typically for no longer than three months. (GC Exs. 3 & 4 § 2.3 (“Arise and Vendor acknowledge that the Services to be provided by Vendor are temporary and nonpermanent in nature.”); Tr. 267:7-9.) Arise never binds IBs to long-standing contracts of service. Consistent with this, Mr. Rice serviced pursuant to SOWs that expired after a two-month term. (*See, e.g.*, GC Exs. 3 & 4 § 15.) For example, pursuant to the terms of the SOWs, CCS designated Mr. Rice to provide services on two Barnes & Noble SOWs with effective dates of November 14, 2014 that expired on their own terms on January 15, 2015. (*Id.*)

The ALJ acknowledged that SOWs typically last 90 days and that neither IBs nor Arise are required to renew an SOW after it expired. (Decision at 16.) The ALJ seemed to rely on the fact that Arise frequently offers new SOWs on the same project to conclude that the factor should be neutral (as opposed to weighing in favor of independent contractor status). But the fact that Arise offers new SOWs frequently to the same IBs does not change the fact that the projects are contractually limited to a definite period of time. The ALJ erred in concluding that this factor was neutral and should have concluded that it weighed in favor of independent contractor status.

8. The ALJ Erred in Finding That The Factor of Whether the Parties Believe They Are Creating an Independent Contractor Relationship Was Neutral

The ALJ erred in finding that the factor of whether the parties believe they are creating an independent contractor relationship was neutral, as both the objective intent of the parties evidenced in the contracts and the subjective intent of the parties based on their conduct showed that they believed they were creating an independent contractor relationship.

First, as the ALJ acknowledged, the parties clearly communicated their intent to enter into an independent contractor relationship. *Argix Direct*, 343 NLRB No. 1017, 1022. CCS represented to Arise that it intended to create an independent contractor relationship with Arise, that CCS would have exclusive control over the services provided on its behalf, that it was solely responsible for hiring, firing, and/or discipline of its employees and contractors, and that CCS would be responsible for Mr. Rice’s compensation. (GC Ex. 2 §§ 1.1, 1.2, 1.3, 1.6; see e.g., GC Exs. 3 & 4 §§ 4.1, 4.3, 13.3.) Mr. Rice, too, acknowledged that he “is not an employee of Arise,” and that it is “solely the responsibility of [CCS] to compensate” Mr. Rice. (GC Ex. 5 §§1, 2.) Prior to first providing services using the Arise platform, Mr. Rice also acknowledged that he understood this was an independent contractor relationship by checking a box when he was registering as a user on the platform. (Tr. 263:19-264:8.)

In addition, the ALJ, again, failed to consider significant evidence involving CCS showing this factor should weigh in favor of independent contractor status. As discussed throughout this analysis, CCS and Mr. Rice operated as if they were independent contractors, and not employees, of Arise. CCS has operated as its own independent business, and currently holds itself out to the public as a “virtual call center with contractors working from home all over the United States.” (Resp. Ex. 18; see also Resp. Ex. 16 at 3 (“In 2008 we branched out and began hiring contractors to work with us through Arise and since then we’ve expanded with

contractors working for big & small businesses alike.’’)). Without examining CCS’s operation as an independent contractor, the ALJ ignored a crucial part of this relationship. Even if Mr. Rice testified that he believed that he viewed Arise as his employer, that should not be enough to overcome all of the other evidence present here showing that the parties acknowledged that they were independent contractors and otherwise acted like independent contractors. Accordingly, the ALJ should have concluded that this factor weighed in favor of independent contractor status.

Overall, based on the foregoing, the ALJ erred in finding that Mr. Rice, and all other CSPs, were statutory employees of Arise.

E. The ALJ Erred In His Reliance On The Board’s Erroneous Decision In *D.R. Horton*

Despite Mr. Rice’s voluntary execution of the Waiver Agreement with CCS, in which he expressly agreed to resolve any and all disputes with Arise through binding arbitration, the ALJ followed the Board’s precedent in *D.R. Horton*, 357 NLRB 2277 (2012), *enf. denied in relevant part* 737 F.3d 344 (5th Cir. 2013), *pet. for reh’g en banc denied* (No. 12-60031)(5th Cir., 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), in finding that the Waiver Agreement’s class action waiver constituted a violation of Section 8(a)(1) of the National Labor Relations Act (“NLRA”). (Decision at 19:20-33.) However, *D.R. Horton* was incorrectly decided on its merits and is clearly contrary to pertinent Supreme Court precedent. Thus, the ALJ’s reliance thereon was improper and should be rejected.

Section 2 of the Federal Arbitration Act (“FAA”) establishes a “liberal federal policy favoring arbitration.” *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 667 (2012)(citing *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983)). Indeed, the default rule under the FAA calls for the enforcement of arbitration provisions. 9 U.S.C. § 2.

Accordingly, the Supreme Court has consistently favored the enforcement of arbitration agreements as written. *See, e.g., Am. Express Co. v. Italian Colors Rest.*, 133 S.Ct. 2304, 2308 (2013); *AT&T Mobility, LLC v. Concepcion*, 131 S.Ct. 1740 (2011); *see Stolt-Nielsen S.A. v. Animal Feeds Int’l Corp.*, 559 U.S. 662, 684-87 (2010); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983); *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 20 (1983).

Despite the clear and unwavering decisions of the Supreme Court enforcing bilateral arbitration agreements pursuant to their terms, the Board issued its *D.R. Horton* decision in 2012, which held that any agreement prohibiting employees from filing class or collective claims violated Section 8(a)(1) of the NLRA. *D.R. Horton*, 357 NLRB 2277 (2012), *enf. denied in relevant part* 737 F.3d 344 (5th Cir. 2013), *pet. for reh’g en banc denied* (No. 12-60031)(5th Cir., April 16, 2014). The Board made little attempt in distinguishing *Concepcion*, merely asserting that “[h]ere, in contrast, only agreements between employers and their own employees are at stake.” *Id.* at 2287. Similarly, the Board merely dedicated two sentences to distinguish *Stolt-Nielsen*, noting that the arbitration provisions at issue there did not entail the waiver of rights protected by the NLRA nor were they embedded within employment agreements. *Id.* Thus, the Board merely made a distinction without a difference in refusing to apply the explicit provisions of the FAA. Furthermore, the Board has continued to enforce its decision in *D.R. Horton* despite the Supreme Court’s subsequent ruling in *CompuCredit*, which clarified the Supreme Court’s position with respect to the FAA’s interplay with federal statutes and expressly reiterated that “unless the FAA’s mandate has been ‘overridden by a contrary congressional command[.]’” arbitration provisions should be enforced according to their terms. *CompuCredit Corp.*, 132 S. Ct. at 667 (citing *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226

(1987)). Furthermore, *CompuCredit* made clear that such contrary congressional commands must be stated with “clarity.” *See id.* at 672.

The Board’s continued enforcement of its decision in *D.R. Horton* is in direct contravention of the *CompuCredit* analysis, as it requires the FAA to yield to the NLRA, despite the NLRA’s absence of *any* explicit congressional command to override the FAA. Rather, the Act makes no mention of the enforceability of arbitration agreements that include class waivers. Instead, the Board apparently relies on the NLRA’s protection of “concerted activities” as creating a substantive right to collective actions. 357 NLRB at 2281. Certainly, the broad protection of “concerted activities” is not the clear, contrary congressional command that the Court envisioned when it decided *Shearson* and, subsequently, *CompuCredit*.

The Fifth Circuit has since rejected the Board’s *D.R. Horton* analysis on at least four separate occasions.²⁸ The Eighth Circuit has similarly upheld arbitration agreements in the Fair Labor Standards Act (“FLSA”) context, reasoning that there is no inherent conflict between the FLSA and the FAA—the condition precedent for finding arbitration provisions unenforceable. *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1054 (8th Cir. 2013); *see CompuCredit Corp.*, 132 S.Ct. at 667. Indeed, nearly every Circuit that has addressed the issue has found that arbitration agreements containing class waivers are enforceable in FLSA matters. *See, e.g., Sutherland v. Ernst & Young, LLP*, 726 F.3d 290, 297-98, n. 8 (2d Cir. 2013).²⁹

²⁸ *Citi Trends, Inc. v. NLRB*, No. 15-60913, 2016 WL 4245458, at *1 (5th Cir. Aug. 10, 2016); *PJ Cheese, Inc. v. NLRB*, No. 15-60610, 2016 WL 3457261, at *1 (5th Cir. June 16, 2016); *Chesapeake Energy Corp. v. NLRB*, 633 F. App’x 613, 615 (5th Cir. 2016)(per curiam).

²⁹ *Vilches v. Travelers Cos.*, 413 Fed. Appx. 487, 494 n. 4 (3d Cir. 2011) ; *Hornstein v. Mortg. Mkt., Inc.*, 9 Fed. Appx. 618, 619 (9th Cir. 2001); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005); *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).

Furthermore, “[t]he use of class action procedures...is not a substantive right.” *D.R. Horton*, 737 F.3d at 357 (citing *Amchem Prods, Inc. v. Windsor*, 521 U.S. 591 (1997); *Deposit Guar. 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.”)(emphasis added)). In fact, courts have found under varying employment-related statutory frameworks that there is no substantive right to class procedures. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991) *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298.

In line with the foregoing precedent, the NLRA’s legislative history does not evidence any intent to guarantee employees’ access to a particular procedural device in bringing employment-related claims. *Se D.R. Horton*, 737 F.3d at 362. To the contrary, the purpose of the NLRA and its predecessor, the National Industrial Recovery Act of 1933, was merely to “level the playing field” between workers and employers by allowing unions to collectively bargain for the terms and conditions of employment. *Id.* Indeed, the enactment of the NLRA predated the existence of the FLSA and modern class action practice. *Id.* at 361. Thus, as the Fifth Circuit noted, it is difficult to envision the inherent conflict necessary to override the FAA when the NLRA “would have been protecting a right of access to a procedure that did not exist when the NLRA was (re)enacted.” *Id.* Thus, the Board’s attempt to convert a mere procedural mechanism of the Courts to a substantive right guaranteed under the NLRA is wholly unsupported. Accordingly, the ALJ’s intractability in receding from the Board’s decisions in *D.R. Horton* and *Murphy Oil* directly contravenes the Supreme Court’s consistent enforcement of arbitration agreements, as written, pursuant to the terms of the FAA.

F. The ALJ Erred In Adhering To The Board’s “Non-Acquiescence Policy”

The ALJ chose to adhere to Board’s decisions in *D.R. Horton* and *Murphy Oil* without meaningful analysis of pertinent precedent, furthering the Board’s longstanding “non-acquiescence” policy, by which it ignores federal circuit court jurisprudence to the extent it conflicts with the Board’s interpretation of the NLRA. See *Arvin Indus., Inc.*, 285 NLRB 753, 757 (1987). Notwithstanding the propriety of such a policy, it is apparent that the Board has gone well beyond the scope of its reach in concluding that the provisions of the NLRA supersede enforcement of the FAA.

Generally, courts will provide the Board judicial deference when interpreting ambiguous provisions of a statute that the Board is charged with administering. *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536 (1992). The scope of employees’ Section 7 rights certainly falls within that scope of deference, but such deference “cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption...of major policy decisions properly made by Congress.” *NLRB v. Fin. Inst. Emps. Of Am., Local 1182*, 475 U.S. 192, 202 (1986). “The Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives.” *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942). It is for this reason that the U.S. Supreme Court has never deferred to the Board’s interpretation of the NLRA when such interpretation “potentially trench[ed] upon federal statutes and policies unrelated to the NLRA.” *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002).

The Board’s interpretation of the NLRA in *D.R. Horton* certainly “trenches upon” and effectively nullifies appropriate precedent favoring the enforcement of arbitration agreements as written under the FAA. As stated by one California state court of appeal, the subject matter of

the interplay between the FAA and section 7 of the NLRA falls well outside the scope of the “Board’s core expertise in collective bargaining and unfair labor practices.” *Nelsen v. Legacy Partners Residential, Inc.*, 207 Cal. App. 4th 1115, 1133-34 (Cal. Ct. App. 2012). Rather, *D.R. Horton* was a novel interpretation of Section 7 when it was rendered, as no court had provided that an individual who filed a class action regarding wages, hours or working conditions had, *per se*, engaged in Section 7 activity. *Id.* at 1134. To the contrary, at least two courts had explicitly rejected that class action waivers violated Section 7 prior to *D.R. Horton*. *Id.* (citing *Grabowski v. C.H. Robinson*, 817 F. Supp. 2d 1159, 1168-69 (S.D. Cal. 2011); *Slawienski v. Nephron Pharm. Corp.*, Civil Action No. 1:10-CV-0460-JEC, 2010 WL 5186622, *2 (N.D. Ga. 2010)).

Thus, the ALJ’s adoption of the Board’s decisions in *D.R. Horton* and *Murphy Oil*, without further analysis, constituted an improper adherence to the Board’s “non-acquiescence” policy. This is particularly true given that no weight was properly afforded to the Supreme Court’s decisions in *Concepcion* and *Italian Colors*, as was required per the ALJ’s own words. (Decision at 20:9-11). Despite dozens of challenges across the country since its rendering, only recently have the Ninth and Seventh Circuits concurred with the NLRB’s decision in *D.R. Horton*.³⁰ As noted by Circuit Judge Ikuta in his dissent, the Ninth Circuit’s adoption of *D.R. Horton* was “breathhtaking in its scope and in its error; it [was] directly contrary to Supreme Court precedent and joins the wrong side of a circuit split.” *Morris*, ___ F.3d ___, 2016 WL

³⁰ See *Morris v. Ernst & Young, LLP*, ___ F.3d ___, 2016 WL 4433080 (9th Cir. Aug. 22, 2016), petition for cert. filed (No. 16-300) (U.S. Sep. 8, 2016); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1161 (7th Cir. 2016), petition for cert. filed (No. 16-285) (U.S. Sep. 2, 2016).

4433080, at *11 (J. Ikuta, dissenting). Both the Ninth and Seventh Circuits' decisions are now pending appeal.³¹

G. The ALJ Erred In Failing To Consider The Acknowledgement And Waiver's Carve Out Provision For Filing Charges With An Administrative Agency

In his analysis, the ALJ failed to consider certain distinguishing characteristics of the Waiver Agreement that bring it outside the purview of the Board's decision in *D.R. Horton*. Specifically, the Waiver Agreement contained a savings clause that permitted Mr. Rice the right to file charges with the NLRB to challenge the enforceability of the arbitration or class action waiver provisions. (G.C. Ex. 5). Both the Board and the Supreme Court have consistently upheld agreements that provide such a right to challenge these provisions with an administrative agency. *See generally, Concepcion*, 131 S.Ct. 1740; *O'Charley's, Inc.*, Case No. 26-CA-19974, 28 NLRB AMR 3809 (Apr. 16, 2001) *Italian Colors Rest.*, 133 S.Ct. at 2308. Specifically, the Agreement at issue here provides as follows:

All parties agree that this Agreement **does not limit any party's right to initiate action in state or federal court challenging the enforceability of the group, representative, class, collective, or hybrid action waiver set forth herein.** If Client Support Professional chooses to exercise that right, Company will not retaliate against Client Support Professional for doing so. Company reserves the right to oppose such a challenge to enforcement of this Agreement. The parties further agree that **nothing in this Agreement precludes any party from participating in proceedings to adjudicate unfair labor practice charges before the National Labor Relations Board**, including but not limited to charges addressing the enforcement of the group, representative, class, collective, or hybrid action waiver set forth herein.

(G.C. Ex. 5)

³¹ In addition, the NLRB recently petitioned for a writ of certiorari to the Supreme Court in *Murphy Oil* given the Fifth Circuit's unequivocal and repeated rejection of the Board's position. *Murphy Oil*, 808 F.3d 1013, *pet. for cert. filed* (No. 16-307) (U.S. Sep. 9, 2016).

Accordingly, Mr. Rice was free to file charges with the EEOC, NLRB, and any other administrative agency and vindicate his Section 7 rights in that context.

In addition, the Southern District of Florida has twice enforced the arbitration and class action waiver provisions at issue here against the CSPs of IBs that contracted with Arise. *See Otis v. Arise Virtual Sols., Inc.*, Case 0:12-cv-62143-KMW, Doc. No. 41 (S.D. Fla. Aug. 5, 2013); *Steele v. Arise Virtual Sols., Inc.*, Case 0:13-cv-62823-WJZ, Doc. No. 51 (S.D. Fla. Feb. 25, 2015). The Waiver Agreement containing the carve out provision clearly falls within the ambit of the exception in *D.R. Horton*, and the ALJ clearly erred in failing to consider said provision in his analysis.

H. The ALJ Erred In Concluding That Arise Violated Section 8(a)(1) By Requesting That Rice Withdraw His Consent Form Opting Into The Steele Litigation

Although only briefly mentioned in his Decision, it appears that the ALJ asserted Arise's mere request for Mr. Rice to withdraw his consent to opt-into the *Steele* litigation and proceed in arbitration violated Section 8(a)(1). (Decision at 20:33-37). Even assuming, *arguendo*, that the NLRA creates a substantive right to proceed collectively, there is little doubt that such a right may be waived. Indeed, as stated by the Eleventh Circuit, "even assuming Congress intended to create some 'right' to class actions, if an employee must affirmatively opt in to any such class action, surely the employee has the power to waive participation in a class action as well." *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1335 (11th Cir. 2014), *cert. denied*, 134 S.Ct. 2886 (2014). As much as the NLRA protects employees' ability to engage in protected and concerted activity, it equally protects employees' ability to forego participating in such activity. *See NLRB v. Drivers, Chaffeurs, Helpers, Local Union No. 639*, 362 U.S. 274, 279-80 (1960); *Lee v. NLRB*, 393 F.3d 491, 494-95 (5th Cir. 2005). Because Mr. Rice freely and voluntarily executed the Waiver Agreement with CCS containing the class action waiver, he was

free to withdraw his consent to the collective action and proceed under the arbitration provisions of his agreement if he chose to do so. The request from Arise that Mr. Rice proceed in this manner is not only standard practice prior to filing a motion to compel arbitration, it was implicitly required under the Local Rules of the Southern District of Florida. L.R. 7.1(a)(3)(requiring counsel to make a reasonable effort to confer with all parties affected by relief sought in a motion to compel in an attempt to resolve the issues to be raised in the motion prior to filing). While the ALJ did not go so far as to find Arise’s Motion to Compel Arbitration violative of the Act, his decision approaches the line of denying Arise access to the courts and constitutionally protected due process rights. *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

I. The ALJ Erred In Awarding Expenses, Attorneys’ Fees, And Interest To Mr. Rice For Arise’s Successful Efforts To Enforce The Acknowledgement and Waiver Agreement

The Supreme Court has unequivocally stated that the Board may only award attorneys’ fees if an employer violates the Act based on a non-NLRA lawsuit that has a “retaliatory motive” and lacks any “reasonable basis” in the non-NLRA proceeding. *Bill Johnson’s Rests. v. NLRB*, 461 U.S. 731, 749 (1983). First, as further discussed above, the enforcement of rights under the FLSA and modern collective action procedures—both of which originated legislatively subsequent to the enactment of the NLRA—could not have been steeped in a retaliatory motive based on NLRA-protected rights. *See D.R. Horton*, 737 F.3d at 361. Put in other words, the NLRA does not invoke a right to class procedures and mechanisms that did not exist at the time of its enactment. Thus, even if Arise had retaliated due to Mr. Rice’s invocation of said procedures, no NLRA-protected rights were implicated.

Further, the ALJ explicitly recognized that Arise was successful in its motion to compel arbitration upon the district court’s dismissal of the collective action on February 25, 2015.

(Decision at 11:1-2, n.5). Thus, it is virtually indefensible to suggest that Arise did not have a “reasonable basis” in bringing a *successful* motion to enforce the class action waiver and compel arbitration. Still, the ALJ insists that the Arise pay Mr. Rice’s attorneys’ fees in a matter in which *Mr. Rice lost and Arise won*. Moreover, the statute upon which Plaintiffs’ claims in the *Steele* litigation were predicated was the FLSA—a statutory framework over which federal courts have jurisdiction, not the NLRB. Quite simply, the Board has no authority under the NLRA or its legislative history to award fees in favor of non-prevailing parties in FLSA matters in which it has no jurisdiction.

The ALJ also neglected to temper its decision to award attorneys’ fees on the grounds that, at the time Arise’s motion to compel was filed, the overwhelming majority of courts, including the Supreme Court, supported the enforcement of arbitration agreements as written. Only within the last several months have the Seventh and Ninth Circuits issued opinions concurring with the Board’s decisions in *D.R. Horton* and *Murphy Oil*. Even assuming, *arguendo*, that Arise filed its motion to compel again today in reliance on decisions of the United States Supreme Court, it would be improper for the Board to find that Arise had no reasonable basis to file its motion given the circuit split and Eleventh Circuit authority in its favor. *See Walthour*, 745 F.3d at 1334-35.³²

V. CONCLUSION

For the foregoing reasons, Arise respectfully submits that this ALJ erred in concluding that Mr. Rice was an employee of Arise and in extrapolating his findings to all CSPs, that Arise

³² The NLRB argued in *Murphy Oil* that reviewing circuit courts have adopted the NLRB’s interpretation that a retaliatory motive may be found where an employer attempts to enforce an illegal contract provision, notwithstanding First Amendment protections. 361 NLRB No. 72, slip op. at 20, n. 104. Of course, each of the reviewing courts the NLRB relied upon independently agreed with the Board’s determination that the contract provision at issue was illegal. *See id.* As the decision in *Walthour* demonstrates, such is not the case with class action waivers within the Eleventh Circuit.

violated Section 8(a)(1) of the NLRA, and in awarding expenses, attorneys' fees and interest to Mr. Rice.

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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