



United States Government

NATIONAL LABOR RELATIONS BOARD

OFFICE OF THE GENERAL COUNSEL

Washington, D.C. 20570

August 5, 2016

Lyle W. Cayce
Clerk, United States Court of Appeals
for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130

Re: *Citigroup Technology, Inc. v. NLRB*
5th Cir. No. 15-60856
Board Case No. 12-CA-130742

Dear Mr. Cayce:

I am enclosing a certified copy of the agency record in this case

Very truly yours,

Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Encls.

cc: Jeffrey A. Schwartz, Esq.
Edward M. Cherof, Esq.
Jonathan J. Spitz, Esq.

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

CITIGROUP TECHNOLOGY, INC.)	
)	
Petitioner/Cross-Respondent)	
)	
v.)	No. 15-60856
)	
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent/Cross-Petitioner)	

CERTIFIED AGENCY RECORD

Pursuant to authority delegated in Section 102.115 of the National Labor Relations Board’s Rules and Regulations, 29 C.F.R. § 102.115, I certify that the attached papers and documents constitute the record before the Board in Citigroup Technology, Inc., Case No. 12-CA-130742.

Gary W. Shinnors
Executive Secretary
National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

August 5, 2016

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

CITIGROUP TECHNOLOGY, INC.)	
)	
Petitioner/Cross-Respondent)	
)	
v.)	No. 15-60856
)	
NATIONAL LABOR RELATIONS BOARD)	
)	
Respondent/Cross-Petitioner)	

CERTIFICATE OF SERVICE

The undersigned certifies that on August 5, 2016, I filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit via UPS. I certify that the foregoing document will be served today via UPS on the following counsel:

Jeffrey A. Schwartz, Esq.
Edward M. Cherof, Esq.
Jonathan J. Spitz, Esq.
Jackson Lewis P.C.
1155 Peachtree Street, N.E.
Suite 1000
Atlanta, GA 30309

Linda Dreeben
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 5th day of August, 2016

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Board Case No. 12-CA-130742

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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12**

CITIGROUP TECHNOLOGY, INC. and
CITICORP BANKING CORPORATION (PARENT),
A SUBSIDIARY OF CITIGROUP, INC.

and

Case 12-CA-130742

ANDREA SMITH, an Individual

JOINT MOTION AND STIPULATED RECORD

Pursuant to Section 102.35(a)(9) of the Rules and Regulations of the National Labor Relations Board, Citigroup Technology, Inc., and Citicorp Banking Corp. (Parent), a subsidiary of Citigroup, Inc., herein called Respondent, Andrea Smith, an individual, herein called Smith or the Charging Party, and Counsel for the General Counsel, herein collectively referred to as the parties, hereby jointly move that the Administrative Law Judge approve this motion and stipulated record and set a time for filing briefs in this matter. The parties stipulate and agree that this Joint Motion and Stipulated Record and the exhibits that are referred to herein and attached hereto shall constitute the entire record in the above-captioned case, Case 12-CA-130742. The parties further stipulate and agree that all documents attached hereto as exhibits are authentic and relevant, and all documents attached as exhibits were prepared by or at the direction of the named authors, were mailed and/or delivered to the named addressees on or about the dates stated on the documents, and were received by the addressees. The parties further stipulate and agree that the facts recited below and the exhibits attached hereto are not in dispute and represent a full and complete record of the evidence necessary for the finder of fact to issue a decision. No oral testimony is necessary or desired and the parties waive their right to a hearing in this matter.

The parties stipulate and agree to the facts and exhibits as follows:

1. General Counsel's Exhibits 1(a) through 1(l) attached, are the formal papers. General Counsel's Exhibit 1(m) attached, is an index and description of the formal papers. The Amended Complaint and Notice of Hearing [GCX 1(i)]¹ and the Answer to the Amended Complaint and Notice of Hearing [GCX 1(l)] contain certain admitted relevant facts and conclusions of law that are not repeated in this Stipulation.
2. Respondent employs approximately 1,000 employees at its place of business located at 3800 Citibank Center in Tampa, Florida, and thousands of other employees throughout the United States.
3. Since on or about December 26, 2012, and continuing to the present, Respondent has maintained and enforced as part of its U.S. Employee Handbook, "Appendix A: The Employment Arbitration Policy" revised (herein called the Employment Arbitration Policy), attached hereto as JX1, with respect to all of its employees in the United States, including all employees employed at its Tampa, Florida facility.
4. Since on or about December 26, 2012, and continuing to the present, Respondent has required all newly hired employees to agree to the Employment Arbitration Policy as a condition of employment.
5. In January, 2013, Darlene Echevarria (herein called Echevarria) was hired by Respondent as an Anti-Money Laundering Operations Analyst in Respondent's Tampa, Florida facility. Echevarria worked for Respondent in that position from January 7, 2013, until August 23, 2013.
6. On January 31, 2013, Respondent sent Smith a letter in which Respondent offered Smith the position of Anti-Money Laundering Operations Analyst in Respondent's Tampa, Florida facility (herein called the job offer), which includes as a part thereof a provision titled "Principles of Employment." Smith accepted Respondent's job offer on February 5, 2013. The January 31, 2013 letter, with Smith's signatures dated February 5, 2013, on the sixth, seventh, and ninth pages, are attached hereto as JX2.

¹ General Counsel's exhibits are referenced as GCX (number); Joint exhibits are referenced as JX (number).

7. The receipt for Respondent's U.S. 2013 Employee Handbook that was electronically signed by Smith on February 5, 2013, is attached hereto as JX 3.
8. The Employee Arbitration Policy that was electronically signed by Smith on February 5, 2013, is attached hereto as JX4.
9. Smith began working for Respondent as an Anti-Money Laundering Operations Analyst on or about February 19, 2013, and she continued in that position until March 28, 2014, when she voluntarily resigned her employment with Respondent.
10. On March 28, 2014, Echevarria, on her own behalf and on behalf of other similarly situated employees of Respondent, including Smith, Danielle Lucas, Yadira Calderon and Kelleigh S. Weeks, through counsel, submitted a demand for arbitration to the American Arbitration Association (hereinafter called AAA), titled "Nationwide Class Action Arbitration Submission," a "Notice of Filing Notice of Consent to Join" and "Notices of Consent to Join Collective Action" signed by Darlene Echevarria, Danielle Lucas, Yadira Calderon, Kelleigh Weeks, and Andrea Smith, seeking designation of the action in Darlene Echevarria, on her own behalf and others similarly situated v. Citigroup, Inc., a Foreign Profit Corporation and Citibank, N.A. as a collective action, alleging that Respondent violated the Fair Labor Standards Act, 29 U.S.C. Sec. 201 et. seq., by failing to pay overtime wages to Echevarria and other similarly situated employees of Respondent, including Smith, Danielle Lucas, Yadira Calderon and Kelleigh S. Weeks, and seeking certain compensation, damages and other relief. The Nationwide Class Action Arbitration Submission, Notice of Filing Notice of Consent to Join, and the Notices of Consent to Join Collective Action signed by Darlene Echevarria, Danielle Lucas, Yadira Calderon, Kelleigh Weeks, and Andrea Smith are attached hereto as JX5.
11. On April 14, 2014, AAA Case Filing Coordinator Kristen Cottone sent a letter to the parties in the matter of Darlene Echevarria v. Citigroup, Inc., et al., Case No. 01-14-0000-0324, requesting a full copy of the arbitration agreement between the parties and other information, so

AAA could decide whether it could proceed with the case. A copy of the April 14, 2014, letter is attached hereto as JX6.

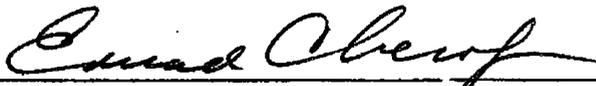
12. On April 15, 2014, Counsel for Respondent sent a letter to AAA, accompanied by the Employment Arbitration Policy, requesting that AAA reject Echevarria's demand for designation of her claim as a nationwide collective arbitration and only accept her individual claim. A copy of the April 15, 2014, letter and the accompanying Employment Arbitration Policy signed by Darlene Echevarria on December 27, 2012, are attached hereto as JX7.

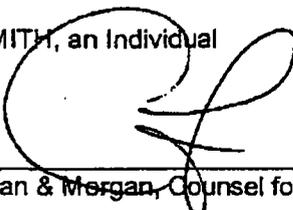
13. On April 28, 2014, Kristen Cottone of AAA sent a letter to all parties in the matter of Darlene Echevarria v. Citigroup, Inc., et al., Case No. 01-14-0000-0324, stating that in accordance with AAA's policy on class arbitrations, it could not administer the matter as a class action, since the agreement between the parties (the Employment Arbitration Policy) prohibits class actions. A copy of the April 28, 2014, letter is attached hereto as JX8.

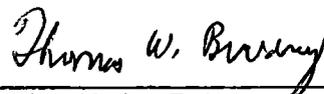
Based on the above the undersigned urge that this motion be granted.

Respectfully submitted,

CITIGROUP TECHNOLOGY, INC. and
CITICORP BANKING CORPORATION (PARENT),
A SUBSIDIARY OF CITIGROUP, INC.

By:  Date: 10/7/14
Jackson Lewis P.C., Counsel for Respondent

ANDREA SMITH, an Individual
By:  Date: 10/7/14
Morgan & Morgan, Counsel for the Charging Party

COUNSEL for the GENERAL COUNSEL
NATIONAL LABOR RELATIONS BOARD
By:  Date: 10/8/14
National Labor Relations Board, Region 12

CERTIFICATE OF SERVICE

I hereby certify that the Joint Motion and Stipulated Record in Case 12-CA-130742 was electronically filed and served as stated below on the 8th day of October, 2014:

By electronic filing at www.nlr.gov to:

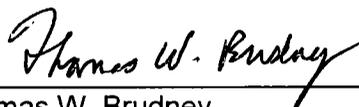
Hon. William N. Cates
Associate Chief Administrative Law Judge
Division of Judges
401 West Peachtree Street N.W., Suite 1708
Atlanta, Georgia 30308-3510

By electronic mail to:

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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12**

CITIGROUP TECHNOLOGY, INC. and
CITICORP BANKING CORPORATION (PARENT),
A SUBSIDIARY OF CITIGROUP, INC.

and

Case 12-CA-130742

ANDREA SMITH, an Individual

INDEX AND DESCRIPTION OF FORMAL DOCUMENTS

- General Counsel Exhibit 1(a) Original Charge in Case 12-CA-130742, filed 06/12/14
- 1(b) Letter of Service of 1(a), dated 06/12/14
- 1(c) Affidavit of Service of 1(a), dated 06/16/14
- 1(d) First Amended Charge in Case 12-CA-130742, filed 08/27/14
- 1(e) Letter of Service of 1(d), dated 08/27/14
- 1(f) Affidavit of Service of 1(d), dated 08/27/14
- 1(g) Complaint and Notice of Hearing, dated 08/29/14
- 1(h) Affidavit of Service of 1(g), dated 08/29/14
- 1(i) Amended Complaint and Notice of Hearing, dated 09/10/14
- 1(j) Affidavit of Service of 1(i), dated 09/10/14
- 1(k) Answer to Complaint and Notice of Hearing, filed 09/12/14
- 1(l) Answer to Amended Complaint and Notice of Hearing,
filed 09/24/14
- 1(m) Index and Description of Formal Documents

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12**

CITIGROUP TECHNOLOGY, INC. and
CITICORP BANKING CORPORATION (PARENT),
A SUBSIDIARY OF CITIGROUP, INC.

and

Case 12-CA-130742

ANDREA SMITH, an Individual

**ANSWER OF RESPONDENT TO
AMENDED COMPLAINT AND NOTICE OF HEARING**

Respondent, Citigroup Technology, Inc. and Citicorp Banking Corporation (Parent), a Subsidiary of Citigroup, Inc. ("Citigroup"), by and through its attorneys, Jackson Lewis PC, and pursuant to §102.20 and §102.21 of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, respectfully answers the Amended Complaint and Notice of Hearing ("Complaint") as follows:

1.

Respondent admits the allegation set forth in paragraph 1 (a) and (b) of the Complaint.

2.

Respondent admits the allegations set forth in paragraph 2 (a), (b), (c) and (d) of the Complaint.

3.

Respondent admits Rehana Blackeram is a Recruiting Coordinator and Carlos Fernandez is an Assistant Vice President. Respondent denies these individuals are supervisors and/or agent

within the meaning of the Act. Respondent denies all other allegation set forth in paragraph 3 of the Complaint.

4.

Respondent admits the allegation set forth in paragraph 4 (a), (b) and (c) of the Complaint. Respondent denies the allegation contained in paragraph 4 (d) of the Complaint.

5.

Respondent denies the allegation set forth in paragraph 5 (a) of the Complaint. Respondent admits the allegation set forth in paragraph 5 (b) of the Complaint.

6.

Respondent denies the allegation set forth in paragraph 6 of the Complaint.

7.

Respondent denies the allegation set forth in paragraph 7 of the Complaint.

AFFIRMATIVE AND OTHER DEFENSES

Respondent asserts the following affirmative defenses to the allegations of the Complaint:

1.

The Complaint is barred because it is based on the Board's decision in *D.R. Horton, Inc. and Michael Cuda*, 337 NLRB No. 184 (2012), which is contrary to recent decisions of the United States Supreme Court holding that arbitration agreements must be enforced according to their terms, including *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2012); *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012), and *Marmet Health Care Ctr. v. Brown*, 132 S.Ct. 1201 (2012).

2.

The Complaint is barred because the Board lacks the authority to rule that the National Labor Relations Act prevails over the strong federal policy favoring the enforcement of arbitration agreements according to their terms as manifested by the Federal Arbitration Act.

3.

The Complaint is barred because the Board lacks authority to invalidate lawful individual arbitration agreements voluntarily entered into by an employer and its employees.

4.

Complaint is barred because its allegations and the remedies it seeks violate Respondent's First Amendment Rights to defend itself in a lawsuit initiated by Charging Party by taking well-grounded and reasonably-based positions in the litigation. It is contrary to the decisions of the United States Supreme Court in *Bill Johnson's Restaurants, Inc. v. NLRB*, 103 S.Ct. 2161 (1983) and *BE&K Construction Company v. NLRB*, 122 S.Ct. 2390 (2002). The Board's Complaint should be stayed pending the final outcome of Charging Party's civil action.

5.

The Complaint is barred because it seeks to require Respondent to rescind its Arbitration Agreement not only with respect to Respondent's employees covered by the National Labor Relations Act but also with respect to supervisors, managers and other employees not covered by the Act, over which the National Labor Relations Board has no jurisdiction.

6.

The Complaint is barred because the National Labor Relations Board lacks jurisdiction to order Respondent to take actions, or not take actions, with respect to litigation initiated by Charging Party in other forums.

7.

The Complaint is barred because Charging Party, by accepting employment with Respondent after having been fully informed regarding Respondent's arbitration agreement, voluntarily agreed to arbitrate her employment disputes with Respondent.

8.

The Complaint is barred by reason of the statute of limitations in Section 10(b) of the National Labor Relations Act because, among other reasons, Charging Party filed her Charge more than six months after she accepted employment with Respondent and thereby voluntarily agreed to Respondent's arbitration agreement.

9.

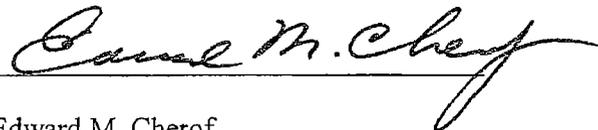
The Complaint is barred because Charging Party acted alone and for her own benefit in filing her civil action, and by her conduct did not engage or seek to engage in protected, concerted activity under the National Labor Relations Act.

WHEREFORE, Respondent requests that the Complaint be, in all respects, dismissed.

Respectfully submitted this 24th day of September, 2014.

JACKSON LEWIS PC
1155 Peachtree Street, Suite 1000
Atlanta, Georgia 30309
Telephone: (404) 525-8200
Facsimile: (404) 525-1173

By:



Edward M. Cherof
Jonathan J. Spitz
Stephanie Adler-Paindiris

**Attorneys For Respondent, Citigroup
Technology, Inc., and Citicorp Banking
Corporation (Parent), a Subsidiary of
Citigroup, Inc.**

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12**

CITIGROUP TECHNOLOGY, INC. and
CITICORP BANKING CORPORATION (PARENT),
A SUBSIDIARY OF CITIGROUP, INC.

and

Case 12-CA-130742

ANDREA SMITH, an Individual

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of September, 2014, I served a true copy of
Answer of Respondent to Amended Complaint and Notice of Hearing via U. S. Mail, postage-
paid, addressed to:

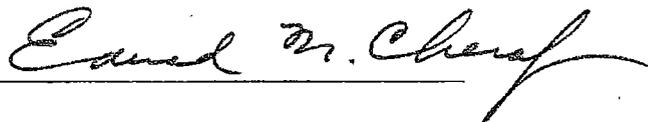
Margaret J. Diaz
Regional Director
National Labor Relations Board – Region 12
2201 East Kennedy Blvd., Suite 530
Tampa, FL 33602-5824

Citigroup Technology, Inc. and Citicorp
Banking Corporation (parent), a subsidiary of
Citigroup, Inc.
399 Park Ave.
New York, NY 10022-4614

Andrea Smith
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Riverview, FL 33678

Andrew Frisch
Morgan & Morgan
500 N. Pine Island Rd., Suite 400
Plantation, FL 33324-1311

By:



Edward M. Cherof
Jonathan J. Spitz
Stephanie Adler-Paindiris

**Attorneys For Respondent, Citigroup
Technology, Inc., and Citicorp Banking
Corporation (Parent), a Subsidiary of
Citigroup, Inc.**

**UNITED STATES OF AMERICA
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Respondent admits the allegation set forth in paragraph 1 (a) and (b) of the Complaint.

2.

Respondent admits the allegations set forth in paragraph 2 (a), (b), (c) and (d) of the Complaint.

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Respondent admits Rehana Blackeram is a Recruiting Coordinator and Carlos Fernandez is a Senior Recruiter. Respondent denies these individuals are supervisors and/or agent within the meaning of the Act. Respondent denies all other allegation set forth in paragraph 3 of the Complaint.

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Respondent denies the allegation set forth in paragraph 5 (a) of the Complaint. Respondent admits the allegation set forth in paragraph 5 (b) of the Complaint.

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The Complaint is barred to the extent it is based on the Board's decision in *D.R. Horton, Inc. and Michael Cuda*, 337 NLRB No. 184 (2012), which is contrary to recent decisions of the United States Supreme Court holding that arbitration agreements must be enforced according to their terms, including *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2012); *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012), and *Marmet Health Care Ctr. v. Brown*, 132 S.Ct. 1201 (2012).

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The Complaint is barred because the Board lacks the authority to rule that the National Labor Relations Act prevails over the strong federal policy favoring the enforcement of arbitration agreements according to their terms as manifested by the Federal Arbitration Act.

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The Complaint is barred because it seeks to require Respondent to rescind its Arbitration Agreement not only with respect to Respondent's employees covered by the National Labor Relations Act but also with respect to supervisors, managers and other employees not covered by the Act, over which the National Labor Relations Board has no jurisdiction.

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The Complaint is barred because the National Labor Relations Board lacks jurisdiction to order Respondent to take actions, or not take actions, with respect to litigation initiated by Charging Party in other forums.

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The Complaint is barred because Charging Party, by accepting employment with Respondent after having been fully informed regarding Respondent's arbitration agreement, voluntarily agreed to arbitrate her employment disputes with Respondent.

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The Complaint is barred by reason of the statute of limitations in Section 10(b) of the National Labor Relations Act because, among other reasons, Charging Party filed her Charge more than six months after she accepted employment with Respondent and thereby voluntarily agreed to Respondent's arbitration agreement.

9.

The Complaint is barred because Charging Party acted alone and for her own benefit in filing her civil action, and by her conduct did not engage or seek to engage in protected, concerted activity under the National Labor Relations Act.

WHEREFORE, Respondent requests that the Complaint be, in all respects, dismissed.

Respectfully submitted this 12th day of September, 2014.

JACKSON LEWIS P.C.
1155 Peachtree Street, Suite 1000
Atlanta, Georgia 30309
Telephone: (404) 525-8200
Facsimile: (404) 525-1173

By:



Edward M. Cherof
Stephanie Adler-Paindiris
Jonathan J. Spitz

**Attorneys For Respondent, Citigroup
Technology, Inc., and Citicorp Banking
Corporation (Parent), a Subsidiary of
Citigroup, Inc.**

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12**

CITIGROUP TECHNOLOGY, INC., AND CITICORP
BANKING CORPORATION (PARENT), A
SUBSIDIARY OF CITIGROUP, INC.

and

Case 12-CA-130742

ANDREA SMITH, an Individual

**AFFIDAVIT OF SERVICE OF:
Amended Complaint and Notice of Hearing
(with forms NLRB-4338 and NLRB-4668 attached)**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on **September 10, 2014**, I served the above-entitled document(s) by **certified or regular mail**, as noted below, upon the following persons, addressed to them at the following addresses:

Stephanie Adler-Paindiris, Esq.
Jackson Lewis, LLP
390 N Orange Ave Ste 1285
Orlando, FL 32801-1674

REGULAR MAIL

Edward M. Cherof, Esq.
Jackson Lewis, LLP
1155 Peachtree St NE
Suite 1000
Atlanta, GA 30309

REGULAR MAIL

Citigroup Technology, Inc., and Citicorp
Banking Corporation (parent), a subsidiary of
Citigroup, Inc.
399 Park Ave
New York, NY 10022-4614

**CERTIFIED MAIL, RETURN RECEIPT
REQUESTED**

Andrea Smith
10538 Shady Falls Court
Riverview, FL 33678

**CERTIFIED MAIL, RETURN RECEIPT
REQUESTED**

Andrew Frisch, Esq.
Morgan & Morgan
600 N. Pine Island Rd.
Suite 400
Plantation, FL 33324-1311

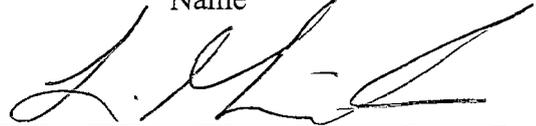
REGULAR MAIL

September 10, 2014

Date

Latoria Grinder,
Designated Agent of NLRB

Name

A handwritten signature in black ink, appearing to read "L. Grinder", written over a horizontal line.

Signature

U.S. Postal Service™
CERTIFIED MAIL™ RECEIPT
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 For delivery information, visit our website at www.usps.com
OFFICIAL USE

Postage \$	
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees \$	

Sent To Andrea Smith
 Street, Apt. No., or PO Box No. 10538 Shady Falls Ct
 City, State, ZIP+4 Riverview FL 33678

SENDER:
 Complete items 1 and/or 2 for additional services.
 Complete items 3, 4a, and 4b.
 Print your name and address on the reverse of this form so that we can return this card to you.
 Attach this form to the front of the mailpiece, or on the back if space does not permit.
 Write "Return Receipt Requested" on the mailpiece below the article number.
 The Return Receipt will show to whom the article was delivered and the date delivered.

Article Addressed to:
 Andrea Smith
 10538 Shady Falls Court
 Riverview, FL 33678

Received By: (Print Name)
Andrea Smith

Signature: (Addressee or Agent)
X [Signature]

I also wish to receive the following services (for an extra fee):
 1. Addressee's Address
 2. Restricted Delivery
 Consult postmaster for fee.

Article Number
 7012 3460 0001 9062 6496

4b. Service Type
 Registered Certified
 Express Mail Insured
 Return Receipt for Merchandise COD

7. Date of Delivery
9/13/14

8. Addressee's Address (Only if requested and fee is paid)

U.S. Postal Service™
CERTIFIED MAIL™ RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)
 For delivery information, visit our website at www.usps.com
OFFICIAL USE

Postage \$	
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees \$	

Sent To Citigroup Technology Inc.
 Street, Apt. No., or PO Box No. 399 Park Ave.
 City, State, ZIP+4 New York, NY 10022-4614

SENDER:
 Complete items 1 and/or 2 for additional services.
 Complete items 3, 4a, and 4b.
 Print your name and address on the reverse of this form so that we can return this card to you.
 Attach this form to the front of the mailpiece, or on the back if space does not permit.
 Write "Return Receipt Requested" on the mailpiece below the article number.
 The Return Receipt will show to whom the article was delivered and the date delivered.

Article Addressed to:
 Citigroup Technology, Inc., and Citicorp Banking Corporation (parent), a subsidiary of Citigroup, Inc.
 399 Park Ave
 New York, NY 10022-4614

Received By: (Print Name)
Amended CNOH 12-CA-130743

Signature: (Addressee or Agent)
X [Signature]

I also wish to receive the following services (for an extra fee):
 1. Addressee's Address
 2. Restricted Delivery
 Consult postmaster for fee.

Article Number
 7012 3460 0001 9062 6489

4b. Service Type
 Registered Certified
 Express Mail Insured
 Return Receipt for Merchandise COD

7. Date of Delivery
9/13/14

8. Addressee's Address (Only if requested and fee is paid)

9669 2906 1000 094E 2102

PS Form 3811, December 1994

102595-97-B-0179

Domestic Return Receipt

6849 2906 1000 094E 2102

PS Form 3811, December 1994

102595-97-B-0179

Domestic Return Receipt

Thank you for using Return Receipt Service

Thank you for using Return Receipt Service

18

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12**

CITIGROUP TECHNOLOGY, INC. and
CITICORP BANKING CORPORATION (PARENT),
A SUBSIDIARY OF CITIGROUP, INC.

and

Case 12-CA-130742

ANDREA SMITH, an Individual

AMENDED COMPLAINT AND NOTICE OF HEARING

This Amended Complaint and Notice of Hearing is based on a charge filed by Andrea Smith (the Charging Party). It is issued pursuant to Section 10(b) of the National Labor Relations Act, 29 U.S.C. Sec. 151 et seq. (the Act) and Section 102.15 of the Rules and Regulations of the National Labor Relations Board (the Board) and alleges that Citigroup Technology, Inc. and Citicorp Banking Corporation (parent), a subsidiary of Citigroup, Inc. (Respondent) has violated the Act as described below.

1.

(a) The original charge in Case 12-CA-130742 was filed by the Charging Party on June 12, 2014, and a copy was served on Respondent by regular mail on June 16, 2014.

(b) The first amended charge in Case 12-CA-130742 was filed by the Charging Party on August 27, 2014, and a copy was served on Respondent by regular mail on the same date.

2.

(a) At all material times, Respondent, a Delaware corporation, with an office and place of business located in Tampa, Florida, herein called Respondent's Tampa facility, has been engaged in the business of providing global financial services.

(b) During the past 12 months, Respondent, in conducting its business operations described above in paragraph 2(a), derived gross revenues in excess of \$500,000.

(c) During the past 12 months, Respondent, in conducting its business operations described above in paragraph 2(a), purchased and received at its Tampa facility goods valued in excess of \$50,000 directly from points outside the State of Florida.

(d) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

3.

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Rehana Blackeram	-	Human Resources Representative
Carlos Fernandez	-	Professional Recruiter

4.

(a) Since on or about April 10, 2010, and at all material times thereafter, Respondent has promulgated, maintained, and enforced "The Employment Arbitration Policy" (hereinafter called the Arbitration Policy), found in Appendix A of its Employee Handbook, which includes the following provision:

The Policy makes arbitration the required and exclusive forum for the resolution of all disputes arising out of or in any way related to employment based on legally protected rights (i.e., statutory, regulatory, contractual, or common-law rights) that may arise between an employee or former employee and Citi or its current and former parents, subsidiaries, and affiliates and its and their current and former officers, directors, employees, and agents (and that aren't resolved by the internal Dispute Resolution Procedure) including, without limitation, claims, demands, or actions under Title VII of the Civil Rights Act of 1964, the

Civil Rights Acts of 1866 and 1991, the Age Discrimination in Employment Act of 1967, the Older Workers Benefit Protection Act of 1990, the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, the Family and Medical Leave Act of 1993, the Fair Labor Standards Act of 1938, the Equal Pay Act of 1963, the Employee Retirement Income Security Act of 1974, the Worker Adjustment and Retraining Notification Act, the Sarbanes-Oxley Act of 2002, and all amendments thereto, and any other federal, state, or local statute, regulation, or common-law doctrine regarding employment, employment discrimination, the terms and conditions of employment, termination of employment, compensation, breach of contract, defamation, retaliation, whistle-blowing, or any claims arising under the Citigroup Separation Pay Plan.

Except as otherwise required by applicable law, this Policy applies only to claims brought on an individual basis. Consequently neither Citi nor any employee may submit a class action, collective action, or other representative action for resolution under this Policy.

(b) Since on or before February 5, 2013, and at all material times thereafter, Respondent has required employees to accept the Arbitration Policy referenced in paragraph 4(a) as a condition of employment.

(c) By the conduct described above in paragraphs 4(a) and 4(b), Respondent has precluded employees from filing any group, class, collective, or other representative action claims in arbitration with respect to disputes identified in the Arbitration Policy which concern wages, hours and other terms and conditions of employment.

(d) By the conduct described above in paragraphs 4(a) and 4(b), Respondent has precluded employees from using the judicial system with respect to employment disputes identified in the Arbitration Policy which concern wages, hours and other terms and conditions of employment.

5.

(a) On or about March 28, 2014, employees Andrea Smith, Darlene Echevarria and other similarly situated employees engaged in concerted activities with other employees for the purpose of mutual aid and protection by filing a "Nationwide Collective Action Arbitration Submission" before the American Arbitration Association (the

Association) in Darlene Echevarria v. Citigroup, Inc., et al., Case No.: 01-14-0000-0324, alleging violations of the Fair Labor Standards Act.

(b) Since on or about April 15, 2014, Respondent has attempted to enforce and has enforced the Arbitration Policy by filing with the Association a request that the Association reject the "Nationwide Collective Action Arbitration Submission" described above in paragraph 4(a). On April 28, 2014, the Association granted Respondent's request and ruled that pursuant to the terms of the Arbitration Policy, employees could only pursue claims on an individual basis.

6.

By the conduct described above in paragraphs 4(a), 4(b), 4(c), 4(d) and 5(b), Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

7.

The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the amended complaint. The answer must be **received by this office on or before September 24, 2014, or postmarked on or before September 23, 2014**. Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file

electronically, go to www.nlr.gov, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-Filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing.

Service of the answer on each of the other parties must be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the amended complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE that on **October 9, 2014**, at **10:00 a.m.**, at the National Labor Relations Board Hearing Room, 201 East Kennedy Blvd., Suite 530, Tampa,

Florida, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this amended complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

DATED at Tampa, Florida, this 10th day of September, 2014.



Margaret J. Diaz, Regional Director
National Labor Relations Board, Region 12
201 East Kennedy Blvd., Suite 530
Tampa, FL 33602-5824

Attachments

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
NOTICE

Case 12-CA-130742

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end.

An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing. However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements *will not be granted* unless good and sufficient grounds are shown *and* the following requirements are met:

- (1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).
- (2) Grounds must be set forth in *detail*;
- (3) Alternative dates for any rescheduled hearing must be given;
- (4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and
- (5) Copies must be simultaneously served on all other parties (listed below), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

Stephanie Adler-Paindiris, Esq.
Jackson Lewis, LLP
390 N Orange Ave Ste 1285
Orlando, FL 32801-1674

Andrea Smith
10538 Shady Falls Court
Riverview, FL 33678

Edward M. Cherof, Esq.
Jackson Lewis, LLP
1155 Peachtree St NE
Suite 1000
Atlanta, GA 30309

Andrew Frisch
Morgan & Morgan
600 N. Pine Island Rd.
Suite 400
Plantation, FL 33324-1311

Citigroup Technology, Inc., and Citicorp
Banking Corporation (parent), a subsidiary of
Citigroup, Inc.
399 Park Ave
New York, NY 10022-4614

Procedures in NLRB Unfair Labor Practice Hearings

The attached complaint has scheduled a hearing that will be conducted by an administrative law judge (ALJ) of the National Labor Relations Board who will be an independent, impartial finder of facts and applicable law. **You may be represented at this hearing by an attorney or other representative.** If you are not currently represented by an attorney, and wish to have one represent you at the hearing, you should make such arrangements as soon as possible. A more complete description of the hearing process and the ALJ's role may be found at Sections 102.34, 102.35, and 102.45 of the Board's Rules and Regulations. The Board's Rules and regulations are available at the following link: www.nlr.gov/sites/default/files/attachments/basic-page/node-1717/rules_and_regs_part_102.pdf.

The NLRB allows you to file certain documents electronically and you are encouraged to do so because it ensures that your government resources are used efficiently. To e-file go to the NLRB's website at www.nlr.gov, click on "e-file documents," enter the 10-digit case number on the complaint (the first number if there is more than one), and follow the prompts. You will receive a confirmation number and an e-mail notification that the documents were successfully filed.

Although this matter is set for trial, this does not mean that this matter cannot be resolved through a settlement agreement. The NLRB recognizes that adjustments or settlements consistent with the policies of the National Labor Relations Act reduce government expenditures and promote amity in labor relations and encourages the parties to engage in settlement efforts.

I. BEFORE THE HEARING

The rules pertaining to the Board's pre-hearing procedures, including rules concerning filing an answer, requesting a postponement, filing other motions, and obtaining subpoenas to compel the attendance of witnesses and production of documents from other parties, may be found at Sections 102.20 through 102.32 of the Board's Rules and Regulations. In addition, you should be aware of the following:

- **Special Needs:** If you or any of the witnesses you wish to have testify at the hearing have special needs and require auxiliary aids to participate in the hearing, you should notify the Regional Director as soon as possible and request the necessary assistance. Assistance will be provided to persons who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603.
- **Pre-hearing Conference:** One or more weeks before the hearing, the ALJ may conduct a telephonic prehearing conference with the parties. During the conference, the ALJ will explore whether the case may be settled, discuss the issues to be litigated and any logistical issues related to the hearing, and attempt to resolve or narrow outstanding issues, such as disputes relating to subpoenaed witnesses and documents. This conference is usually not recorded, but during the hearing the ALJ or the parties sometimes refer to discussions at the pre-hearing conference. You do not have to wait until the prehearing conference to meet with the other parties to discuss settling this case or any other issues.

II. DURING THE HEARING

The rules pertaining to the Board's hearing procedures are found at Sections 102.34 through 102.43 of the Board's Rules and Regulations. Please note in particular the following:

- **Witnesses and Evidence:** At the hearing, you will have the right to call, examine, and cross-examine witnesses and to introduce into the record documents and other evidence.
- **Exhibits:** Each exhibit offered in evidence must be provided in duplicate to the court reporter and a copy of each of each exhibit should be supplied to the ALJ and each party when the exhibit is offered in

evidence. If a copy of any exhibit is not available when the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the ALJ before the close of hearing. If a copy is not submitted, and the filing has not been waived by the ALJ, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

- **Transcripts:** An official court reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the ALJ for approval. Everything said at the hearing while the hearing is in session will be recorded by the official reporter unless the ALJ specifically directs off-the-record discussion. If any party wishes to make off-the-record statements, a request to go off the record should be directed to the ALJ.
- **Oral Argument:** You are entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. Alternatively, the ALJ may ask for oral argument if, at the close of the hearing, if it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.
- **Date for Filing Post-Hearing Brief:** Before the hearing closes, you may request to file a written brief or proposed findings and conclusions, or both, with the ALJ. The ALJ has the discretion to grant this request and to will set a deadline for filing, up to 35 days.

III. AFTER THE HEARING

The Rules pertaining to filing post-hearing briefs and the procedures after the ALJ issues a decision are found at Sections 102.42 through 102.48 of the Board's Rules and Regulations. Please note in particular the following:

- **Extension of Time for Filing Brief with the ALJ:** If you need an extension of time to file a post-hearing brief, you must follow Section 102.42 of the Board's Rules and Regulations, which requires you to file a request with the appropriate chief or associate chief administrative law judge, depending on where the trial occurred. You must immediately serve a copy of any request for an extension of time on all other parties and furnish proof of that service with your request. You are encouraged to seek the agreement of the other parties and state their positions in your request.
- **ALJ's Decision:** In due course, the ALJ will prepare and file with the Board a decision in this matter. Upon receipt of this decision, the Board will enter an order transferring the case to the Board and specifying when exceptions are due to the ALJ's decision. The Board will serve copies of that order and the ALJ's decision on all parties.
- **Exceptions to the ALJ's Decision:** The procedure to be followed with respect to appealing all or any part of the ALJ's decision (by filing exceptions with the Board), submitting briefs, requests for oral argument before the Board, and related matters is set forth in the Board's Rules and Regulations, particularly in Section 102.46 and following sections. A summary of the more pertinent of these provisions will be provided to the parties with the order transferring the matter to the Board.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12

**CITIGROUP TECHNOLOGY, INC., AND
CITICORP BANKING CORPORATION
(PARENT), A SUBSIDIARY OF CITIGROUP, INC.**

and

Case 12-CA-130742

ANDREA SMITH, an Individual

**AFFIDAVIT OF SERVICE OF:
Complaint and Notice of Hearing
(with forms NLRB-4338 and NLRB-4668 attached)**

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on **August 29, 2014**, I served the above-entitled document(s) by **certified or regular mail**, as noted below, upon the following persons, addressed to them at the following addresses:

Stephanie Adler-Paindiris, Esq.
Jackson Lewis, LLP
390 N Orange Ave Ste 1285
Orlando, FL 32801-1674

REGULAR MAIL

Edward M. Cherof, Esq.
Jackson Lewis, LLP
1155 Peachtree St NE
Suite 1000
Atlanta, GA 30309

REGULAR MAIL

Citigroup Technology, Inc., and Citicorp
Banking Corporation (parent), a subsidiary of
Citigroup, Inc.
399 Park Ave
New York, NY 10022-4614

**CERTIFIED MAIL, RETURN RECEIPT
REQUESTED**

Andrea Smith
10538 Shady Falls Court
Riverview, FL 33678

**CERTIFIED MAIL, RETURN RECEIPT
REQUESTED**

Andrew Frisch, Esq.
Morgan & Morgan
600 N. Pine Island Rd.
Suite 400
Plantation, FL 33324-1311

REGULAR MAIL

August 29, 2014

Date

Latoria Grinder,
Designated Agent of NLRB

Name

A handwritten signature in black ink, appearing to read 'L. Grinder', written over a horizontal line.

Signature

U.S. Postal Service™
CERTIFIED MAIL™ RECEIPT
(Domestic Mail Only; No Insurance Coverage Provided)
 For delivery information, visit our website at www.usps.com
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Postage \$	
Certified Fee	
Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees \$	

Postmark Here
 CNOH
 12-CA-130742

Sent to
 Andrea Smith
 Street, Apt. No., or PO Box No. 10538 Shady Falls Ct.
 City, State, ZIP+4 Riverview FL 33678

SENDER:
 Complete items 1 and/or 2 for additional services.
 Complete items 3, 4a, and 4b.
 Print your name and address on the reverse of this form so that we can return this card to you.
 Attach this form to the front of the mailpiece, or on the back if space does not permit.
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 Consult postmaster for fee.

3. Article Addressed to:
 Andrea Smith
 10538 Shady Falls Court
 Riverview, FL 33678

4a. Article Number: 7012 3460 0001 9062 6427

4b. Service Type
 Registered Certified
 Express Mail Insured
 Return Receipt for Merchandise COD

7. Date of Delivery
 12/15/14

8. Addressee's Address (Only if requested and fee is paid)

5. Received By: (Print Name)
 Andrea Smith

6. Signature: (Addressee or Agent)
 X [Signature]

2249 2906 7000 094E 2702

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Postage \$	
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Return Receipt Fee (Endorsement Required)	
Restricted Delivery Fee (Endorsement Required)	
Total Postage & Fees \$	

Postmark Here
 CNOH
 12-CA-130742

Sent to
 Citigroup
 Street, Apt. No., or PO Box No. 399 Park Ave.
 City, State, ZIP+4 New York, NY 10022

SENDER:
 Complete items 1 and/or 2 for additional services.
 Complete items 3, 4a, and 4b.
 Print your name and address on the reverse of this form so that we can return this card to you.
 Attach this form to the front of the mailpiece, or on the back if space does not permit.
 Write "Return Receipt Requested" on the mailpiece below the article number.
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3. Article Addressed to:
 Citigroup Technology, Inc., and
 Citicorp Banking Corporation (parent),
 a subsidiary of Citigroup, Inc.
 399 Park Ave
 New York, NY 10022-4614

4a. Article Number: 7012 3460 0001 9062 6434

4b. Service Type
 Registered Certified
 Express Mail Insured
 Return Receipt for Merchandise COD

7. Date of Delivery
 9/5/14

8. Addressee's Address (Only if requested and fee is paid)

5. Received By: (Print Name)
 L Johnson

6. Signature: (Addressee or Agent)
 X [Signature]

4E49 2906 7000 094E 2702

Thank you for using Return Receipt Service.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12**

CITIGROUP TECHNOLOGY, INC. and
CITICORP BANKING CORPORATION (PARENT),
A SUBSIDIARY OF CITIGROUP, INC.

and

Case 12-CA-130742

ANDREA SMITH, an Individual

COMPLAINT AND NOTICE OF HEARING

This Complaint and Notice of Hearing is based on a charge filed by Andrea Smith (the Charging Party). It is issued pursuant to Section 10(b) of the National Labor Relations Act, 29 U.S.C. Sec.151 et seq. (the Act) and Section 102.15 of the Rules and Regulations of the National Labor Relations Board (the Board) and alleges that Citigroup Technology, Inc. and Citicorp Banking Corporation (parent), a subsidiary of Citigroup, Inc. (Respondent) has violated the Act as described below.

1.

(a) The original charge in Case 12-CA-130742 was filed by the Charging Party on June 12, 2014, and a copy was served on Respondent by regular mail on June 16, 2014.

(b) The first amended charge in Case 12-CA-130742 was filed by the Charging Party on August 27, 2014, and a copy was served on Respondent by regular mail on the same date.

2.

(a) At all material times, Respondent, a Delaware corporation, with an office and place of business located in Tampa, Florida, herein called Respondent's Tampa facility, has been engaged in the business of providing global financial services.

(b) During the past 12 months, Respondent, in conducting its business operations described above in paragraph 2(a), derived gross revenues in excess of \$500,000.

(c) During the past 12 months, Respondent, in conducting its business operations described above in paragraph 2(a), purchased and received at its Tampa facility goods valued in excess of \$50,000 directly from points outside the State of Florida.

(d) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

3.

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Rehana Blackeram	-	Human Resources Representative
Carlos Fernandez	-	Professional Recruiter

4.

(a) Since on or about April 10, 2010, and at all material times thereafter, Respondent has promulgated, maintained, and enforced "The Employment Arbitration Policy" (hereinafter called the Arbitration Policy), found in Appendix A of its Employee Handbook, which includes the following provision:

Except as otherwise required by applicable law, this Policy applies only to claims brought on an individual basis. Consequently neither Citi nor any employee may submit a class action, collective action, or other representative action for resolution under this Policy.

(b) Since on or before February 5, 2013, and at all material times thereafter, Respondent has required employees to accept the Arbitration Policy referenced in paragraph 4(a) as a condition of employment.

5.

(a) On or about March 28, 2014, employees Andrea Smith, Darlene Echevarria and other similarly situated employees engaged in concerted activities with other employees for the purpose of mutual aid and protection by filing a "Nationwide Collective Action Arbitration Submission" before the American Arbitration Association (the Association) in Darlene Echevarria v. Citigroup, Inc., et al., Case No.: 01-14-0000-0324, alleging violations of the Fair Labor Standards Act.

(b) Since on or about April 15, 2014, Respondent has attempted to enforce and has enforced the Arbitration Policy by filing with the Association a request that the Association reject the "Nationwide Collective Action Arbitration Submission." On April 28, 2014, the Association granted Respondent's request and ruled that pursuant to the terms of the Arbitration Policy, employees could only pursue claims on an individual basis.

6.

By the conduct described above in paragraphs 4(a), 4(b), 5(a), and 5(b), Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act.

7.

The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the complaint. The answer must be **received by this office on or before September 12, 2014, or postmarked on or before September 11, 2014**. Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlr.gov, click on **File Case Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-Filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing.

Service of the answer on each of the other parties must be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed

by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE that on **October 9, 2014**, at **10:00 a.m.**, at the National Labor Relations Board Hearing Room, 201 East Kennedy Blvd., Suite 530, Tampa, Florida, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

DATED at Tampa, Florida, this 29th day of August, 2014.


Margaret J. Diaz, Regional Director
National Labor Relations Board, Region 12
201 East Kennedy Blvd., Suite 530
Tampa, FL 33602-5824

Attachments

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
NOTICE

Case 12-CA-130742

The issuance of the notice of formal hearing in this case does not mean that the matter cannot be disposed of by agreement of the parties. On the contrary, it is the policy of this office to encourage voluntary adjustments. The examiner or attorney assigned to the case will be pleased to receive and to act promptly upon your suggestions or comments to this end.

An agreement between the parties, approved by the Regional Director, would serve to cancel the hearing. However, unless otherwise specifically ordered, the hearing will be held at the date, hour, and place indicated. Postponements *will not be granted* unless good and sufficient grounds are shown *and* the following requirements are met:

- (1) The request must be in writing. An original and two copies must be filed with the Regional Director when appropriate under 29 CFR 102.16(a) or with the Division of Judges when appropriate under 29 CFR 102.16(b).
- (2) Grounds must be set forth in *detail*;
- (3) Alternative dates for any rescheduled hearing must be given;
- (4) The positions of all other parties must be ascertained in advance by the requesting party and set forth in the request; and
- (5) Copies must be simultaneously served on all other parties (listed below), and that fact must be noted on the request.

Except under the most extreme conditions, no request for postponement will be granted during the three days immediately preceding the date of hearing.

Stephanie Adler-Paindiris, Esq.
Jackson Lewis, LLP
390 N Orange Ave Ste 1285
Orlando, FL 32801-1674

Andrea Smith
10538 Shady Falls Court
Riverview, FL 33678

Edward M. Cherof, Esq.
Jackson Lewis, LLP
1155 Peachtree St NE
Suite 1000
Atlanta, GA 30309

Andrew Frisch
Morgan & Morgan
600 N. Pine Island Rd.
Suite 400
Plantation, FL 33324-1311

Citigroup Technology, Inc., and Citicorp
Banking Corporation (parent), a subsidiary of
Citigroup, Inc.
399 Park Ave
New York, NY 10022-4614

Procedures in NLRB Unfair Labor Practice Hearings

The attached complaint has scheduled a hearing that will be conducted by an administrative law judge (ALJ) of the National Labor Relations Board who will be an independent, impartial finder of facts and applicable law. **You may be represented at this hearing by an attorney or other representative.** If you are not currently represented by an attorney, and wish to have one represent you at the hearing, you should make such arrangements as soon as possible. A more complete description of the hearing process and the ALJ's role may be found at Sections 102.34, 102.35, and 102.45 of the Board's Rules and Regulations. The Board's Rules and regulations are available at the following link: www.nlr.gov/sites/default/files/attachments/basic-page/node-1717/rules_and_regs_part_102.pdf.

The NLRB allows you to file certain documents electronically and you are encouraged to do so because it ensures that your government resources are used efficiently. To e-file go to the NLRB's website at www.nlr.gov, click on "e-file documents," enter the 10-digit case number on the complaint (the first number if there is more than one), and follow the prompts. You will receive a confirmation number and an e-mail notification that the documents were successfully filed.

Although this matter is set for trial, this does not mean that this matter cannot be resolved through a settlement agreement. The NLRB recognizes that adjustments or settlements consistent with the policies of the National Labor Relations Act reduce government expenditures and promote amity in labor relations and encourages the parties to engage in settlement efforts.

I. BEFORE THE HEARING

The rules pertaining to the Board's pre-hearing procedures, including rules concerning filing an answer, requesting a postponement, filing other motions, and obtaining subpoenas to compel the attendance of witnesses and production of documents from other parties, may be found at Sections 102.20 through 102.32 of the Board's Rules and Regulations. In addition, you should be aware of the following:

- **Special Needs:** If you or any of the witnesses you wish to have testify at the hearing have special needs and require auxiliary aids to participate in the hearing, you should notify the Regional Director as soon as possible and request the necessary assistance. Assistance will be provided to persons who have handicaps falling within the provisions of Section 504 of the Rehabilitation Act of 1973, as amended, and 29 C.F.R. 100.603.
- **Pre-hearing Conference:** One or more weeks before the hearing, the ALJ may conduct a telephonic prehearing conference with the parties. During the conference, the ALJ will explore whether the case may be settled, discuss the issues to be litigated and any logistical issues related to the hearing, and attempt to resolve or narrow outstanding issues, such as disputes relating to subpoenaed witnesses and documents. This conference is usually not recorded, but during the hearing the ALJ or the parties sometimes refer to discussions at the pre-hearing conference. You do not have to wait until the prehearing conference to meet with the other parties to discuss settling this case or any other issues.

II. DURING THE HEARING

The rules pertaining to the Board's hearing procedures are found at Sections 102.34 through 102.43 of the Board's Rules and Regulations. Please note in particular the following:

- **Witnesses and Evidence:** At the hearing, you will have the right to call, examine, and cross-examine witnesses and to introduce into the record documents and other evidence.
- **Exhibits:** Each exhibit offered in evidence must be provided in duplicate to the court reporter and a copy of each of each exhibit should be supplied to the ALJ and each party when the exhibit is offered in

evidence. If a copy of any exhibit is not available when the original is received, it will be the responsibility of the party offering such exhibit to submit the copy to the ALJ before the close of hearing. If a copy is not submitted, and the filing has not been waived by the ALJ, any ruling receiving the exhibit may be rescinded and the exhibit rejected.

- **Transcripts:** An official court reporter will make the only official transcript of the proceedings, and all citations in briefs and arguments must refer to the official record. The Board will not certify any transcript other than the official transcript for use in any court litigation. Proposed corrections of the transcript should be submitted, either by way of stipulation or motion, to the ALJ for approval. Everything said at the hearing while the hearing is in session will be recorded by the official reporter unless the ALJ specifically directs off-the-record discussion. If any party wishes to make off-the-record statements, a request to go off the record should be directed to the ALJ.
- **Oral Argument:** You are entitled, on request, to a reasonable period of time at the close of the hearing for oral argument, which shall be included in the transcript of the hearing. Alternatively, the ALJ may ask for oral argument if, at the close of the hearing, if it is believed that such argument would be beneficial to the understanding of the contentions of the parties and the factual issues involved.
- **Date for Filing Post-Hearing Brief:** Before the hearing closes, you may request to file a written brief or proposed findings and conclusions, or both, with the ALJ. The ALJ has the discretion to grant this request and to will set a deadline for filing, up to 35 days.

III. AFTER THE HEARING

The Rules pertaining to filing post-hearing briefs and the procedures after the ALJ issues a decision are found at Sections 102.42 through 102.48 of the Board's Rules and Regulations. Please note in particular the following:

- **Extension of Time for Filing Brief with the ALJ:** If you need an extension of time to file a post-hearing brief, you must follow Section 102.42 of the Board's Rules and Regulations, which requires you to file a request with the appropriate chief or associate chief administrative law judge, depending on where the trial occurred. You must immediately serve a copy of any request for an extension of time on all other parties and furnish proof of that service with your request. You are encouraged to seek the agreement of the other parties and state their positions in your request.
- **ALJ's Decision:** In due course, the ALJ will prepare and file with the Board a decision in this matter. Upon receipt of this decision, the Board will enter an order transferring the case to the Board and specifying when exceptions are due to the ALJ's decision. The Board will serve copies of that order and the ALJ's decision on all parties.
- **Exceptions to the ALJ's Decision:** The procedure to be followed with respect to appealing all or any part of the ALJ's decision (by filing exceptions with the Board), submitting briefs, requests for oral argument before the Board, and related matters is set forth in the Board's Rules and Regulations, particularly in Section 102.46 and following sections. A summary of the more pertinent of these provisions will be provided to the parties with the order transferring the matter to the Board.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

**CITIGROUP TECHNOLOGY, INC., AND CITICORP
BANKING CORPORATION (PARENT), A
SUBSIDIARY OF CITIGROUP, INC.**

Charged Party

Case 12-CA-130742

and

ANDREA SMITH

Charging Party

AFFIDAVIT OF SERVICE OF FIRST AMENDED CHARGE AGAINST EMPLOYER

I, the undersigned employee of the National Labor Relations Board, being duly sworn, say that on August 27, 2014, I served the above-entitled document(s) by regular mail upon the following persons, addressed to them at the following addresses:

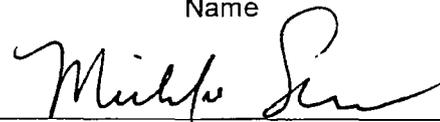
Stephanie Adler-Paindiris, Esq.
Jackson Lewis, LLP
390 N Orange Ave Ste 1285
Orlando, FL 32801-1674

Edward M. Cherof, Esq.
Jackson Lewis, LLP
1155 Peachtree St NE, Suite 1000
Atlanta, GA 30309

Citigroup Technology, Inc., and Citicorp
Banking Corporation (parent), a subsidiary of
Citigroup, Inc.
399 Park Ave
New York, NY 10022-4614

August 27, 2014
Date

Michele Serrano,
Designated Agent of NLRB
Name


Signature



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 12
201 E Kennedy Blvd Ste 530
Tampa, FL 33602-5824

Agency Website:
www.nlrb.gov
Telephone: (813)228-2641
Fax: (813)228-2874



Download
NLRB
Mobile App

August 27, 2014

Citigroup Technology, Inc., and Citicorp Banking
Corporation (parent), a subsidiary of Citigroup, Inc.
399 Park Ave
New York, NY 10022-4614

Re: Citigroup Technology, Inc., and Citicorp
Banking Corporation (parent), a subsidiary
of Citigroup, Inc.
Case 12-CA-130742

Dear Sir or Madam:

Enclosed is a copy of the first amended charge that has been filed in this case.

Investigator: This charge is being investigated by Field Attorney KATHLEEN M. TROY whose telephone number is (813)228-2654. If the agent is not available, you may contact Supervisory Examiner DENISE C. MORRISON whose telephone number is (813)228-2455.

Presentation of Your Evidence: As you know, we seek prompt resolutions of labor disputes. Therefore, I urge you or your representative to submit a complete written account of the facts and a statement of your position with respect to the allegations in the first amended charge as soon as possible. If the Board agent later asks for more evidence, I strongly urge you or your representative to cooperate fully by promptly presenting all evidence relevant to the investigation. In this way, the case can be fully investigated more quickly.

Procedures: Your right to representation, the means of presenting evidence, and a description of our procedures, including how to submit documents, was described in the letter sent to you with the original charge in this matter. If you have any questions, please contact the Board agent.

Very truly yours,

Margaret J. Diaz
Regional Director

Enclosure: Copy of first amended charge

GENERAL COUNSEL EXHIBIT NO. 1(e)

Citigroup Technology, Inc., and Citicorp
Banking Corporation (parent), a subsidiary
of Citigroup, Inc. - 2 -
Case 12-CA-130742

cc: Stephanie Adler-Paindiris, Esq.
Jackson Lewis, LLP
390 N Orange Ave Ste 1285
Orlando, FL 32801-1674

Edward M. Cherof, Esq.
Jackson Lewis, LLP
1155 Peachtree St NE, Suite 1000
Atlanta, GA 30309

FORM EXEMPT UNDER 44 U.S.C 3512

INTERNET
FORM NLRB-501
(2-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

FIRST AMENDED CHARGE AGAINST EMPLOYER

DO NOT WRITE IN THIS SPACE	
Case 12-CA-130742	Date Filed 8-27-14

INSTRUCTIONS:

File an original with NLRB Regional Director for the region in which the alleged unfair labor practice occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

a. Name of Employer Citigroup Technology, Inc., and Citicorp Banking Corporation (parent), a subsidiary of Citigroup Inc.		b. Tel. No. (800)285-3000
d. Address (Street, city, state, and ZIP code) 399 Park Avenue New York, NY 10043		c. Cell No.
e. Employer Representative Jackson Lewis LLP 390 North Orange Avenue, Suite 128 Orlando, FL 32801		f. Fax No.
i. Type of Establishment (factory, mine, wholesaler, etc.) Financial Institution/Banking		g. e-Mail
j. Identify principal product or service Financial services and products		h. Number of workers employed Over 1,000

k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and (list subsections) _____ of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.

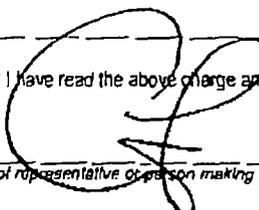
2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices)
Since on or about April 15, 2014, the above-referenced Employers have sought to enforce a waiver of the right to join a collective action pursuant to the FLSA, 29 U.S.C. 216(b), against various employees, including Andrea Smith, in violation of the NLRB decision D.R. Horton, 357 NLRB No. 184 (January 2012).

3. Full name of party filing charge (if labor organization, give full name, including local name and number)
Andrea Smith

4a. Address (Street and number, city, state, and ZIP code) 10538 Shady Falls Court Riverview, FL 33578		4b. Tel. No. (813) 387-0341
		4c. Cell No. (813) 758-8162
		4d. Fax No.
		4e. e-Mail AADSAADS@gmail.com

5. Full name of national or international labor organization of which it is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization)

6. DECLARATION
I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief.

By  Andrew R. Frisch, Attorney
(Signature of representative of person making charge) (Print/type name and title or office, if any)

Tel. No. (954) 318-0268
Office, if any, Cell No. (561) 598-9454
Fax No. (954) 327-3013
e-Mail afrisch@forthepeople.com

Address 600 N. Pine Island Road, Suite 400, Plantation, FL 33324 8/26/2014 (date)

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CITIGROUP, INC. AND CITICORP, N.A.

Charged Party

and

ANDREA SMITH

Charging Party

Case 12-CA-130742

AFFIDAVIT OF SERVICE OF CHARGE AGAINST EMPLOYER

I, the undersigned employee of the National Labor Relations Board, state under oath that on June 16, 2014, I served the above-entitled document(s) by post-paid regular mail upon the following persons, addressed to them at the following addresses:

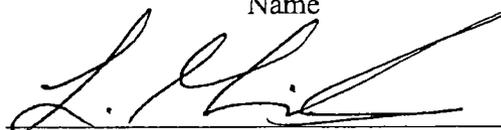
Citigroup, Inc. & Citicorp, N.A.
 399 Park Ave
 New York, NY 10022-4614

June 16, 2014

Date

Latoria Grinder,
 Designated Agent of NLRB

Name



Signature

GENERAL COUNSEL EXHIBIT NO. 1(c)



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD

REGION 12
201 E Kennedy Blvd Ste 530
Tampa, FL 33602-5824

Agency Website: www.nlr.gov
Telephone: (813)228-2641
Fax: (813)228-2874



Download
NLRB
Mobile App

June 16, 2014

Citigroup, Inc. & Citicorp, N.A.
399 Park Ave
New York, NY 10022-4614

Re: Citigroup, Inc. and Citicorp, N.A.
Case 12-CA-130742

Dear Sir or Madam:

Enclosed is a copy of a charge that has been filed in this case. This letter tells you how to contact the Board agent who will be investigating the charge, explains your right to be represented, discusses presenting your evidence, and provides a brief explanation of our procedures, including how to submit documents to the NLRB.

Investigator: This charge is being investigated by Field Attorney KATHLEEN M. TROY whose telephone number is (813)228-2654. If this Board agent is not available, you may contact Supervisory Examiner DENISE C. MORRISON whose telephone number is (813)228-2455.

Right to Representation: You have the right to be represented by an attorney or other representative in any proceeding before us. If you choose to be represented, your representative must notify us in writing of this fact as soon as possible by completing Form NLRB-4701, Notice of Appearance. This form is available on our website, www.nlr.gov, or from an NLRB office upon your request.

If you are contacted by someone about representing you in this case, please be assured that no organization or person seeking your business has any "inside knowledge" or favored relationship with the National Labor Relations Board. Their knowledge regarding this proceeding was only obtained through access to information that must be made available to any member of the public under the Freedom of Information Act.

Presentation of Your Evidence: We seek prompt resolutions of labor disputes. Therefore, I urge you or your representative to submit a complete written account of the facts and a statement of your position with respect to the allegations set forth in the charge as soon as possible. If the Board agent later asks for more evidence, I strongly urge you or your representative to cooperate fully by promptly presenting all evidence relevant to the investigation. In this way, the case can be fully investigated more quickly.

Full and complete cooperation includes providing witnesses to give sworn affidavits to a Board agent, and providing all relevant documentary evidence requested by the Board agent. Sending us your written account of the facts and a statement of your position is not enough to be

Citigroup, Inc. and Citicorp, N.A.
Case 12-CA-130742

- 2 -

June 16, 2014

considered full and complete cooperation. A refusal to fully cooperate during the investigation might cause a case to be litigated unnecessarily.

In addition, either you or your representative must complete the enclosed Commerce Questionnaire to enable us to determine whether the NLRB has jurisdiction over this dispute. If you recently submitted this information in another case, or if you need assistance completing the form, please contact the Board agent.

We will not honor any request to place limitations on our use of position statements or evidence beyond those prescribed by the Freedom of Information Act and the Federal Records Act. Thus, we will not honor any claim of confidentiality except as provided by Exemption 4 of FOIA, 5 U.S.C. Sec. 552(b)(4), and any material you submit may be introduced as evidence at any hearing before an administrative law judge. We are also required by the Federal Records Act to keep copies of documents gathered in our investigation for some years after a case closes. Further, the Freedom of Information Act may require that we disclose such records in closed cases upon request, unless there is an applicable exemption. Examples of those exemptions are those that protect confidential financial information or personal privacy interests.

Procedures: We strongly urge everyone to submit all documents and other materials (except unfair labor practice charges and representation petitions) by E-Filing (not e-mailing) through our website, www.nlr.gov. However, the Agency will continue to accept timely filed paper documents. Please include the case name and number indicated above on all your correspondence regarding the charge.

Information about the Agency, the procedures we follow in unfair labor practice cases and our customer service standards is available on our website, www.nlr.gov or from an NLRB office upon your request. NLRB Form 4541 offers information that is helpful to parties involved in an investigation of an unfair labor practice charge.

We can provide assistance for persons with limited English proficiency or disability. Please let us know if you or any of your witnesses would like such assistance.

Very truly yours,



MARGARET J. DIAZ
Regional Director

Enclosures:

1. Copy of Charge
2. Commerce Questionnaire

Revised 3/21/2011		NATIONAL LABOR RELATIONS BOARD		
QUESTIONNAIRE ON COMMERCE INFORMATION				
Please read carefully, answer all applicable items, and return to the NLRB Office. If additional space is required, please add a page and identify item number.				
CASE NAME Citigroup, Inc. and Citicorp, N.A.		CASE NUMBER 12-CA-130742		
1. EXACT LEGAL TITLE OF ENTITY (as filed with State and/or stated in legal documents forming entity)				
2. TYPE OF ENTITY				
<input type="checkbox"/> CORPORATION <input type="checkbox"/> LLC <input type="checkbox"/> PARTNERSHIP <input type="checkbox"/> SOLE PROPRIETORSHIP <input type="checkbox"/> OTHER (Specify)				
3. IF A CORPORATION OR LLC				
A. STATE OF INCORPORATION OR FORMATION		B. NAME, ADDRESS, AND RELATIONSHIP (e.g. parent, subsidiary) OF ALL RELATED ENTITIES		
4. IF AN LLC OR ANY TYPE OF PARTNERSHIP, FULL NAME AND ADDRESS OF ALL MEMBERS OR PARTNERS				
5. IF A SOLE PROPRIETORSHIP, FULL NAME AND ADDRESS OF PROPRIETOR				
6. BRIEFLY DESCRIBE THE NATURE OF YOUR OPERATIONS (Products handled or manufactured, or nature of services performed):				
7. A. PRINCIPAL LOCATION:		B. BRANCH LOCATIONS:		
8. NUMBER OF PEOPLE PRESENTLY EMPLOYED				
A. Total		B. At the address involved in this matter		
9. DURING THE MOST RECENT (Check appropriate box): <input type="checkbox"/> CALENDAR YR <input type="checkbox"/> 12 MONTHS or <input type="checkbox"/> FISCAL YR (FY dates)				
			YES	NO
A. Did you provide services valued in excess of \$50,000 directly to customers outside your State? If no, indicate actual value. \$				
B. If you answered no to 9A, did you provide services valued in excess of \$50,000 to customers in your State who purchased goods valued in excess of \$50,000 from directly outside your State? If no, indicate the value of any such services you provided \$				
C. If you answered no to 9A and 9B, did you provide services valued in excess of \$50,000 to public utilities, transit systems, newspapers, health care institutions, broadcasting stations, commercial buildings, educational institutions, or retail concerns? If less than \$50,000, indicate amount. \$				
D. Did you sell goods valued in excess of \$50,000 directly to customers located outside your State? If less than \$50,000, indicate amount. \$				
E. If you answered no to 9D, did you sell goods valued in excess of \$50,000 directly to customers located inside your State who purchased other goods valued in excess of \$50,000 from directly outside your State? If less than \$50,000, indicate amount. \$				
F. Did you purchase and receive goods valued in excess of \$50,000 from directly outside your State? If less than \$50,000, indicate amount. \$				
G. Did you purchase and receive goods valued in excess of \$50,000 from enterprises who received the goods directly from points outside your State? If less than \$50,000, indicate amount. \$				
H. Gross Revenues from all sales or performance of services (Check the largest amount): <input type="checkbox"/> \$100,000 <input type="checkbox"/> \$250,000 <input type="checkbox"/> \$500,000 <input type="checkbox"/> \$1,000,000 or more If less than \$100,000, indicate amount.				
I. Did you begin operations within the last 12 months? If yes, specify date: _____				
10. ARE YOU A MEMBER OF AN ASSOCIATION OR OTHER EMPLOYER GROUP THAT ENGAGES IN COLLECTIVE BARGAINING?				
<input type="checkbox"/> YES <input type="checkbox"/> NO (If yes, name and address of association or group)				
11. REPRESENTATIVE BEST QUALIFIED TO GIVE FURTHER INFORMATION ABOUT YOUR OPERATIONS				
NAME	TITLE	E-MAIL ADDRESS	TEL. NUMBER	
12. AUTHORIZED REPRESENTATIVE COMPLETING THIS QUESTIONNAIRE				
NAME AND TITLE (Type or Print)	SIGNATURE	E-MAIL ADDRESS	DATE	
<p align="center">PRIVACY ACT STATEMENT</p> <p>Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary. However, failure to supply the information may cause the NLRB to refuse to process any further a representation or unfair labor practice case, or may cause the NLRB to issue you a subpoena and seek enforcement of the subpoena in federal court.</p>				

INTERNET
FORM NLRB-501
(4-08)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST EMPLOYER

FORM EXEMPT UNDER 5 U.S.C. 5512

DO NOT WRITE IN THIS SPACE	
Case 12-CA-130742	Date Filed 6-12-14

INSTRUCTIONS:

File an original with NLRB Regional Director for the region in which the alleged unfair labor practices occurred or is occurring.

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT	
a. Name of Employer Citigroup, Inc. Citicorp, N.A.	b. Tel. No. (800)285-3000 c. Cell No. f. Fax No.
d. Address (Street, city, state, and ZIP code) 399 Park Avenue New York, NY 10043	e. Employer Representative Stephanie Adler-Paindiris/Nicole Sber Jackson Lewis LLP 390 North Orange Avenue, Suite 128 Orlando, FL 32801
g. e-Mail h. Number of workers employed Over 1,000	i. Identify principal product or service Financial services and products
c. Type of Establishment (factory, mine, wholesaler, etc.) Financial Institution/Banking	
k. The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (7) and (list subsections) of the National Labor Relations Act, and these unfair labor practices are practices affecting commerce within the meaning of the Act, or these unfair labor practices are unfair practices affecting commerce within the meaning of the Act and the Postal Reorganization Act.	
2. Basis of the Charge (set forth a clear and concise statement of the facts constituting the alleged unfair labor practices) Since on or about April 15, 2014, the above-referenced Employers have sought to enforce a waiver of the right to join a collective action pursuant to the FLSA, 29 U.S.C. 216(b), against various employees, including Andrea Smith, in violation of the NLRB decision D.R. Horton, 357 NLRB No. 184 (January 2012)	
3. Full name of party filing charge (if labor organization, give full name, including local name and number) Andrea Smith	
4a. Address (Street and number, city, state, and ZIP code) 10538 Shady Falls Court Riverview, FL 33578	4b. Tel. No. (813) 387-0341 4c. Cell No. (813) 758-8162 4d. Fax No. 4e. e-Mail AADSAADS@gmail.com
5. Full name of national or international labor organization of which e is an affiliate or constituent unit (to be filled in when charge is filed by a labor organization)	
6. DECLARATION I declare that I have read the above charge and that the statements are true to the best of my knowledge and belief	
By:  (Signature of representative of person making charge)	Andrea Smith (Print type name and title or office, if any)
Te: No. (813) 387-0341 Office, if any, Cell No. (813) 758-8162 Fax No. e-Mail AADSAADS@gmail.com	
Address 10538 Shady Falls Court, Riverview, FL 33578 06/08/14 (Date)	

WILLFUL FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001)
PRIVACY ACT STATEMENT

Submission of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing unfair labor practice and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is voluntary; however, failure to supply the information will cause the NLRB to decline to invoke its processes.

JOINT EXHIBIT 1



Appendix A: The Employment Arbitration Policy

Statement of Intent

Citi values each of its employees and looks forward to good relations with, and among, all of its employees. Occasionally, however, disagreements may arise between an individual employee and Citi or between employees in a context that involves Citi.¹

Citi believes that the resolution of such disagreements will be best accomplished by internal dispute resolution and, where that fails, by external arbitration. For these reasons, Citi has adopted this Employment Arbitration Policy ("Policy"). Arbitration shall be conducted either under the auspices of the Financial Industry Regulatory Authority, Inc. ("FINRA") or the American Arbitration Association ("AAA") as follows:

- Before the arbitration facilities of FINRA if: (1) you're a registered person or hold a securities license(s) with a self-regulatory organization and are employed by Citigroup Global Markets Inc. ("CGMI") or (2) you're a registered person or hold a securities license(s) with a self-regulatory organization, you're employed by CGMI (the "Secondary Employer") and another Citi affiliate (the "Primary Employer") (which together make you a "Dual Employee"), and your dispute involves the Secondary Employer or activities related to your securities license(s). In such Dual Employee instances, any other related disputes you may have against your Primary Employer must be heard before the FINRA as well.
- Before the AAA where you don't meet the criteria above for FINRA arbitration, FINRA declines the use of its facilities, or you're a Dual Employee and your dispute doesn't involve CGMI or activities related to your securities license(s).

Arbitrations shall be conducted in accordance with the respective arbitration rules of the FINRA or AAA, as applicable, then in effect and as supplemented by this Policy. Throughout this Policy there will be references to AAA or FINRA, but only one set of rules applies to any particular proceeding.

Employment with Citi is a voluntary relationship for no definite period of time, and nothing in this Policy or any other Citi document constitutes an express or implied contract of employment for any definite period of time. This Policy doesn't constitute, nor should it be construed to constitute, a waiver by Citi of its rights under the "employment-at-will" doctrine nor does it afford an employee or former employee any rights or remedies not otherwise available under applicable law.

Scope of Policy

The Policy makes arbitration the required and exclusive forum for the resolution of all disputes arising out of or in any way related to employment based on legally protected rights (i.e., statutory, regulatory, contractual, or common-law rights) that may arise between an employee or former employee and Citi or its current and former parents, subsidiaries, and affiliates and its and their current and former officers, directors, employees, and agents (and that aren't resolved by the internal Dispute Resolution Procedure) including, without limitation, claims, demands, or actions under Title VII of the Civil Rights Act of 1964, the Civil Rights Acts of 1866 and 1991, the Age Discrimination in Employment Act of 1967, the Older Workers Benefit Protection Act of 1990, the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, the Family and Medical Leave Act of 1993, the Fair Labor Standards Act of 1938, the Equal Pay Act of 1963, the Employee Retirement Income Security Act of 1974, the Worker Adjustment and Retraining

¹ Citi refers to, individually and collectively, Citigroup Inc. and each of its subsidiaries and their affiliates.

Notification Act, the Sarbanes-Oxley Act of 2002, and all amendments thereto, and any other federal, state, or local statute, regulation, or common-law doctrine regarding employment, employment discrimination, the terms and conditions of employment, termination of employment, compensation, breach of contract, defamation, retaliation, whistle-blowing, or any claims arising under the Citigroup Separation Pay Plan.

Except as otherwise required by applicable law, this Policy applies only to claims brought on an individual basis. Consequently, neither Citi nor any employee may submit a class action, collective action, or other representative action for resolution under this Policy.

Claims that an employee or former employee may have regarding Worker's Compensation or unemployment compensation benefits aren't covered by this Policy.

Nothing in this Policy shall prevent either party from seeking from any court of competent jurisdiction injunctive relief in aid of arbitration or to maintain the status quo prior to arbitration. The Policy doesn't exclude the National Labor Relations Board from jurisdiction over disputes covered by the National Labor Relations Act or FINRA or the New York Stock Exchange ("NYSE") for matters over which FINRA or the NYSE have jurisdiction.

This Policy doesn't exclude the jurisdiction of the Equal Employment Opportunity commission ("EEOC") and/or state and local human rights agencies to investigate alleged violations of the laws enforced by the EEOC and/or these agencies. An employee isn't waiving any right to file a charge of discrimination with the EEOC and/or state or local human rights agency.

This Policy doesn't require that Citi institute arbitration, nor is Citi required to follow the steps of the Dispute Resolution Procedure, before taking corrective action of any kind, including termination of employment. However, if an employee disagrees with any such corrective action and believes that such action violated his or her legally protected rights, he or she may institute proceedings in accordance with the Policy. The results of the arbitration process are final and binding on the employee and Citi.

While all employees are obligated to arbitrate any dispute they may have with Citi, certain employees or former employees are subject to the arbitration requirements of FINRA. In the event FINRA declines to accept a particular claim under its rules, then that claim will be subject to AAA arbitration under this Policy.

Arbitration rules and procedures

Arbitration under this Policy shall be conducted pursuant to the Employment Dispute Resolution Rules of the AAA or the rules for FINRA arbitration, in either case, "rules." Citi has modified and expanded these rules and procedures in certain respects. In particular, provisions covering fees and costs have been modified so that many of the costs typically shared by the parties will be borne by Citi.

To the extent any of the following rules or procedures are in conflict with the rules or procedures of FINRA or the AAA at the time of the filing of an arbitration claim, the rules and procedures of FINRA or the AAA, as applicable, shall govern.

1. Initiation of arbitration proceeding

To initiate arbitration you must send a written demand for arbitration to the Director of Employee Relations for Citi. The demand must be received by the Director of Employee Relations for Citi within the time period provided by the statute of limitations applicable to the claim(s) set forth in the demand. The demand shall set forth a statement of the nature of the dispute, including the alleged act or omission at issue; the names of all persons involved in the dispute; the amount in controversy, if any; and the remedy sought. Within 30 calendar days of receiving such demand, or as soon as possible thereafter, Citi shall file the demand with the appropriate office of the AAA or FINRA. You'll also complete any other required forms for submission of the claim for arbitration, such as the Uniform Submission Agreement, when filing a claim with FINRA. For employees subject to FINRA arbitration, a claim may be initiated with Human

Resources as outlined herein or pursuant to FINRA's Code of Arbitration procedure, which can be found at www.finra.org/ArbitrationMediation/Rules/CodeofArbitrationProcedure/index.htm.

2. Appointment of neutral arbitrator(s)

Neutral arbitrator(s) shall be appointed in the manner provided by AAA or FINRA rules, as applicable. However, it's Citi's intent that arbitrators be diverse, experienced, and knowledgeable about employment related claims.

3. Qualifications of neutral arbitrator(s)

No person shall serve as a neutral arbitrator in any matter in which that person has any financial or personal interest in the result of the proceeding. Prior to accepting appointment, the prospective arbitrator(s) shall disclose any circumstance likely to prevent a prompt hearing or to create a presumption of bias. Upon receipt of such information, the AAA or FINRA, as applicable, either will replace that person or communicate the information to the parties for comment. Thereafter, the AAA or FINRA, as applicable, may disqualify that person, and its decision shall be conclusive. Vacancies shall be filled in accordance with the AAA or FINRA rules, as applicable.

4. Vacancies

The AAA or FINRA, as applicable, is authorized to substitute another arbitrator if a vacancy occurs or if an appointed arbitrator is unable to serve promptly.

5. Proceedings

The hearing shall be conducted by the arbitrator(s) in whatever manner will most expeditiously permit full presentation of evidence and arguments of the parties. The arbitrator(s) shall set the date, time, and place of the hearing, notice of which must be given to the parties by the AAA or FINRA, as applicable, at least 30 calendar days in advance unless the parties agree otherwise. In the event the hearing can't reasonably be completed in one day, the arbitrator(s) will schedule the hearing to be continued on a mutually convenient date.

6. Representation

Any party may be represented by an attorney or other representative (excluding any Citi supervisory employee) or by himself or herself. For an employee or former employee without representation, the AAA or FINRA, as applicable, may, upon request, provide reference to institutions that might offer assistance.

7. Confidentiality of and attendance at hearing

The arbitrator(s) shall maintain the confidentiality of the hearings unless the law provides to the contrary. The arbitrator(s) shall have the authority to exclude witnesses, other than a party and the party's representative(s), from the hearing during the testimony of any other witness. The arbitrator(s) also shall have the authority to decide whether any person who isn't a witness may attend the hearing.

8. Postponement

The arbitrator(s) for good cause shown may postpone any hearing upon the request of a party or upon the arbitrator's own initiative and shall grant such postponement when all of the parties agree thereto.

9. Oaths

Before proceeding with the first hearing, each arbitrator may take an oath of office and, if required by law, shall do so. The arbitrator(s) may require a witness to testify under oath administered by any duly qualified person and, if it's required by law or requested by any party, shall do so.

10. Stenographic record

In the event a party requests a stenographic record, that party shall bear the cost of such record. If both parties request a stenographic record, the cost shall be borne equally by the parties. In the event the claimant requests a stenographic record, Citi shall bear the cost of obtaining a copy of the record for itself. In the event Citi requests a stenographic record, Citi also shall bear the cost of providing a copy to the claimant.

11. Arbitration in the absence of a party

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator(s) shall require the party who's present to submit such evidence as the arbitrator(s) may require for the making of the award.

12. Discovery

Discovery requests shall be made pursuant to the rules of the AAA or FINRA, as applicable. Upon request of a party, the arbitrator(s) may order further discovery consistent with the applicable rules and the expedited nature of arbitration.

13. Prehearing motions

The arbitrator(s) shall be authorized to consider and rule on prehearing motions, including dispositive motions. Any ruling regarding such motion shall be made consistent with Section 19 of this policy.

14. Evidence

The arbitrator(s) shall be the judge of the relevance and materiality of the evidence offered; conformity to legal rules of evidence shall not be necessary.

15. Evidence by affidavit and filing of documents

The arbitrator(s) may receive and consider the evidence of witnesses by affidavit but shall give it only such weight as the arbitrator(s) deems (deem) it entitled to after consideration of any objection made to its admission. All documents to be considered by the arbitrator(s) shall be filed at the hearing.

16. Closing of hearing

The arbitrator(s) shall ask whether the parties have any further proof to offer or witnesses to be heard. Upon receiving negative replies, or if satisfied that the record is complete, the arbitrator(s) shall declare the hearing closed and the minutes thereof shall be recorded.

17. Waiver of procedures

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these procedures hasn't been complied with, and who fails to state objections thereto in writing, shall be deemed to have waived the right to object.

18. Time of award

The award shall be made promptly by the arbitrator(s) unless otherwise agreed by the parties or specified by law. The arbitrator(s) shall be instructed to make the award within 30 days of the close of the hearing or as soon as possible thereafter.

19. Award

- a. **Form.** The award shall be in writing and shall be signed by the arbitrator(s). If either party requests, such award shall be in a form consistent with the rules of the AAA or FINRA, as applicable. All awards shall be executed in the manner required by law. The award shall be final and binding upon the claimant and Citi, and judicial review shall be limited as provided by law.
- b. **Scope of relief.** The arbitrator(s) shall be governed by applicable federal, state, and/or local law and shall be bound by applicable Citi policies and procedures. The arbitrator(s) may award relief only on an individual basis. The arbitrator(s) shall have the authority to award compensatory damages and injunctive relief to the extent permitted by applicable law. The arbitrator(s) may award punitive or exemplary damages or attorneys' fees where expressly provided by applicable law. The arbitrator(s) shall not have the authority to make any award that's arbitrary and capricious or to award to Citi the costs of the arbitration that it's otherwise required to bear under this policy.

20. Delivery of award to parties

The parties shall accept as legal delivery of the award the placing of the award or a true copy thereof in the mail addressed to a party or its representative at the last known address via certified mail, return receipt, personal service of the award, or the filing of the award in any manner that's permitted by law.

21. Enforcement

The award of the arbitrator may be enforced under the terms of the Federal Arbitration Act (Title 9 U.S. C.) and/or under the law of any state to the maximum extent possible. If a court determines that the award isn't completely enforceable, it shall be enforced and binding on both parties to the maximum extent permitted by law.

22. Judicial proceedings and exclusion of liability

- a. Neither the AAA or FINRA, nor any arbitrator in a proceeding under this Policy, is a necessary party in judicial proceedings relating to the arbitration.
- b. Parties to these procedures shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.

23. Expenses and fees

Unless otherwise precluded by applicable law, expenses and fees shall be allocated as follows:

- a. **Filing fees.** Citi shall pay any filing fee required by the AAA or FINRA, as applicable.
- b. **Hearing fees and arbitrator fees.** Citi shall pay the hearing fee and arbitrator fee for the hearing.
- c. **Postponement/cancellation fees.** Postponement and cancellation fees shall be payable, at the discretion of the arbitrator, by the party causing the postponement or cancellation.
- d. **Other expenses.** The expenses of witnesses shall be paid by the party requiring the presence of such witnesses. All other ordinary and reasonable expenses of the arbitration, including hearing room expenses; travel expenses of the arbitrator, AAA, or FINRA representatives, as applicable; and any witness produced at the arbitrator's direction, shall be paid completely by Citi.
- e. **Legal fees and expenses.** Each side shall pay its own legal fees and expenses subject to Paragraph 23 (a) and (b) above. The allocation of expenses as provided for in items "a" through "d" may not be disturbed by the arbitrator except where the arbitrator determines that a party's claims were frivolous or were asserted in bad faith.

24. Serving of notice

Any notices or process necessary or proper for the initiation or continuation of an arbitration under these procedures, for any court action in connection therewith or for the entry of judgment on an award made under these procedures, may be served on a party by mail addressed to the party or its representative at the last known address or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard thereto has been granted to the party. The AAA or FINRA, as applicable, and the parties also may use facsimile transmission, telex, telegram, or other written forms of electronic communication to give the notices required by these procedures, provided that such notice is confirmed by the telephone or subsequent mailing to all affected parties. Service on the other party must be simultaneous with the filing and be made by the same means.

25. Time period for arbitration

Any proceeding under this Policy must be brought within the time period provided for within the statute(s) of limitations applicable to the claims asserted by the claimant.

26. Amendment or termination of arbitration policy

Citi reserves the right to revise, amend, modify, or discontinue the Policy at any time in its sole discretion with 30 days' written notice. Such amendments may be made by publishing them in the Handbook or by

separate release to employees and shall be effective 30 calendar days after such amendments are provided to employees and will apply prospectively only. *Your continuation of employment after receiving such amendments shall be deemed acceptance of the amended terms.*

27. Interpretation and application of procedure

The arbitrator shall interpret and apply these procedures as they relate to the arbitrator's powers and duties. All other procedures shall be interpreted and applied by the AAA or FINRA, as applicable. Except as otherwise expressly agreed upon, any dispute as to the arbitrability of a particular claim made pursuant to this Policy shall be resolved in arbitration.

28. Severability

If any part or provision of this Policy is held to be invalid, illegal, or unenforceable, such holding won't affect the legality, validity, or enforceability of the remaining parts and each provision of this Policy will be valid, legal, and enforceable to the fullest extent permitted by law.

When you acknowledge this document you are acknowledging that you have read this policy; you understand that it is your obligation to read this document carefully; and that no provision is intended to constitute a waiver, nor to be construed to constitute a waiver, of your or Citi's right to compel arbitration of employment related disputes.

This form was electronically acknowledged by:

Name: Darlene Echevarria

Date: 12/27/2012

JOINT EXHIBIT 2



January 31, 2013

Andrea Smith
1605 Palm Leaf Drive
Brandon, Florida 33510

Dear Andrea:

We are pleased to extend you an offer to join CTI in AML Hub Ops GTS - Team D, a division of Citi's Global Operations & Technology. We were impressed with your accomplishments, and are confident that Citi can offer you a rewarding and challenging career opportunity.

This letter and any attachments ("Letter") set forth the terms of our offer. References herein to "Citi" shall mean Citigroup Inc., its subsidiaries, and its and their affiliates. If you accept, you will be joining a family of companies that serves 200 million customer accounts in nearly 100 countries and is bound together by a workforce committed to excellence, and a workplace based on mutual respect, where every employee can make a difference.

The terms of our offer are as follows:

Start Date:

Your anticipated start date will be February 19, 2013, or such other date we may mutually agree upon, but generally no later than thirty days from the date of this Letter, subject to your compliance with any employment termination notice that you may be required to provide to your current employer.

Title/Function:

Upon joining Citi, you will serve as AML Compliance Analyst, in AML Hub Ops GTS - Team D within CTI, reporting to Mary Stevens.

Pre-Employment Requirements:

This offer of employment is subject to satisfactory completion of all reference and background checks (which will include a consumer or investigative consumer report, and a criminal background check) and a pre-employment drug screen. Furthermore, you must provide appropriate work authorization and, in compliance with the Immigration Reform and Control Act of 1986, complete an Employment Verification Form I-9 and present proof of identity and employment eligibility no later than 3 days after your start date. Please note that these reference and background checks may not be completed by your start date. If the outcome of these checks and the pre-employment screening are not satisfactory, this offer may be withdrawn and/or your employment may be terminated immediately.

Please call 800-733-1676 (option 3) within 48 hours of accepting this offer to schedule a drug test. Be prepared to identify yourself as a Citi candidate and provide your name and zip code where you would like to take the test. You also may be asked for the name of your HR Representative or Recruiter who is Carlos Fernandez. Cancellations of the drug test are prohibited. You may wish to consider whether to wait to resign from your current position until

you receive notification from us of a satisfactory pre-employment drug screening.

Fingerprinting instructions will be provided to you.

You are required to complete your new hire paperwork and pre-employment screening prior to your start date; failure to do so may result in a delay of your start date. Please remember to bring acceptable documents for employment eligibility verification on your start date.

Orientation:

On or after your first day of employment you will receive an email inviting you to complete Citi's New Hire Orientation web-based training module. This self-paced training module will provide you an overview of Citi's history and our business, the health and welfare benefits you may be eligible to receive*, as well as other very important items that you will need to know as you begin your career at Citi. When you have your Citi systems access you can launch the training by selecting the link in the email you receive, by viewing recommended/required training on the Citi Learning Portal, or by using the following link: <https://training.citigroup.net>

Please email: lpuginquiries@citi.com if you are having difficulty accessing the training.

*For Citi Temps: the Health and Welfare section can be bypassed.

Location and Work Hours:

Your primary work location will be Tampa, FL, and your regularly scheduled work hours shall be determined.

A copy of your new hire paperwork will be sent to you separately. If you have any questions about completing your new hire paperwork, please contact Rehana Bhakeram at 813-604-2292.

Benefits:

As of your start date, you will be eligible to participate in Citi's comprehensive employee benefits plans, subject to any exclusions and limitations in effect at the time of delivery. A benefits package will be provided to you within a few weeks of your start date. You must enroll by the deadline stated in your benefits package, which is generally 31 days after your start date. Please note that all compensation, benefits and other policies, plans and programs are subject to change at any time at management's discretion.

If you wish to enroll in your benefits prior to your start date, please review and follow the instructions in the web site information booklet included in your new hire paperwork. You may enroll on-line up to 45 days prior to your start date. If you enroll on-line, you will receive a confirmation of your benefit elections approximately two weeks after your start date. If you wish to change your benefit choices after enrolling on-line, you must do so no later than 31 days after your start date, and you will need to call the Benefits Center at 1-800-881-3938 and follow the prompts to the Health & Welfare option (#4) to speak with a Benefits Representative.

Once you have commenced employment and have been given access to Citi's intranet, you may obtain more detailed information regarding employee benefits and services, as well as programs and material for new employees, by visiting the Citi for You website at http://www.citigroup.net/human_resources/.

Base Salary:

Your annual base salary will be \$44,000.00, payable in accordance with Citi's regular payroll practices (which is paid bi-weekly, every other Friday).

Discretionary Incentive and Retention Award:

You will be eligible for a discretionary incentive and retention award, generally made on an annual basis. Such awards are made at the discretion of management and, if made, will be based upon a variety of factors, including your performance, the performance of your business, and the performance of Citi, and for newly hired employees only, the length of time you have been in the position during the performance year. Absent a separate written agreement to the contrary, and except as specifically provided below, all awards are discretionary and you do not have a right to receive such an award. Except as specifically provided below, in order to be eligible to receive an award, you must be actively employed by Citi on the day you receive the award or award notification, as the case may be, which is generally in the year following the year services are performed, but no later than March 15 of the following year. Subject to Citi's policies, programs and practices regarding such awards, including Citi's Capital Accumulation Program or Citi's Deferred Cash Award Plan (collectively referred to as "CAP"), Citi reserves the right to grant all or part of any discretionary incentive and retention award(s) in a form other than cash including, for example, a deferred cash award, a contingent, deferred or restricted stock award, stock options, and/or common stock equivalents (pursuant to which awards denominated in cash currency may be settled in Citigroup Inc. common stock or other compensation). Awards may be subject to vesting conditions and other terms described in the award program documents in effect at the time of the award. Citi's policies, programs and practices with respect to discretionary incentive and retention awards, including the types of awards offered and the award program terms, may change at any time at Citi's discretion.

Prior Restrictive Covenants:

You represent and agree that you will abide by any pre-existing terms and conditions that are contained in any contractual restrictive and other covenants you may have entered into with any prior employer, client/customer or other person or entity, including (without limitation) any covenants relating to the hiring or solicitation of employees, solicitation of clients/customers, your employment by a competitor, or maintaining the confidentiality of proprietary information, and your timely delivery to your current employer of any required notice of termination of your employment with it, as applicable. You further represent that your employment with Citi will not violate any pre-existing restrictive or other covenant, and you understand that your employment with Citi is contingent upon same. If you are subject to any such covenants, you will disclose and provide copies of them to me prior to accepting this offer.

Compliance Requirements:

You are required to obtain Citi's compliance approval for any outside business activity in which you are currently involved. If you have any questions regarding these requirements, please call the Outside Activities hotline at 866-547-9144 and notify your HR representative.

Non-Solicitation:

During your employment and for the one-year period following the resignation or termination of your employment for any reason, you agree that you will not (a) engage in any conduct, either

individually or in concert with a third party, which directly or indirectly causes or attempts to cause any Citi employee to leave the employment of Citi, or (b) directly or indirectly, induce or attempt to induce or otherwise counsel, advise, encourage or solicit any client or customer of Citi to terminate their relationship with Citi or to transfer assets away from or otherwise reduce its business with Citi. You acknowledge that should you breach this provision in any way, Citi will suffer immediate and irreparable harm and that money damages will be inadequate relief. Therefore, you acknowledge and agree that, in addition to any other remedies, Citi will be entitled to injunctive relief to enforce this paragraph, and you hereby consent to the issuance by a court of competent jurisdiction of a temporary restraining order, preliminary or permanent injunction to enforce Citi's rights herein.

Training and Licensing Requirements:

Your continued employment is contingent, among other things, upon your successful completion of any and all training requirements for your position, including passing all applicable exams. If, in the future, Citi sets forth licensing requirements for your position, your continued employment will also be contingent upon obtaining these licenses in a timeframe specified by the business.

Arbitration:

Any controversy or dispute relating to your employment with or separation from Citi will be resolved in accordance with Citi's Employment Arbitration Policy as set forth in the Principles of Employment which you will be required to sign as a condition of your Citi employment, the terms of which are incorporated herein. A copy of the Principles of Employment is attached.

I acknowledge that I have received and read or have had the opportunity to read this arbitration agreement. I understand that this arbitration agreement requires that disputes that involve the matters subject to the agreement be submitted to mediation or arbitration pursuant to the arbitration agreement rather than to a judge and jury in court.

At-Will:

This offer should not be construed as a promise or guarantee of employment for any defined period of time. Your employment relationship with Citi is "at will," which affords you and Citi the right to terminate the relationship at any time for no reason or any reason not otherwise prohibited by law.

Confidential Information:

You agree that during your employment and after your employment with Citi terminates for any reason, you will keep confidential and not disclose or use for any purpose not authorized by Citi or required by law any personal, proprietary, confidential and/or secret information of or regarding Citi, its business, products and services, methods, systems, and business plans, and information (including personal information) regarding its current, former and prospective employees, clients, or vendors, that you may have access to or acquire during the course of your employment with Citi ("Confidential Information"). You further agree to promptly return all Confidential Information upon the resignation or termination of your employment for any reason. These obligations are further described in the Intellectual Property and Confidential Information Agreement which you will be required to sign as a condition of your employment with Citi. A copy of the Intellectual Property and Confidential Information Agreement is included in your new hire paperwork and is available for your review prior to your acceptance of this offer upon request. You acknowledge that should you breach this provision in any way, Citi will suffer immediate and irreparable harm and that money damages will be inadequate relief. Therefore, you acknowledge and agree that, in addition to any other remedies, Citi will be entitled to

injunctive relief to enforce this paragraph, and you hereby consent to the issuance by a court of competent jurisdiction of a temporary restraining order, preliminary or permanent injunction to enforce Citi's rights herein.

Taxes:

All compensation, payments, incentive and retention awards, stock, options, perquisites, and benefits set forth in this Letter are subject to applicable federal, state and local taxes, and Citi will withhold such taxes as it determines are required by applicable law or regulation. You will remain obligated to pay all required taxes on all compensation, payments, incentive and retention awards, perquisites, and benefits regardless of whether these amounts have been withheld or are required to be withheld by Citi.

Confidential Offer:

You agree to keep the terms of this offer strictly confidential, and further agree not to disclose this offer or the terms thereof to any person or entity other than your attorney, accountant, tax advisor and immediate family members, and as otherwise required or permitted by applicable law. Nothing contained herein is intended to prohibit or restrict you or Citi from disclosing this offer to any government, regulatory, or self-regulatory organization ("SRO"), or from responding to any court order or subpoena.

Media Inquiries and Statements:

Upon your acceptance of this offer, you agree that at no time shall you discuss any matters affecting or concerning Citi with any member of the media unless a duly authorized representative of the business in which you will work and Citi's Global Public Affairs group both grant prior written consent. This requirement is not intended to supersede your rights and obligations under the applicable law and Citi policy, including but not limited to Citi's policies regarding media inquiries.

Severability:

In the event that any provision of this Letter shall be determined to be invalid or unenforceable, in whole or in part, the remaining provisions of this Letter shall be unaffected thereby and shall remain in full force and effect to the fullest extent permitted by law.

Merger of Terms:

This Letter describes Citi's offer of employment. Any other documents, discussions, or agreements that you may have had with us are not part of our offer unless they are described in this Letter. If there is any conflict between this Letter and the terms of the documents described in this Letter, the terms of the documents will control. Further, any award or grant made to you pursuant to any equity or incentive compensation or employee purchase plan or program, including but not limited to any stock incentive plan, shall be treated pursuant to the terms of the applicable program(s) or plan(s) and any changes thereto. Please consult the relevant prospectus and any applicable supplement for the controlling terms. In the event of any conflict between the terms of this Letter and those of the applicable plan or program, then the terms of the plan or program shall govern.

Modification:

Except as otherwise provided herein, this Letter may not be modified except by a separate writing signed by both you and the Senior Human Resources Officer for your business.

409A of the Internal Revenue Code:

We agree that, unless any plan, program or arrangement referred to in this Letter provides for

payments or awards that are subject to Section 409A of the Internal Revenue Code of 1986, as amended, and the rules and regulations promulgated thereunder (the "Code"), any payment or award made pursuant to this Letter is intended to be a short-term deferral that is exempt from Section 409A of the Code, and that this letter shall be administered in accordance with the short-term deferral exception to Section 409A of the Code. You agree that if any payment or award to be made pursuant to this Letter or any plan, program or arrangement referred to in this Letter is determined to be subject to Section 409A of the Code, then such payment or award shall be administered in accordance with Section 409A of the Code.

In addition, you hereby agree that if you are determined to be a "specified employee" (as defined in Section 409A of the Code), at the time of your "separation from service" (as defined in Section 409A of the Code) from Citi, then any payment, whether made pursuant to this Letter or any other plan, program or arrangement sponsored by Citi, that is subject to Section 409A of the Code and is payable on account of your "separation from service" shall be made on the date that is six months after your "separation from service" (or, if earlier, the date of your death).

Legal and Regulatory Compliance:

Notwithstanding anything in this Letter to the contrary, any payment or award made to you pursuant to this Letter will be subject to any limitations, adjustments or clawback provisions applicable to you to the extent required under (a) any applicable law, regulation, rule, regulatory guidance or legal authority or (b) any policy implemented at any time by Citi in its discretion to (i) comply with any legal, regulatory or governmental requirements, directions, supervisory comments, guidance or promulgations specifically including but not limited to guidance on remuneration practices or sound incentive compensation practices promulgated by any U.S. or non-U.S. governmental agency or authority, (ii) comply with the listing requirements of any stock exchange on which Citi's common stock is traded or (iii) comply with or enable Citi to qualify for any government loan, subsidy, investment or other program.

Expiration:

To accept this offer of employment, please review, sign and return one executed original of this Letter to my attention within the next five business days, otherwise this offer of employment will lapse.

We look forward to having you on board.

Sincerely yours,

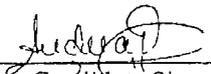


Carlos Fernandez *FOR*
Recruiter
Citi Professional Recruiting

On Behalf of:
CTI

Accepted: Andrea Smith
Candidate Printed Name

Date: 02/05/2013


 Candidate Signature

Date: 02/05/2013

PRINCIPLES OF EMPLOYMENT

As you consider our offer of employment or continued employment with Citigroup Inc., its subsidiaries, and its and their affiliates (collectively "Citi"), there are certain matters that we want to clarify. First, you must observe the policies that we publish from time to time for employees. These include a requirement that you maintain the highest standards of conduct and act within the highest ethical principles. You must not do anything that may be a conflict of interest with your responsibilities as an employee. These expectations are included in the U.S. Employee Handbook, the Citi Code of Conduct, and any other policies that apply to your business sector or to Citi employees generally. These documents are available for your review prior to your acceptance of employment if you choose to review them. You will be asked to acknowledge receiving a copy of the Employee Handbook and the Citi Code of Conduct on or before your start date. Remember-it is your responsibility to read and understand these policies and expectations. If you have any questions, now or in the future, please ask Human Resources.

Second, you must never use (except when necessary in your employment with us), nor disclose to any unauthorized person within Citi or anyone not affiliated with Citi, any personal, proprietary or confidential information you obtain as a result of your employment with us ("Confidential Information"). This applies both while you are employed with us and after that employment ends. If you leave our employ, you may not access, disclose, use retain or take with you any Confidential Information, or any writing or other record that relates to Confidential Information.

Third, your employment with us requires your full attention. You waive any rights to and further agree to assign, and hereby do assign, any work of authorship, invention, discovery, development or improvement made or conceived by you, either alone or jointly with others, during the time you are employed by us which pertains to our business; arises out of your employment; is aided by the use of time, materials, property or facilities of Citi; or is at Citi's request and expense ("Intellectual Property"). Works of authorship created within the scope of your employment are owned by Citi as "works for hire". In addition, in the event that you currently own rights in any inventions or technologies (such as financial models, trading strategies or software programs) that pertain to Citi's business ("Other Technologies"), you are required to notify your manager of the existence and nature of such things prior to your employment with us. Unless you obtain a signed written agreement from an authorized representative of Citi providing otherwise prior to your employment with us, you agree to assign, and hereby do assign, to us any interest that you have in such Other Technologies. Additionally you agree to assist Citi in connection with any effort to perfect the assignment of Intellectual Property including Other Technologies; any controversy or legal proceeding relating to Intellectual Property; and in obtaining domestic and foreign patent(s), copyright or other protection covering Intellectual Property. You also must irrevocably waive author's moral rights relating to Intellectual Property and not exercise such right in any manner.

Fourth, you agree to follow our dispute resolution/arbitration procedure for resolving all disputes (other than disputes which by statute are not arbitrable) arising out of or relating to your employment with and separation from Citi.* This applies while you are employed by us as well as after your employment ends. While we hope that disputes with our employees will never arise, we want them resolved promptly if they do arise. These procedures do not preclude us from

taking disciplinary actions (including terminations) at any time, but if you dispute those actions, we both agree that the disagreement will be resolved through these procedures. Our procedures are divided into two parts:

1. An internal dispute resolution procedure that allows you to seek review of any action taken regarding your employment or termination of your employment which you think is unfair.
2. In the unusual situation when this procedure does not fully resolve a dispute, and such dispute is based upon a legally protected right (i.e., statutory, contractual, or common law), we both agree to submit the dispute, within the time provided by the applicable statute(s) of limitations, to binding arbitration as follows:
 - Before the arbitration facilities of the Financial Industry Regulatory Authority, Inc. ("FINRA") if: (1) you're a registered person or hold a securities license(s) with a self-regulatory organization and are employed by Citigroup Global Markets Inc. ("CGMI"); or, (2) you're a registered person or hold a securities license(s) with a self-regulatory organization, you're employed by CGMI (the "Secondary Employer") and another Citi affiliate (the "Primary Employer") (which together make you a "Dual Employee"), and your dispute involves the Secondary Employer or activities related to your securities license(s). In such Dual Employee instances, any other related disputes you may have against your Primary Employer must be heard before the FINRA as well.
 - Before the American Arbitration Association ("AAA") where you don't meet the criteria above for FINRA arbitration, FINRA declines the use of its facilities, or you are a Dual Employee and your dispute does not involve CGMI or activities related to your securities license(s).

Arbitrations shall be conducted in accordance with the respective arbitration rules of the FINRA or AAA, as applicable, then in effect and as supplemented by Citi's Arbitration Policy then in effect ("Arbitration Policy"). A detailed description of the Arbitration Policy is included in the Employee Handbook, and is available for review prior to your acceptance of employment if you choose to review it. Again, it is your responsibility to read and understand the dispute resolution/arbitration procedure. If you have any questions, now or in the future, please ask Human Resources.

Fifth, during your employment and for the one-year period following the resignation or termination of your employment for any reason, you agree that you won't (a) engage in any conduct, either individually or with a third party, which directly or indirectly causes or attempts to cause any Citi employee to leave the employment of Citi, or (b) directly or indirectly, induce or attempt to induce or otherwise encourage or solicit any client or customer of Citi to terminate its relationship with Citi, or to transfer assets away from or reduce its business with Citi.

Sixth, nothing herein constitutes a contract of employment for a definite period of time. The employment relationship is "at-will" which affords either party the right to terminate the relationship at any time for no reason or any reason not otherwise prohibited by applicable law. Citi retains the right to decrease an employee's compensation and/or benefits, transfer or demote

an employee, or otherwise change the terms and conditions of any employee's employment with Citi at any time with or without notice at its sole discretion.

We believe these matters are important to you as an employee and to us as an employer. Your acceptance of our offer of employment with Citi constitutes your acceptance of the aforementioned provisions.

Understood and agreed.



Signature

02/05/2013

Date

*These include, but aren't limited to, all claims, demands, or actions alleging unlawful employment discrimination or other conduct under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1866, the Civil Rights Act of 1991, the Age Discrimination in Employment Act of 1967, the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, the Family and Medical Leave Act of 1993, the Fair Labor Standards Act of 1938, the Equal Pay Act of 1963, the Employee Retirement Income Security Act of 1974, the Worker Adjustment and Retraining Notification Act of 1989, and all amendments thereto and any other federal, state, or local statute or regulation or common law doctrine regarding employment, employment discrimination, the terms and conditions of employment, termination of employment, compensation, breach of contract, defamation, retaliation or whistleblower claims and any claims arising under the Citigroup Separation Pay Plan.

JOINT EXHIBIT 3

U.S. 2013 Employee Handbook Receipt Form



If you haven't already completed the Handbook acknowledgment, please return this form as directed by your business, but in any event no later than 30 days after receipt.

<https://welcome.citi.com/NewCitiOnlineForms/citihhr/template/EmployeeHandbook.pdf>

By signing below or executing the online acknowledgment receipt, you acknowledge that you've received the Handbook and you understand that it's your obligation to read the Handbook and become familiar with its terms.

WITH THE EXCEPTION OF THE EMPLOYMENT ARBITRATION POLICY, I UNDERSTAND THAT NOTHING CONTAINED IN THIS HANDBOOK, NOR THE HANDBOOK ITSELF, IS CONSIDERED A CONTRACT OF EMPLOYMENT. IN ADDITION, NOTHING IN THIS HANDBOOK CONSTITUTES A GUARANTEE THAT MY EMPLOYMENT WILL CONTINUE FOR ANY SPECIFIED PERIOD OF TIME. I UNDERSTAND THAT MY EMPLOYMENT WITH CITI IS AT WILL, WHICH MEANS IT CAN BE TERMINATED BY ME OR CITI AT ANY TIME, WITH OR WITHOUT NOTICE, FOR NO REASON OR ANY REASON NOT OTHERWISE PROHIBITED BY LAW.

I understand that appended to this Handbook is an Employment Arbitration Policy as well as the "Principles of Employment" that require me and Citi to submit employment-related disputes to binding arbitration (see Appendix A and Appendix D). I understand that it's my obligation to read these documents carefully. I also understand that no provision in the Handbook or elsewhere is intended to constitute a waiver, nor be construed to constitute a waiver, of my or Citi's right to compel arbitration of employment-related disputes.

Please sign here:

Andrea Smith

Date: 02/05/2013

GEID Number: 1010232704

Please print your name

Andrea Smith

JOINT EXHIBIT 4



Appendix A: The Employment Arbitration Policy

Statement of Intent

Citi values each of its employees and looks forward to good relations with, and among, all of its employees. Occasionally, however, disagreements may arise between an individual employee and Citi or between employees in a context that involves Citi.¹

Citi believes that the resolution of such disagreements will be best accomplished by internal dispute resolution and, where that fails, by external arbitration. For these reasons, Citi has adopted this Employment Arbitration Policy ("Policy"). Arbitration shall be conducted either under the auspices of the Financial Industry Regulatory Authority, Inc. ("FINRA") or the American Arbitration Association ("AAA") as follows:

- Before the arbitration facilities of FINRA if: (1) you're a registered person or hold a securities license(s) with a self-regulatory organization and are employed by Citigroup Global Markets Inc. ("CGMI") or (2) you're a registered person or hold a securities license(s) with a self-regulatory organization, you're employed by CGMI (the "Secondary Employer") and another Citi affiliate (the "Primary Employer") (which together make you a "Dual Employee"), and your dispute involves the Secondary Employer or activities related to your securities license(s). In such Dual Employee instances, any other related disputes you may have against your Primary Employer must be heard before the FINRA as well.
- Before the AAA where you don't meet the criteria above for FINRA arbitration, FINRA declines the use of its facilities, or you're a Dual Employee and your dispute doesn't involve CGMI or activities related to your securities license(s).

Arbitrations shall be conducted in accordance with the respective arbitration rules of the FINRA or AAA, as applicable, then in effect and as supplemented by this Policy. Throughout this Policy there will be references to AAA or FINRA, but only one set of rules applies to any particular proceeding.

Employment with Citi is a voluntary relationship for no definite period of time, and nothing in this Policy or any other Citi document constitutes an express or implied contract of employment for any definite period of time. This Policy doesn't constitute, nor should it be construed to constitute, a waiver by Citi of its rights under the "employment-at-will" doctrine nor does it afford an employee or former employee any rights or remedies not otherwise available under applicable law.

Scope of Policy

The Policy makes arbitration the required and exclusive forum for the resolution of all disputes arising out of or in any way related to employment based on legally protected rights (i.e., statutory, regulatory, contractual, or common-law rights) that may arise between an employee or former employee and Citi or its current and former parents, subsidiaries, and affiliates and its and their current and former officers, directors, employees, and agents (and that aren't resolved by the internal Dispute Resolution Procedure) including, without limitation, claims, demands, or actions under Title VII of the Civil Rights Act of 1964, the Civil Rights Acts of 1866 and 1991, the Age Discrimination in Employment Act of 1967, the Older Workers Benefit Protection Act of 1990, the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, the Family and Medical Leave Act of 1993, the Fair Labor Standards Act of 1938, the Equal Pay Act of 1963, the Employee Retirement Income Security Act of 1974, the Worker Adjustment and Retraining

¹ Citi refers to, individually and collectively, Citigroup Inc. and each of its subsidiaries and their affiliates

Notification Act, the Sarbanes-Oxley Act of 2002, and all amendments thereto, and any other federal, state, or local statute, regulation, or common-law doctrine regarding employment, employment discrimination, the terms and conditions of employment, termination of employment, compensation, breach of contract, defamation, retaliation, whistle-blowing, or any claims arising under the Citigroup Separation Pay Plan.

Except as otherwise required by applicable law, this Policy applies only to claims brought on an individual basis. Consequently, neither Citi nor any employee may submit a class action, collective action, or other representative action for resolution under this Policy.

Claims that an employee or former employee may have regarding Worker's Compensation or unemployment compensation benefits aren't covered by this Policy.

Nothing in this Policy shall prevent either party from seeking from any court of competent jurisdiction injunctive relief in aid of arbitration or to maintain the status quo prior to arbitration. The Policy doesn't exclude the National Labor Relations Board from jurisdiction over disputes covered by the National Labor Relations Act or FINRA or the New York Stock Exchange ("NYSE") for matters over which FINRA or the NYSE have jurisdiction.

This Policy doesn't exclude the jurisdiction of the Equal Employment Opportunity commission ("EEOC") and/or state and local human rights agencies to investigate alleged violations of the laws enforced by the EEOC and/or these agencies. An employee isn't waiving any right to file a charge of discrimination with the EEOC and/or state or local human rights agency.

This Policy doesn't require that Citi institute arbitration, nor is Citi required to follow the steps of the Dispute Resolution Procedure, before taking corrective action of any kind, including termination of employment. However, if an employee disagrees with any such corrective action and believes that such action violated his or her legally protected rights, he or she may institute proceedings in accordance with the Policy. The results of the arbitration process are final and binding on the employee and Citi.

While all employees are obligated to arbitrate any dispute they may have with Citi, certain employees or former employees are subject to the arbitration requirements of FINRA. In the event FINRA declines to accept a particular claim under its rules, then that claim will be subject to AAA arbitration under this Policy.

Arbitration rules and procedures

Arbitration under this Policy shall be conducted pursuant to the Employment Dispute Resolution Rules of the AAA or the rules for FINRA arbitration, in either case, "rules." Citi has modified and expanded these rules and procedures in certain respects. In particular, provisions covering fees and costs have been modified so that many of the costs typically shared by the parties will be borne by Citi.

To the extent any of the following rules or procedures are in conflict with the rules or procedures of FINRA or the AAA at the time of the filing of an arbitration claim, the rules and procedures of FINRA or the AAA, as applicable, shall govern.

1. Initiation of arbitration proceeding

To initiate arbitration you must send a written demand for arbitration to the Director of Employee Relations for Citi. The demand must be received by the Director of Employee Relations for Citi within the time period provided by the statute of limitations applicable to the claim(s) set forth in the demand. The demand shall set forth a statement of the nature of the dispute, including the alleged act or omission at issue; the names of all persons involved in the dispute; the amount in controversy, if any; and the remedy sought. Within 30 calendar days of receiving such demand, or as soon as possible thereafter, Citi shall file the demand with the appropriate office of the AAA or FINRA. You'll also complete any other required forms for submission of the claim for arbitration, such as the Uniform Submission Agreement, when filing a claim with FINRA. For employees subject to FINRA arbitration, a claim may be initiated with Human

Resources as outlined herein or pursuant to FINRA's Code of Arbitration procedure, which can be found at www.finra.org/ArbitrationMediation/Rules/CodeofArbitrationProcedure/index.htm.

2. Appointment of neutral arbitrator(s)

Neutral arbitrator(s) shall be appointed in the manner provided by AAA or FINRA rules, as applicable. However, it's Citi's intent that arbitrators be diverse, experienced, and knowledgeable about employment related claims.

3. Qualifications of neutral arbitrator(s)

No person shall serve as a neutral arbitrator in any matter in which that person has any financial or personal interest in the result of the proceeding. Prior to accepting appointment, the prospective arbitrator(s) shall disclose any circumstance likely to prevent a prompt hearing or to create a presumption of bias. Upon receipt of such information, the AAA or FINRA, as applicable, either will replace that person or communicate the information to the parties for comment. Thereafter, the AAA or FINRA, as applicable, may disqualify that person, and its decision shall be conclusive. Vacancies shall be filled in accordance with the AAA or FINRA rules, as applicable.

4. Vacancies

The AAA or FINRA, as applicable, is authorized to substitute another arbitrator if a vacancy occurs or if an appointed arbitrator is unable to serve promptly.

5. Proceedings

The hearing shall be conducted by the arbitrator(s) in whatever manner will most expeditiously permit full presentation of evidence and arguments of the parties. The arbitrator(s) shall set the date, time, and place of the hearing, notice of which must be given to the parties by the AAA or FINRA, as applicable, at least 30 calendar days in advance unless the parties agree otherwise. In the event the hearing can't reasonably be completed in one day, the arbitrator(s) will schedule the hearing to be continued on a mutually convenient date.

6. Representation

Any party may be represented by an attorney or other representative (excluding any Citi supervisory employee) or by himself or herself. For an employee or former employee without representation, the AAA or FINRA, as applicable, may, upon request, provide reference to institutions that might offer assistance.

7. Confidentiality of and attendance at hearing

The arbitrator(s) shall maintain the confidentiality of the hearings unless the law provides to the contrary. The arbitrator(s) shall have the authority to exclude witnesses, other than a party and the party's representative(s), from the hearing during the testimony of any other witness. The arbitrator(s) also shall have the authority to decide whether any person who isn't a witness may attend the hearing.

8. Postponement

The arbitrator(s) for good cause shown may postpone any hearing upon the request of a party or upon the arbitrator's own initiative and shall grant such postponement when all of the parties agree thereto.

9. Oaths

Before proceeding with the first hearing, each arbitrator may take an oath of office and, if required by law, shall do so. The arbitrator(s) may require a witness to testify under oath administered by any duly qualified person and, if it's required by law or requested by any party, shall do so.

10. Stenographic record

In the event a party requests a stenographic record, that party shall bear the cost of such record. If both parties request a stenographic record, the cost shall be borne equally by the parties. In the event the claimant requests a stenographic record, Citi shall bear the cost of obtaining a copy of the record for itself. In the event Citi requests a stenographic record, Citi also shall bear the cost of providing a copy to the claimant.

11. Arbitration in the absence of a party

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator(s) shall require the party who's present to submit such evidence as the arbitrator(s) may require for the making of the award.

12. Discovery

Discovery requests shall be made pursuant to the rules of the AAA or FINRA, as applicable. Upon request of a party, the arbitrator(s) may order further discovery consistent with the applicable rules and the expedited nature of arbitration.

13. Prehearing motions

The arbitrator(s) shall be authorized to consider and rule on prehearing motions, including dispositive motions. Any ruling regarding such motion shall be made consistent with Section 19 of this policy.

14. Evidence

The arbitrator(s) shall be the judge of the relevance and materiality of the evidence offered; conformity to legal rules of evidence shall not be necessary

15. Evidence by affidavit and filing of documents

The arbitrator(s) may receive and consider the evidence of witnesses by affidavit but shall give it only such weight as the arbitrator(s) deems (deem) it entitled to after consideration of any objection made to its admission. All documents to be considered by the arbitrator(s) shall be filed at the hearing.

16. Closing of hearing

The arbitrator(s) shall ask whether the parties have any further proof to offer or witnesses to be heard. Upon receiving negative replies, or if satisfied that the record is complete, the arbitrator(s) shall declare the hearing closed and the minutes thereof shall be recorded.

17. Waiver of procedures

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these procedures hasn't been complied with, and who fails to state objections thereto in writing, shall be deemed to have waived the right to object.

18. Time of award

The award shall be made promptly by the arbitrator(s) unless otherwise agreed by the parties or specified by law. The arbitrator(s) shall be instructed to make the award within 30 days of the close of the hearing or as soon as possible thereafter.

19. Award

- a. **Form.** The award shall be in writing and shall be signed by the arbitrator(s). If either party requests, such award shall be in a form consistent with the rules of the AAA or FINRA, as applicable. All awards shall be executed in the manner required by law. The award shall be final and binding upon the claimant and Citi, and judicial review shall be limited as provided by law.
- b. **Scope of relief.** The arbitrator(s) shall be governed by applicable federal, state, and/or local law and shall be bound by applicable Citi policies and procedures. The arbitrator(s) may award relief only on an individual basis. The arbitrator(s) shall have the authority to award compensatory damages and injunctive relief to the extent permitted by applicable law. The arbitrator(s) may award punitive or exemplary damages or attorneys' fees where expressly provided by applicable law. The arbitrator(s) shall not have the authority to make any award that's arbitrary and capricious or to award to Citi the costs of the arbitration that it's otherwise required to bear under this policy.

20. Delivery of award to parties

The parties shall accept as legal delivery of the award the placing of the award or a true copy thereof in the mail addressed to a party or its representative at the last known address via certified mail, return receipt, personal service of the award, or the filing of the award in any manner that's permitted by law.

21. Enforcement

The award of the arbitrator may be enforced under the terms of the Federal Arbitration Act (Title 9 U.S.C.) and/or under the law of any state to the maximum extent possible. If a court determines that the award isn't completely enforceable, it shall be enforced and binding on both parties to the maximum extent permitted by law.

22. Judicial proceedings and exclusion of liability

- a. Neither the AAA or FINRA, nor any arbitrator in a proceeding under this Policy, is a necessary party in judicial proceedings relating to the arbitration.
- b. Parties to these procedures shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.

23. Expenses and fees

Unless otherwise precluded by applicable law, expenses and fees shall be allocated as follows:

- a. Filing fees. Citi shall pay any filing fee required by the AAA or FINRA, as applicable.
- b. Hearing fees and arbitrator fees. Citi shall pay the hearing fee and arbitrator fee for the hearing.
- c. Postponement/cancellation fees. Postponement and cancellation fees shall be payable, at the discretion of the arbitrator, by the party causing the postponement or cancellation.
- d. Other expenses. The expenses of witnesses shall be paid by the party requiring the presence of such witnesses. All other ordinary and reasonable expenses of the arbitration, including hearing room expenses; travel expenses of the arbitrator, AAA, or FINRA representatives, as applicable, and any witness produced at the arbitrator's direction, shall be paid completely by Citi.
- e. Legal fees and expenses. Each side shall pay its own legal fees and expenses subject to Paragraph 23 (a) and (b) above. The allocation of expenses as provided for in items "a" through "d" may not be disturbed by the arbitrator except where the arbitrator determines that a party's claims were frivolous or were asserted in bad faith.

24. Serving of notice

Any notices or process necessary or proper for the initiation or continuation of an arbitration under these procedures, for any court action in connection therewith or for the entry of judgment on an award made under these procedures, may be served on a party by mail addressed to the party or its representative at the last known address or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard thereto has been granted to the party. The AAA or FINRA, as applicable, and the parties also may use facsimile transmission, telex, telegram, or other written forms of electronic communication to give the notices required by these procedures, provided that such notice is confirmed by the telephone or subsequent mailing to all affected parties. Service on the other party must be simultaneous with the filing and be made by the same means.

25. Time period for arbitration

Any proceeding under this Policy must be brought within the time period provided for within the statute(s) of limitations applicable to the claims asserted by the claimant.

26. Amendment or termination of arbitration policy

Citi reserves the right to revise, amend, modify, or discontinue the Policy at any time in its sole discretion with 30 days' written notice. Such amendments may be made by publishing them in the Handbook or by

separate release to employees and shall be effective 30 calendar days after such amendments are provided to employees and will apply prospectively only. *Your continuation of employment after receiving such amendments shall be deemed acceptance of the amended terms.*

27. Interpretation and application of procedure

The arbitrator shall interpret and apply these procedures as they relate to the arbitrator's powers and duties. All other procedures shall be interpreted and applied by the AAA or FINRA, as applicable. Except as otherwise expressly agreed upon, any dispute as to the arbitrability of a particular claim made pursuant to this Policy shall be resolved in arbitration.

28. Severability

If any part or provision of this Policy is held to be invalid, illegal, or unenforceable, such holding won't affect the legality, validity, or enforceability of the remaining parts and each provision of this Policy will be valid, legal, and enforceable to the fullest extent permitted by law.

When you acknowledge this document you are acknowledging that you have read this policy; you understand that it is your obligation to read this document carefully; and that no provision is intended to constitute a waiver, nor to be construed to constitute a waiver, of your or Citi's right to compel arbitration of employment related disputes.

This form was electronically acknowledged by:

Name: Andrea Smith

Date 02/05/2013

JOINT EXHIBIT 5

AAA ARBITRATION PANEL

DARLENE ECHEVARRIA, on her own behalf and
others similarly situated,

Claimants.

Case No.:

v.

CITIGROUP, INC., a Foreign Profit Corporation
and CITIBANK, N.A.,

Respondents.

NATIONWIDE COLLECTIVE ACTION ARBITRATION SUBMISSION

Claimant, DARLENE ECHEVARRIA ("Smith" or "Claimant"), on behalf of herself and other "Anti-Money Laundering Analyst" or "AML" employees and former employees similarly situated, by and through undersigned counsel, files this Nationwide Collective Action Arbitration Submission against Respondents, CITIGROUP, INC., ("CITIGROUP"), and CITIBANK, N.A. ("CITIBANK") (collectively "Respondents") and states as follows:

NATURE OF THE ACTION

1. Claimant alleges on behalf of herself and other similarly situated current and former "Anti-Money Laundering Analyst" employees of the Respondents, who elect to opt into this action, pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 216(b), that they are: (i) entitled to unpaid wages from Respondents for overtime work for which they did not receive overtime premium pay, as required by law; (ii) entitled to liquidated damages pursuant to the FLSA, 29 U.S.C. §§201 et seq; and (iii) declaratory relief pursuant to 28 U.S.C. §2201.

JURISDICTION

2. Jurisdiction before this Tribunal is proper as Respondents required Claimant and other AML employees to execute arbitration agreements electronically which required disputes to be submitted to arbitration. Respondents are in possession of the executed arbitration agreement(s).

PARTIES

3. At all times material hereto, Claimant was a resident of the State of Florida.

4. Further at all times material hereto, Claimant was a non-exempt "Anti-Money Laundering Analyst" and performed related activities for Respondents.

5. At all times material hereto Respondent, CITIGROUP, was, and continues to be a Delaware Corporation.

6. At all times material hereto, Respondent, CITIGROUP, was, and continues to be, engaged in business in Florida, with multiple places of business in and around Tampa, Florida.

7. At all times material hereto Respondent, "CITIBANK" was, and continues to be a subsidiary of "CITIGROUP."

8. At all times material hereto, Respondent, "CITIBANK" had and continues to have multiple places of business in and around Tampa, Florida.

COVERAGE

9. At all times material hereto Claimant was Respondents' "employee" within the meaning of the FLSA.

10. At all times material hereto, Respondents were Claimant's "employer" within the meaning of the FLSA.

11. Respondents were, and continue to be, an "employer" within the meaning of the FLSA.

12. At all times material hereto, Respondents were, and continue to be, "an enterprise engaged in commerce" within the meaning of the FLSA.

13. At all times material hereto, Respondents were, and continue to be, an enterprise engaged in the "production of goods for commerce" within the meaning of the FLSA.

14. At all times material hereto, Respondents were, and continue to be, an enterprise engaged in the "production of good for commerce" within the meaning of the FLSA.

15. At all times material hereto, the annual gross revenue of Respondents was in excess of \$500,000.00 per annum.

16. At all times material hereto, Respondents had two (2) or more employees handling, selling, or otherwise working on goods or materials that had been moved in or produced for commerce, including but not limited to office supplies, telephones and other computer and office equipment.

17. At all times hereto, Claimant was "engaged in commerce" and subject to individual coverage of the FLSA, because she regularly engaged in interstate communications via email, fax and telephone, throughout her employment.

18. At all times hereto, Claimant was engaged in the "production of goods for commerce" and subject to the individual coverage of the FLSA.

STATEMENT OF FACTS

19. Respondents are a global financial company providing products and services throughout the United States.

20. At all times relevant hereto, Claimant was employed by Respondents as an "Anti-Money Laundering Analyst."

21. Claimant worked in this capacity from about January 2013 to August 2019.

22. Claimant and those similarly situated to her routinely worked in excess of forty (40) hours per week as part of their regular job duties.

23. Despite working more than forty (40) hours per week, Respondents failed to pay Claimant, and those similarly situated to her, overtime compensation at a rate of time and a half her regular rate of pay for hours worked over forty in a workweek.

24. Respondent classified Claimant as exempt from overtime.

25. Respondent classified all Anti-Money Laundering Analysts as exempt from overtime.

26. Respondents have employed and continue to employ hundreds of other individuals as "Anti-Money Laundering Analyst" employees who performed and continue to perform the same or similar job duties under the same pay provision as Claimant and the class members nationwide.

27. Respondents have violated Title 29 U.S.C. §207 (the "FLSA") and continuing to date, in that:

- a. Claimant worked in excess of forty (40) hours per week for her period of employment with Respondents;

- b. No payments, or insufficient payments and/or provisions for payment, have been made by Respondents to properly compensate Claimant at the statutory rate of one and one-half times Claimant's regular rate for those hours worked in excess of forty (40) hours per work week as provided by the FLSA; and
- c. Respondents have failed to maintain proper time records as mandated by the FLSA.

28. Claimant has retained the law firm of MORGAN & MORGAN, P.A. to represent her in this litigation and has agreed to pay the firm a reasonable fee for its services.

COLLECTIVE ACTION ALLEGATIONS

29. Claimant and the class members were all "Anti-Money Laundering Analysts" and performed the same or similar job duties as one another in that they conducted searches, gathered data, and recorded evidence from Respondents' internal systems and other sources, for the purpose of providing reports regarding suspicious transactions to Respondents' Senior Management and Compliance.

30. Further, Claimant and the class members were subjected to the same pay provisions in that they were not compensated at time-and-one-half for all hours worked in excess of 40 hours in a workweek. Thus, the class members are owed overtime wages for the same reasons as Claimant.

31. Respondents' failure to compensate employees for hours worked in excess of 40 hours in a workweek as required by the FLSA results from a policy or practice of failure to assure that "Anti-Money Laundering Analysts" are/were paid for

overtime hours worked based on the Respondents' erroneous misclassification of its "Anti-Money Laundering Analyst" employees as exempt from overtime.

32. This policy or practice was applicable to Claimant and the class members. Application of this policy or practice does/did not depend on the personal circumstances of Claimant or those joining this lawsuit. Rather, the same policy or practice which resulted in the non-payment of overtime to Claimant applied and continues to apply to all class members. Accordingly, the class members are properly defined as:

All "Anti-Money Laundering Analysts" who worked for Respondents nationwide within the last three years who were not compensated at time-and-one-half for all hours worked in excess of 40 hours in one or more workweeks.

33. Respondents knowingly, willfully, or with reckless disregard carried out its illegal pattern or practice of failing to pay overtime compensation with respect to Claimant and the class members.

34. Respondents did not act in good faith or reliance upon any of the following in formulating its pay practices: (a) case law, (b) the FLSA, 29 U.S.C. § 201, *et seq.*, (c) Department of Labor Wage & Hour Opinion Letters or (d) the Code of Federal Regulations.

35. During the relevant period, Respondents violated § 7(a)(1) and § 15(a)(2), by employing employees in an enterprise engaged in commerce or in the production of goods for commerce within the meaning of the FLSA as aforesaid, for one or more workweeks without compensating such employees for their work at a rate of at least the time-and-one-half for all hours worked in excess of 40 hours in a work week.

36. Respondents have acted willfully in failing to pay Claimant and the class members in accordance with the law.

37. Respondents have failed to maintain accurate records of Claimant's and the class members' work hours in accordance with the law.

COUNT I
VIOLATION OF 29 U.S.C. §207 OVERTIME COMPENSATION

38. Claimant realleges and reavers paragraphs 1 through 37 of the Complaint as if fully set forth herein.

39. From at least January, 2012, and continuing to date, Claimant worked in excess of the forty (40) hours per week for which Claimant was not compensated at the statutory rate of one and one-half times Claimant's regular rate of pay.

40. Claimant was, and is entitled to be paid at the statutory rate of one and one-half times Claimant's regular rate of pay for those hours worked in excess of forty (40) hours.

41. At all times material hereto, Respondents failed, and continue to fail, to maintain proper time records as mandated by the FLSA.

42. To date, Respondents continue to fail their "Anti-Money Laundering Analysts" employees their FLSA mandated overtime pay, despite their recognition that their position is non-exempt and entitled to same.

43. Respondents' actions in this regard were/are willful and/or showed/show reckless disregard for the provisions of the FLSA as evidenced by its continued failure to compensate Claimant at the statutory rate of one and one-half times Claimant's regular rate of pay for the hours worked in excess of forty (40) hours per weeks when

they knew, or should have known, such was, and is due.

44. Respondents have failed to properly disclose or apprise Claimant of Claimant's rights under the FLSA.

45. Due to the intentional, willful and unlawful acts of Respondents, Claimant suffered and continue to suffer damages and lost compensation for time worked over forty (40) hours per week, plus liquidated damages.

46. Claimant is entitled to an award of reasonable attorney's fees and costs pursuant to 29 U.S.C. §216(b).

PRAYER FOR RELIEF

Wherefore, Claimant on behalf of herself and all other similarly situated Collective Action Members, respectfully requests that this Tribunal grant the following relief:

- a. Designation of this action as a collective action on behalf of the Collective Action Members and prompt issuance of notice pursuant to 29 U.S.C. § 216(b) to all similarly situated members of an FLSA Opt-In Class, appraising them of the pendency of this action, permitting them to assert timely FLSA claims in this action by filing individual Consents to Sue pursuant to 29 U.S.C. §216(b) and appointing Claimant and her counsel to represent the Collective Action members;
- b. A declaratory judgment that the practices complained of herein are unlawful under the FLSA;
- c. An injunction against the Respondents and its officers, agents, successors, employees, representatives and any and all persons in concert with it, as provided by law, from engaging in each of the unlawful practices, policies

and patterns set forth herein:

- d. An award of unpaid overtime compensation due under the FLSA;
- e. An award of liquidated damages as a result of the Respondents' willful failure to pay wages and overtime compensation pursuant to 29 U.S.C § 216;
- f. An award of prejudgment and post judgment interest;
- g. An award of costs and expenses of this action together with reasonable attorneys' and expert fees; and
- h. Such other and further relief as this Tribunal deems just and proper.

Dated: March 26, 2014.

Respectfully submitted,

 C. Ryan Morgan, Esq.
 Florida Bar No. 0015527
 Carlos V. Leach
 Florida Bar Number 540021
 Morgan & Morgan, P.A.
 20 N. Orange Ave., 16th Floor
 P.O. Box 4979
 Orlando, FL 32802-4979
 Telephone: (407) 420-1414
 Facsimile: (407) 425-8171
 Email: RMorgan@forthepeople.com
 Email: CLeach@forthepeople.com

Andrew R. Frisch, Esq.
 Florida Bar No. 27777
 Morgan & Morgan, P.A.
 600 N. Pine Island Road, Suite 400
 Plantation, FL 33324
 Telephone: (954) 318-0268
 Facsimile: (954) 333-3515
 E-mail: AFrisch@forthepeople.com

AAA ARBITRATION PANEL

DARLENE ECHEVARRIA, on her own behalf and
others similarly situated,

Claimants,

Case No.:

v.

CITIGROUP, INC., a Foreign Profit Corporation
and CITIBANK, N.A.,

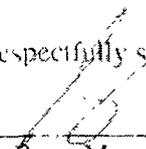
Respondents.

NOTICE OF FILING NOTICE OF CONSENT TO JOIN

Claimant, DARLENE ECHEVARRIA, on her own behalf and others similarly situated,
gives notice of filing the attached Notices of Consent to Join as to DARLENE ECHEVARRIA,
DANIELLE LUCAS, YADIRA CALDERON, KELLIIGH S. WEEKS and ANDREA SMITH.

Dated this 28th day of March, 2014.

Respectfully submitted,


C. Ryan Morgan, Esq.
Florida Bar No. 0015527
Carlos V. Leach
Florida Bar Number 540021
Morgan & Morgan, P.A.
20 N. Orange Ave., 16th Floor
P.O. Box 4979
Orlando, FL 32802-4979
Telephone: (407) 420-1414
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600 N. Pine Island Road, Suite 400
Plantation, FL 33324
Telephone: (954) 318-0268
Facsimile: (954) 333-3515
E-mail: Af-risch@forthepeople.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the above and foregoing Notice of Filing Notices of Consent to Join of Claimants, has been served along with the Arbitration Submission this 28th day of March, 2014.



C. Ryan Morgan, Esq.

AAA Arbitration Panel

CASE NO.:

Darlene Echevarria individually and
on behalf of other similarly situated individuals,

Plaintiff(s),

Citigroup, Inc., et al

Defendant(s).

**CONSENT TO JOIN COLLECTIVE ACTION AND BE REPRESENTED BY
MORGAN AND MORGAN P.A.**

- I, Darlene Echevarria, consent to join the above styled lawsuit seeking damages for unpaid wages under the FLSA;
- I am similarly situated to the named Plaintiff in this matter because I performed similar duties for the Defendant(s) and was paid in the same regard as the named Plaintiff;
- I authorize the named Plaintiff to file and prosecute the above referenced matter in my name and on my behalf and designate the named Plaintiff to make decisions on my behalf concerning the litigation, including negotiating a resolution of my claims;
- I agree to be represented by Morgan and Morgan P.A., counsel for the named Plaintiff; and
- In the event this action gets conditionally certified and then decertified, I authorize Plaintiff's counsel to reuse this consent form to re-file my claims in a separate or related action against Defendant(s).

Date: 1/27/14 Signature: Darlene Echevarria

Address: c/o my counsel
Morgan and Morgan P.A.
600 N. Pine Island Road
Suite 400
Plantation, Florida 33314
(866) 344-2493

AAA Arbitration Panel

Danene Echevarria

Individually, and on behalf of others similarly situated,

Plaintiff.

Cit. Grove, Inc. et al

Defendants.

CONSENT TO JOIN COLLECTIVE ACTION AND BE REPRESENTED BY MORGAN & MORGAN, P.A.

- I, Danielle Lucas consent to join the above styled lawsuit seeking damages for unpaid wages under the FLSA;
- I am similarly situated to the named Plaintiff in this matter because I performed similar duties for the Defendant and was paid in the same regard as the named Plaintiff;
- I authorized the named Plaintiff to file and prosecute the above referenced matter in my name, and on my behalf, and designate the named Plaintiff to make decisions on my behalf concerning the litigation, including negotiating a resolution of my claims;
- I agree to be represented by Morgan & Morgan, P.A.'s counsel for the named Plaintiff;
- In the event this action gets conditionally certified and then decertified, I authorize Plaintiff's counsel to reuse this Consent Form to re-file my claims in a separate or related action against Defendant.

Date: 2/13/14

Signature: [Handwritten Signature]

Address: c/o my Counsel- Morgan & Morgan P.A.
600 North Pine Island Road, Suite 400
Plantation, FL 33324

AAA Arbitration Panel

Darlene Echevarria,
on her own behalf and others
similarly situated,
Claimants

NOTICE OF CONSENT TO JOIN

v.
Citigroup, Inc., a Foreign Profit
Corp., et al

Pursuant to 29 U.S.C. § 216(b), I, Darlene Echevarria, consent to

become a party plaintiff in this action.

2/10/14
DATE

[Signature]
CLIENT SIGNATURE

AAA Arbitration Panel

Earlene Echevarria individually and
on behalf of other similarly situated individuals.

Plaintiff(s).

v. Citigroup, Inc., et al

Defendant(s).

CONSENT TO JOIN COLLECTIVE ACTION AND REPRESENTATION BY
MORGAN AND MORGAN P.A.

- I, Earlene Echevarria, consent to join the above styled lawsuit seeking damages for unpaid wages under the FLSA;
- I am similarly situated to the named Plaintiff in this matter because I performed similar duties for the Defendant(s) and was paid in the same regard as the named Plaintiff;
- I authorize the named Plaintiff to file and prosecute the above referenced matter in my name and on my behalf and designate the named Plaintiff to make decisions on my behalf concerning the litigation, including negotiating a resolution of my claim;
- I agree to be represented by Morgan and Morgan P.A., counsel for the named Plaintiff and
- In the event this action gets conditionally certified or is not certified, I authorize Plaintiff's counsel to reuse this consent for me to re-file my claims in a separate or related action against Defendant(s).

Date: 1/24/2014

Signature: [Handwritten Signature]

Address: c/o my counsel:
Morgan and Morgan P.A.
600 N. Pine Island Road
Suite 400
Plantation, Florida 33314
(866) 344-2493

AAA Arbitration Panel

Darlene Echevarria

Individually, and on behalf of
others similarly situated,

Plaintiff,

Citi Group, Inc, et al

Defendants.

CONSENT TO JOIN COLLECTIVE ACTION AND BE REPRESENTED
BY MORGAN & MORGAN, P.A.

- Andrea Smith consent to join the above styled lawsuit, seeking damages for unpaid wages under the FLSA;
- I am similarly situated to the named Plaintiff in this matter because I performed similar duties for the Defendant and was paid in the same regard as the named Plaintiff;
- I authorized the named Plaintiff to file and prosecute the above referenced matter in my name, and on my behalf, and designate the named Plaintiff to make decisions on my behalf concerning the litigation, including negotiating a resolution of my claims;
- I agree to be represented by Morgan & Morgan, P.A.^{ll}, counsel for the named Plaintiff;
- In the event this action gets conditionally certified and then decertified, I authorize Plaintiff's counsel to reuse this Consent Form to refile my claims in a separate or related action against Defendant.

Date: 10/30/13

Signature: x [Signature]

Address: c/o my Counsel- Morgan & Morgan, P.A.^{ll}
600 North Pine Island Road, Suite 400
Plantation, FL 33324

JOINT EXHIBIT 6



AMERICAN
ARBITRATION
ASSOCIATION®

INTERNATIONAL CENTRE
FOR DISPUTE RESOLUTION®

1101 Laurel Oak Road, Suite 100
Voorhees, NJ 08043
Telephone:(856)435-6401

April 14, 2014

VIA E-MAIL

C. Ryan Morgan
Morgan & Morgan, PA
20 North Orange Avenue, Suite 1600
Orlando, FL 32801

VIA USPS

Citibank, N.A.
399 Park Avenue
New York, NY 10043

Case Number: 01-14-0000-0324

Darlene Echevarria, on her own behalf and others similarly situated
-vs-
Citibank, N.A.

Dear Representatives:

The claimant has filed with us a Demand for Arbitration for administration of a dispute arising out of a contract between the above-referenced parties. This contract has not been provided. We will need a full copy of this agreement before we can proceed with this case.

The Association requests that either Claimant or Respondent provide a contract clause providing for administration by the American Arbitration Association. If there are additional documents that discuss arbitration procedures to be followed, such as an employee handbook, please also provide a copy of those documents.

Additionally, if there is a court order or joint stipulation in place compelling the matter to arbitration, please include a copy of such order or joint stipulation.

Please provide the above requested information on or before April 28, 2014.

The Association reviews every employment case that is filed with us to determine if our Employment Due Process Protocol applies to the case. The Association will notify the parties of the outcome of our review. Please feel free to contact me if you have any questions.

Sincerely,

/s/ Kristen Cottone

Kristen Cottone
Case Filing Coordinator
Direct Dial: (856)679-4615
Email: CottoneK@adr.org
Fax:(877)304-8457

Supervisor Information: Tara Parvey, 856-679-4602, parveyt@adr.org

JOINT EXHIBIT 7

Representing Management Exclusively in Workplace Law and Related Litigation

jackson lewis
Attorneys at Law

Jackson Lewis P.C.
390 North Orange Avenue
Suite 1285
Orlando, Florida 32801
Tel 407 246-8440
Fax 407 246-8441
www.jacksonlewis.com

ALBANY, NY	GRAND RAPIDS, MI	MORRISTOWN, NJ	RALEIGH-DURHAM, NC
ALBUQUERQUE, NM	GREENVILLE, SC	NEW ORLEANS, LA	RAPID CITY, SD
ATLANTA, GA	HARTFORD, CT	NEW YORK, NY	RICHMOND, VA
AUSTIN, TX	HOUSTON, TX	NORFOLK, VA	SACRAMENTO, CA
BALTIMORE, MD	INDIANAPOLIS, IN	OMAHA, NE	SAINT LOUIS, MO
BIRMINGHAM, AL	JACKSONVILLE, FL	ORANGE COUNTY, CA	SAN DIEGO, CA
BOSTON, MA	LAS VEGAS, NV	ORLANDO, FL	SAN FRANCISCO, CA
CHICAGO, IL	LONG ISLAND, NY	PHILADELPHIA, PA	SAN JUAN, PR
CINCINNATI, OH	LOS ANGELES, CA	PHOENIX, AZ	SEATTLE, WA
CLEVELAND, OH	MEMPHIS, TN	PITTSBURGH, PA	STAMFORD, CT
DALLAS, TX	MIAMI, FL	PORTLAND, OR	TAMPA, FL
DENVER, CO	MILWAUKEE, WI	PORTSMOUTH, NH	WASHINGTON, DC REGION
DETROIT, MI	MINNEAPOLIS, MN	PROVIDENCE, RI	WHITE PLAINS, NY

MY DIRECT DIAL IS: 407-246-8404

MY EMAIL ADDRESS IS: SBERTN@JACKSONLEWIS.COM

April 15, 2014

VIA ELECTRONIC MAIL

Kristen Cottone
Case Filing Coordinator
American Arbitration Association
1101 Laurel Oak Road
Suite 100
Voorhees, NJ 08043

RE: Darlene Echevarria v. Citigroup, Inc., et al.
Case No.: 01-14-0000-0324

Dear Ms. Cottone:

Our office has been retained to represent the Respondents, Citigroup, Inc. and Citibank, N.A., in connection with the above-referenced matter. Please accept this correspondence as our notice of appearance and direct all future correspondence to our attention.

On or about March 28, 2014, Claimant, Darlene Echevarria, filed the instant complaint alleging violations of the Fair Labor Standards Act ("FLSA"). Claimant captioned the complaint as a nationwide collective action. However, the Employment Arbitration Policy at issue specifically states that, "neither Citi nor any employee may submit a class action, collective action, or other representative action for resolution under this Policy." By entering into the Employment Arbitration Policy, Claimant explicitly waived her right to bring a collective, class or any other form of representative action in arbitration or otherwise. A copy of the applicable Employment Arbitration Policy is attached.

The AAA's policy on class arbitrations expressly provides that it does not accept demands for class arbitration where the underlying agreement prohibits class claims unless a court order directs otherwise. Here, the parties contractually agreed to prohibit the arbitration of class or collective claims. Second, there is no court order directing the AAA to administer this matter as a class or collective action.

For these reasons, Respondents respectfully request that the AAA reject Claimant's demand for a nationwide collective arbitration and only accept her individual claim.

If you have any questions, please do not hesitate to contact us.

Very truly yours,

JACKSON LEWIS PC



Stephanie L. Adler-Paindiris
Nicole A. Sbert

SLA-P/NAS/dl

Enclosure

cc: C. Ryan Morgan, Esq. (via e-mail)



Appendix A: The Employment Arbitration Policy

Statement of Intent

Citi values each of its employees and looks forward to good relations with, and among, all of its employees. Occasionally, however, disagreements may arise between an individual employee and Citi or between employees in a context that involves Citi.¹

Citi believes that the resolution of such disagreements will be best accomplished by internal dispute resolution and, where that fails, by external arbitration. For these reasons, Citi has adopted this Employment Arbitration Policy ("Policy"). Arbitration shall be conducted either under the auspices of the Financial Industry Regulatory Authority, Inc. ("FINRA") or the American Arbitration Association ("AAA") as follows:

- Before the arbitration facilities of FINRA if: (1) you're a registered person or hold a securities license(s) with a self-regulatory organization and are employed by Citigroup Global Markets Inc. ("CGMI") or (2) you're a registered person or hold a securities license(s) with a self-regulatory organization, you're employed by CGMI (the "Secondary Employer") and another Citi affiliate (the "Primary Employer") (which together make you a "Dual Employee"), and your dispute involves the Secondary Employer or activities related to your securities license(s). In such Dual Employee instances, any other related disputes you may have against your Primary Employer must be heard before the FINRA as well.
- Before the AAA where you don't meet the criteria above for FINRA arbitration, FINRA declines the use of its facilities, or you're a Dual Employee and your dispute doesn't involve CGMI or activities related to your securities license(s).

Arbitrations shall be conducted in accordance with the respective arbitration rules of the FINRA or AAA, as applicable, then in effect and as supplemented by this Policy. Throughout this Policy there will be references to AAA or FINRA, but only one set of rules applies to any particular proceeding.

Employment with Citi is a voluntary relationship for no definite period of time, and nothing in this Policy or any other Citi document constitutes an express or implied contract of employment for any definite period of time. This Policy doesn't constitute, nor should it be construed to constitute, a waiver by Citi of its rights under the "employment-at-will" doctrine nor does it afford an employee or former employee any rights or remedies not otherwise available under applicable law.

Scope of Policy

The Policy makes arbitration the required and exclusive forum for the resolution of all disputes arising out of or in any way related to employment based on legally protected rights (i.e., statutory, regulatory, contractual, or common-law rights) that may arise between an employee or former employee and Citi or its current and former parents, subsidiaries, and affiliates and its and their current and former officers, directors, employees, and agents (and that aren't resolved by the internal Dispute Resolution Procedure) including, without limitation, claims, demands, or actions under Title VII of the Civil Rights Act of 1964, the Civil Rights Acts of 1866 and 1991, the Age Discrimination in Employment Act of 1967, the Older Workers Benefit Protection Act of 1990, the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, the Family and Medical Leave Act of 1993, the Fair Labor Standards Act of 1938, the Equal Pay Act of 1963, the Employee Retirement Income Security Act of 1974, the Worker Adjustment and Retraining

¹ Citi refers to, individually and collectively, Citigroup Inc. and each of its subsidiaries and their affiliates.

JOINT EXHIBIT 8



AMERICAN
ARBITRATION
ASSOCIATION

INTERNATIONAL CENTRE
FOR DISPUTE RESOLUTION

1101 Laurel Oak Road, Suite 100
Voorhees, NJ 08043
Telephone:(856)435-6401

April 28, 2014

VIA E-MAIL

C. Ryan Morgan
Morgan & Morgan, PA
20 North Orange Avenue, Suite 1600
Orlando, FL 32801

Andrew Frisch
Morgan & Morgan, PA
600 North Pine Island, Suite 400
Plantation, FL 33324

Carlos Leach
Morgan & Morgan, PA
20 North Orange Avenue, Suite 1600
Orlando, FL 32801

Case Number: 01-14-0000-0324

Darfene Echevarria, on her own behalf and others similarly situated
-vs-
Citibank, N.A.

Dear Counsel:

The AAA is in receipt of a copy of the contract between the parties. In accordance with the AAA's policy on class arbitrations, we cannot administer this matter as a class action since the agreement between the parties prohibits class claims. The parties may proceed with this matter on an individual basis.

If claimant is in agreement to proceed with this matter on an individual basis, please notify the AAA and the opposing party by May 7, 2014. Absent receipt of correspondence by that date the AAA will close its file on this matter.

Please contact me if you have any questions.

Sincerely,

/s/ Kristen Cottone

Kristen Cottone
Case Filing Coordinator
Direct Dial: (856)679-4615
Email: CottoneK@adr.org
Fax:(877)304-8457

Supervisor Information: Tara Parvey, 856-679-4602, parveyt@adr.org

cc: Stephanie L. Adler-Paindiris (e-mail)
Nicole A. Sbert (e-mail)

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

CITIGROUP TECHNOLOGY, INC. AND
CITICORP BANKING CORPORATION (PARENT),
A SUBSIDIARY OF CITIGROUP, INC.

and

CASE 12-CA-130742

ANDREA SMITH, An Individual

**ORDER ACCEPTING STIPULATED RECORD; WAIVER OF HEARING;
ASSIGNMENT OF JUDGE AND ESTABLISHING BRIEFING DATE**

On October 8, 2014, the Parties filed a Joint Motion and Stipulated Record seeking approval of the Motion and Stipulated Record and set a time for filing briefs in this matter. The Parties stipulate and agree all documents attached to the Motion, as exhibits, are authentic and relevant and the stipulated facts and exhibits are not in dispute, and, represent a full and complete record necessary for the finder of fact to issue a decision. The Parties stipulate no oral testimony is necessary or desired and the Parties expressly waive a hearing before an administrative law judge.

After reviewing the Parties' submissions, I accept the Stipulated Record and the Parties' waiver of a hearing in this matter. I hereby assign the matter to Judge Donna Nutter Dawson for preparation of a decision in this matter on the Stipulated Record, with attachments, and direct that she serve on the Parties her decision in this matter. I further order that the Parties' have until close of business November 10, 2014, to file briefs in this matter.¹

SO ORDERED.

Dated at Atlanta, Georgia this 9TH day of October, 2014.



William N. Cates
Associate Chief Judge

¹ No extensions of time for the filing of brief will be granted.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Order Accepting Stipulated Record; Waiver of Hearing; Assignment of Judge and Establishing Briefing Date was served via facsimile upon each of the following parties:

Thomas W. Brudney, Esq.
National Labor Relations Board
201 E. Kennedy Blvd., Ste. 530
Tampa, FL 33602-5824
FAX: 813-228-2874

Edward M. Cherof, Esq.
Jonathan J. Spitz, Esq.
Jackson Lewis, LLP
1155 Peachtree St., NE, Ste. 1000
Atlanta, GA 30309
FAX: 404-525-1173

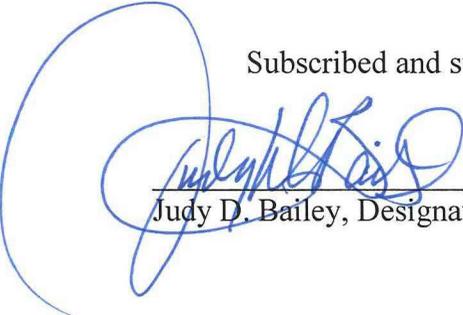
Stephanie Adler-Paindiris, Esq.
Jackson Lewis, LLP
390 N. Orange Ave., Ste. 1285
Orlando, FL 32801-1674
FAX: 407-246-8441

Andrew Frisch, Esq.
Morgan & Morgan
600 N. Pine Island Rd., Ste. 400
Plantation, FL 33324-1311
FAX: 954-333-3515

I certify that a copy of this order was served upon the assigned judge as follows:

Judge Donna Nutter Dawson
Administrative Law Judge
Division of Judges
401 W Peachtree St., Ste. 1708
Atlanta, GA 30308-3519
FAX: 404-331-2061

Subscribed and sworn to before me this 9TH day of October, 2014.



Judy D. Bailey, Designated Agent



Willene F. Heflin

DATED: 10-9-14 NO COPIES INCLUDING COVER: 3 FAXED 10:56

F A X

NLRB, Division of Judges

401 W Peachtree Street, Suite 1708
 Atlanta, GA 30308-3519
 404-331-6652 (office) 404-331-2061 (fax)

TO

FAX #

Thomas W. Brudney, Esq.	813-228-2874
Edward M. Cherof, Esq.	404-525-1173
Stephanie Adler-Paindiris, Esq.	407-246-8441
Andrew Frisch, Esq.	954-333-3515

FROM: William N. Cates, Associate Chief Judge

SUBJECT: Citigroup Technology, Inc. and Citicorp Banking Corporation (Parent),
 a Subsidiary of Citigroup, Inc.
Case # 12-CA-130742

This is in response to your request.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CITIGROUP TECHNOLOGY, INC. and
CITICORP BANKING CORPORATION
(PARENT), A SUBSIDIARY OF CITIGROUP,
INC.

and

ANDREA SMITH, an Individual,

Case 12-CA-130742

**RESPONDENT CITIGROUP TECHNOLOGY, INC. AND CITICORP BANKING
CORP. (PARENT), A SUBSIDIARY OF CITIGROUP, INC.'S
BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

Edward M. Cherof
Jonathan J. Spitz
Stephanie Adler-Paindiris
JACKSON LEWIS P.C.
1155 Peachtree Street, Suite 1000
Atlanta, GA 30309
Telephone: (404) 525-8200

Attorneys for Respondent

I. INTRODUCTION

The facts of this case are not in dispute.¹ Andrea Smith (“Charging Party”) is a former employee of Respondent Citigroup Technology, Inc. and Citicorp Banking Corp. (Parent), a subsidiary of Citigroup, Inc. (“Respondent”). As a condition of hire, Charging Party signed Respondent’s Employment Arbitration Policy (“Policy”). The Policy includes specific language waiving Charging Party’s right to initiate or participate in class or collective arbitration actions. By the terms of the policy, such claims may, however, be pursued individually. Despite entering into this agreement, Charging Party, among others, submitted a demand for a nationwide collective action wage and hour arbitration with the American Arbitration Association (“AAA”). In response to that demand for arbitration, Respondent submitted a letter to the AAA, enclosing the Policy, and requesting that the AAA reject the arbitration demand because it was submitted on a class-wide basis. The AAA subsequently advised the parties it would not proceed with the matter as a class action because of the Policy’s prohibition on class actions. Charging Party thereafter filed the present unfair labor practice charge alleging Respondent’s efforts to enforce the arbitration agreement violated the National Labor Relations Act (“NLRA” or “Act”), 29 U.S.C. § 157, *et seq.*

This is not a typical unfair labor practice case that can be decided in a vacuum of National Labor Relations Board (“Board” or “NLRB”) precedent. Rather, it is a proceeding that brings into question the jurisdiction of the Board to act in a matter Congress has chosen to regulate through another statute, namely, the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1, *et seq.* Four recent decisions of the United States Supreme Court have established the broad preemptive sweep of the FAA. These decisions by the High Court mandate that arbitration

¹ The facts in this case can be found in the Joint Motion and Stipulated Record submitted on October 7, 2014.

agreements be enforced according to their terms, and they reject the application of other state and federal statutes to arbitration agreements in the absence of an express “congressional command” to override the FAA.

The NLRA does not override the FAA. The Supreme Court, Second, Fifth, Eighth, Ninth and Eleventh Circuits have explicitly or implicitly rejected the Board’s position that class action waivers violate the Act. Indeed, the Fifth Circuit denied enforcement of the Board’s decision in *D.R. Horton, Inc. and Michael Cuda*, 357 NLRB No. 184 (2012). On October 28, 2014, the Board issued *Murphy Oil*, 361 NLRB No. 72 (2014), in which a bare majority with two dissents reaffirmed *D.R. Horton*. Like *D.R. Horton*, the rationale in *Murphy Oil* is flawed and is inconsistent with the mandate of the FAA. It should not be relied upon in this case.

The Board does not have jurisdiction to find Respondent’s Policy, which includes a class action waiver, violates the Act. As noted by Member Miscimarra in his *Murphy Oil* dissent, “nothing reasonably supports a conclusion that Congress, in the NLRA, vested the Board with authority to dictate or guarantee how other courts or *other* agencies would adjudicate non-NLRA legal claims, whether as ‘class actions,’ ‘collective actions,’ the ‘joinder of individual claims’ or otherwise.” *Id.* at 23. Rather, Respondent respectfully urges the Administrative Law Judge (“ALJ”) to follow the recent decisions of ALJ Keltner Locke in *Haynes Building Services*, 31-CA-093290, 2014 NLRB LEXIS 94 (Feb. 7, 2014) and ALJ Bruce D. Rosenstein in *Chesapeake Energy Corporation*, No. 14-CA-100530, 2013 NLRB LEXIS 693 (Nov. 8, 2013). ALJs Locke and Rosenstein followed Supreme Court precedent by recommending the dismissal of the Section 8(a)(1) allegations in the Acting General Counsel’s complaint in those cases, which were based on the Board’s decision in *D.R. Horton*.

Moreover, the General Counsel cannot establish Charging Party was engaged in protected concerted activity when she undertook the individual action of making a demand for nationwide class arbitration with the AAA. Finally, Respondent contends the charge in this matter is untimely, as it was clearly filed outside the six-month statute of limitations established by Section 10(b) of the Act.

Accordingly, for the reasons set forth herein, Respondent respectfully requests that the General Counsel's Amended Complaint be dismissed in its entirety, with prejudice.

II. THE VALIDITY AND ENFORCEABILITY OF RESPONDENT'S POLICY ARE BEYOND THE JURISDICTION OF THE BOARD AND MUST BE DETERMINED PURSUANT TO THE FAA

A. The Validity of Respondent's Policy and the Class Action Waiver Contained in the Policy Must Be Determined Under the FAA and Not Under *D.R. Horton* or the NLRA

In *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), which was issued after the Board's decision in *D.R. Horton*, the Supreme Court held that a class action waiver must be enforced according to its terms in the absence of a "contrary congressional command" in the federal statute at issue. *Id.* at 2309; *see also CompuCredit*, 132 S. Ct. 665, 669 (2012) (also issued after the Board's decision in *D.R. Horton*). The Supreme Court has further held that a class action waiver is not invalidated by the so-called effective vindication doctrine, which originated as dictum in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). *American Express*, 133 S. Ct. at 2310.

Under *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), *CompuCredit*, *Marmet Health Care Ctr. v. Brown*, 133 S. Ct. 1201 (2012), and *American Express*, the validity of Respondent's Policy and class action waiver contained therein must be determined under the FAA, not under *D.R. Horton* or the NLRA. Rather, in construing the broad reach and preemptive effective of the FAA the Supreme Court has held:

- The FAA reflects an “emphatic policy in favor” of arbitration. Enacted in 1925, the FAA places arbitration agreements on the same footing as other contracts and declares that such agreements “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law for the revocation of any contract.” 9 U.S.C. § 2. The FAA “reflects an emphatic federal policy in favor” of arbitration. *KPMG, LLP v. Cocchi*, 132 S. Ct. 23, 25 (2011)(internal citations omitted). As the Supreme Court has emphasized, arbitration agreements are to be read liberally to effectuate their purpose, *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 23, n. 27 (1983), and are to be “rigorously enforced,” *Perry v. Thomas*, 482 U.S. 483, 490 (1987)(internal citations omitted).
- Arbitration agreements, including those containing class action waivers, are enforceable in accordance with their terms. “The FAA reflects the fundamental principle that arbitration is a matter of contract.” *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 67 (2010)(internal citations omitted). As such, courts are primarily charged with the responsibility to enforce arbitration agreements in accordance with their terms so as to give effect to the bargain of the parties. *See, e.g., CompuCredit*, 132 S. Ct. at 669 (The FAA “requires courts to enforce agreements to arbitrate according to their terms”); *Marmet*, 132 S. Ct. at 1203 (internal citations omitted) (The FAA “requires courts to enforce the bargain of the parties to arbitrate”). As arbitration is a matter of contract, the parties to an arbitration agreement can agree to waive class arbitration. *Stolt-Nielsen S. A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 683 (2010) (The parties to an arbitration “may agree to limit the issues they choose to arbitrate,” “may agree on [the] rules

under which any arbitration will proceed,” and “may specify *with whom* they choose to arbitrate their disputes”)(internal citations omitted). Indeed, as the Supreme Court recently observed when holding that a state law requiring parties to submit to class arbitration was preempted by the FAA: a state law requiring parties, in contravention of their arbitration agreement, to “shift from bilateral arbitration to class-action arbitration” results in a “fundamental” change to their bargain and is “inconsistent with the FAA.” *Concepcion*, 131 S. Ct. at 1748-1751 (internal citations omitted).

- Arbitration agreements involving federal statutory rights, including those containing class action waivers, are enforceable “unless Congress itself has evinced an intention,” when enacting the statute, to “override” the FAA mandate by a clear “contrary congressional command.” *Mitsubishi*, 473 U.S. at 627 (internal citations omitted); *American Express*, 133 S. Ct. at 2309; The Supreme Court has consistently held that parties may agree to arbitrate claims arising under federal statutes. *See, e.g., Mitsubishi, supra*, 473 U.S. at 627. As long as the arbitral forum affords the parties the opportunity to vindicate any statutory rights forming the basis of their claims, the parties will be held to their bargain to arbitrate. *CompuCredit*, 132 S. Ct. at 671 (“So long as the *guarantee* [of a federal statute’s civil liability provision]—*the guarantee of the legal power to impose liability*—is preserved,” the parties remain free to enter into an agreement requiring the arbitration of their statutory rights). However, if, when enacting a federal statute, “Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue,” then such statutory

rights cannot be subjected to arbitration and the FAA's mandate to enforce arbitration agreements according to their terms is thereby overridden by a contrary congressional command. *Mitsubishi*, 473 U.S. at 628; *American Express*, 133 S.Ct. at 2309. "If Congress did intend to limit or prohibit [the] waiver of a judicial forum for a particular claim, such an intent 'will be deducible from [the statute's] text or legislative history'" or "from an inherent conflict between arbitration and the statute's underlying purpose." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987), quoting *Mitsubishi*, 473 U.S. at 627, 632-637. However, any expression of congressional intent in this regard must be clear and unequivocal. *See, e.g., CompuCredit*, 132 S. Ct. at 673 (If a statute "is silent on whether claims under [it] can proceed in an arbitr[al] forum, the FAA requires the arbitration agreement to be enforced according to its terms").

- Employment arbitration agreements fall within the ambit of the FAA and are enforceable on the same terms as other arbitration agreements. The FAA encompasses employment arbitration agreements, *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 118 (2001), including those containing class action waivers. As the Supreme Court affirmed in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32-33 (1991), where it enforced an arbitration agreement involving a claim arising under the Age Discrimination in Employment Act, the FAA requires such a result even if there may be "unequal bargaining power between employers and employees" and even if "the arbitration could not go

forward as a class action.”² As to this latter point, the Supreme Court in *Gilmer* recognized that a class action, as set forth in the Federal Rules of Civil Procedure, is simply a procedural device which, as the Rules Enabling Act, 28 U.S.C. § 2072(b), makes clear, cannot “abridge, enlarge or modify any substantive right”—and can be, like the choice of a judicial forum, waived.

As these principles attest, the FAA recognizes the rights of parties, whether they are employers or employees, to enter into arbitration agreements, including the right to fashion the procedures under which an arbitration is to proceed. The FAA further mandates that arbitration agreements be enforced according to their terms unless there is a clear congressional command to the contrary. Indeed, there is nothing in the NLRA itself or its legislative history that would even suggest that Congress sought to “override” the FAA’s mandate and preclude an employee from waiving his or her procedural right to file a class action when agreeing to arbitrate employment-related claims.

Just as a union acting on behalf of its members can voluntarily agree to waive a judicial forum and to require its members to arbitrate their individual employment claims, there is no reason why Respondent’s employees cannot voluntarily do so as well on their own behalf. *14 Penn Plaza, LLC v. Pyett*, 556 U.S. 247, 258 (2009) (“Nothing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative”). To the contrary, in his dissent in *Murphy Oil*, member Miscimarra concludes:

Section 9(a) of the Act explicitly protects the right of every employee as an ‘individual’ to ‘present’ and to ‘adjust’ grievances ‘at any time.’” The Act’s

² The *Gilmer* court also recognized that “it should be remembered that arbitration agreements will not preclude the *EEOC* from bringing actions seeking class-wide and equitable relief.” *Id.* Similarly, in the present case, the Policy would not preclude the United States Department of Labor, or similar state agency, from seeking class-wide or equitable relief on behalf of Charging Party.

legislative history shows that Congress intended to preserve every individual employee's right to "adjust" the substance of any employment-related dispute with his or her employer. This guarantee clearly encompasses agreements as to *procedures* that will govern the adjustment of grievances, including agreements to waive class-type treatment, which does not even rise to the level of a substantive right. See *D. R. Horton, Inc. v. NLRB*, 737 F.3d at 362 ("The use of class action procedures . . . is not a substantive right.") (citations omitted); *Deposit Guaranty National 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."). This aspect of Section 9(a) is reinforced by Section 7 of the Act, which protects each employee's right to "*refrain* from" exercising the collective rights enumerated in Section 7. Thus, Section 9(a) and Section 7 make the same point: even if the Act created a substantive right to class-type adjudication of non-NLRA workplace disputes, employees have a protected right *not* to have their claims pursued on a classwide basis and, instead, to agree such claims will be resolved on an "individual" basis. And employers correspondingly do not commit an unfair labor practice by agreeing to such individual adjustments.

See 361 NLRB No. 72, at 30. (Emphasis in original).

B. Following Supreme Court Precedent, The Fifth Circuit Correctly Set Aside the Board's *D.R. Horton* Decision and Order

On December 3, 2013, the Fifth Circuit Court of Appeals granted the petition for review filed by Petitioner/Cross-Respondent D.R. Horton, Incorporated in the *D.R. Horton* case and ultimately set aside the Board's decision invalidating the company's arbitration agreement. *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013). The court held that "the Board's decision did not give proper weight to the [FAA]." *Id.* at 348. In a detailed opinion, the court examined the Board's *D.R. Horton* decision in light of applicable Supreme Court precedent and rejected all of the Board's arguments. First, the court ruled that the right to participate in a class or collective action is not a substantive right, but rather, is a "procedural device." *Id.* at 357. The court held that the Board could not rely on the FAA's "saving clause" to justify its invalidation of arbitration agreements, as the court explicitly stated that "[a] detailed analysis of *Concepcion* leads to the conclusion that the Board's rule does not fit within the FAA's saving clause." *Id.* at 359. The court also determined that the Board's prohibition of class action waivers disfavors

arbitration, as it ruled that “[w]hile the Board’s interpretation is facially neutral—requiring only that employees have access to collective procedures in an arbitral or judicial forum—the effect of this interpretation is to disfavor arbitration.” *Id.* at 360. Next, the court concluded that the NLRA does not contain a congressional command to override the FAA. Relying on *Gilmer*, the court stated: “When considering whether a contrary congressional command is present, courts must remember ‘that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.’” *Id.* (internal citations omitted). The court explicitly ruled that “there is no basis on which to find that the text of the NLRA supports a congressional command to override the FAA.” *Id.* Moreover, the court found that neither the legislative history of the NLRA, nor any policy consideration, would permit the NLRA to override the FAA. *Id.* at 361. The court also noted that it was of some importance that “the NLRA was enacted and reenacted prior to the advent in 1966 of modern class action practice.” *Id.* at 362 (internal citations omitted). Thus, the court reached the conclusion that “[t]he NLRA should not be understood to contain a congressional command overriding application of the FAA,” noting that “[e]very one of our sister circuits to consider the issue has either suggested or expressly stated that they would not defer to the NLRB’s rationale, and held arbitration agreements containing class action waivers enforceable.” *Id.*

One such “sister circuit” to later address this issue is the Eleventh Circuit – in which this case lies – which followed the Fifth Circuit’s *D.R. Horton* decision in *Ashley Walthour, et al. v. Chipio Windshield Repair, LLC, et al.*, 745 F.3d 1326, 1336 (11th Cir. 2014) *cert denied* 134 S. Ct. 2886 (June 30, 2014) (citing the Fifth Circuit’s decision with approval “that the National Labor Relations Act does not contain a contrary congressional command overriding the application of the FAA”). *See also Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir.

2013)(“Therefore, given the absence of any ‘contrary congressional command’ from the FLSA that a right to engage in class actions overrides the mandate of the FAA in favor of arbitration, we reject [appellant’s] invitation to follow the NLRB’s rationale in *D.R. Horton* and join our fellow circuits that have held that arbitration agreements containing class waivers are enforceable in claims brought under the FLSA”); *Richards v. Ernst & Young, LLP*, 734 F.3d 871, 873-874, n. 3 (9th Cir. 2013); and *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297-298, n.8 (2nd Cir. 2013).

C. Given Supreme Court Decisions Interpreting the FAA, and Appellate Court Decisions Rejecting *D.R. Horton*, There Are No Reasonable Grounds for Finding Merit in the General Counsel’s Amended Complaint

Given the Supreme Court’s recent decisions in *Concepcion*, *CompuCredit*, *Marmet* and *American Express*, it cannot reasonably be argued that *D.R. Horton* and *Murphy Oil* are supportable. This is especially so in light of *American Express*, which held that arbitration agreements with class action waivers are enforceable under the FAA notwithstanding any policy arguments to the contrary. *American Express*, 133 S.Ct. at 2337. Rather, only a “contrary congressional command” in a particular statute can override the FAA’s mandate that arbitration agreements be enforced according to their terms. *Id.* As the analysis set forth above demonstrates, no such “congressional command” exists in the NLRA.

Murphy Oil provides no support for the Board’s incorrect position. Indeed, the *Murphy Oil* panel ignores that the Board has no authority to interpret the FAA or the Norris LaGuardia Act, much less to make judgment calls as to which statutes prevail when there is an arguable conflict. Rather, this type of analysis is reserved for federal appellate courts, footnote 17 of the Board’s decision notwithstanding. (“The Board is not required to acquiesce in adverse decisions of the Federal Courts in subsequent proceedings not involving the same parties.”)

In light of the above and, in particular, *CompuCredit Corp.*, *D.R. Horton* is not viable. The two dissenting members in *Murphy Oil* cogently explain why. First, Member Miscimarra concisely explained:

Four considerations warrant a conclusion, in my view, that the Act does not prohibit or contemplate any particular treatment of “class” procedures and waivers relating to non-NLRA claims.

First, as indicated in part B below, nothing reasonably supports a conclusion that Congress, in the NLRA, vested the Board with authority to dictate or guarantee how *other* courts or *other* agencies would adjudicate non NLRA legal claims, whether as “class actions,” “collective actions,” the “joinder” of individual claims, or otherwise. Rather, Congress clearly contemplated that such procedural details would be adjudicated in accordance with procedures prescribed in non-NLRA statutes, supplemented by procedural rules authorized or adopted by Congress, State legislatures, and the courts and agencies charged with enforcing non-NLRA claims. Because the NLRA does not dictate or prescribe any particular procedures governing non-NLRA claim adjudications, I believe the Board lacks authority to conclude that “class” waivers constitute unlawful restraint, coercion, or interference in violation of Section 8(a)(1).

Second, Section 9(a) protects the right of employees and employers “at any time” to adjust “grievances” on an “individual” basis. Therefore, as indicated in part C below, I believe Section 9(a) protects the right of individual employees and their employer to enter into “class” waiver agreement and other agreements to adjust claims on an “individual” basis.

Third, as described in the separate dissenting opinion by Board Member Johnson, it is likewise clear that the Act does not prohibit “class” waivers in employment agreements providing for the arbitration of non-NLRA legal claims consistent with the Federal Arbitration Act (FAA). As to this issue, among others, I agree with Member Johnson’s dissenting opinion and the dozens of court cases that have refused to apply *D. R. Horton*, *supra*.

Fourth, as indicated in part D below, I believe the Act and its legislative history render inappropriate the remedies ordered by the Board here, especially the required payment of attorneys’ fees incurred by the Charging Party in opposing Respondent’s meritorious motion to dismiss, which the district court granted.

Murphy Oil, 361 NLRB No. 72, at p. 23 (internal footnotes omitted).

Member Johnson’s pointed dissent further explains why *D.R. Horton* is fatally flawed:

In today's decision, the Board punishes Murphy Oil for attempting to enforce an arbitration agreement according to its terms. Under the Federal Arbitration Act (FAA), that result would be bad enough. But, in reality, this case is about much more than that. It poses the unfortunate example of a Federal agency refusing to follow the clear instructions of our nation's Supreme Court on the interpretation of the statute entrusted to our charge, and compounding that error by rejecting the Supreme Court's clear instructions on how to interpret the Federal Arbitration Act, a statute where the Board possesses no special authority or expertise. An agency should tread carefully in areas outside its field of expertise, rather than circumvent Supreme Court decisions that control fundamental issues of law in those areas. An agency should also pay heed after a vast majority of courts express disagreement with the agency's attempted interpretation of such laws outside its expertise. But here, the Board majority has done neither. Instead, with this decision, the majority effectively ignores the opinions of nearly 40 Federal and State courts that, directly or indirectly, all recognize the flaws in the Board's use of a strained, tautological reading of the National Labor Relations Act in order to both override the Federal Arbitration Act and ignore the commands of other Federal statutes. Instead, the majority chooses to double down on a mistake that, by now, is blatantly apparent.

The majority's essential rationale for its choice boils down to: "Our law is *sui generis*." But the claim of "we're special" has never amounted to a reason to ignore either the Supreme Court or the general expertise of the judiciary in construing statutes, especially those outside the National Labor Relations Act. Accordingly, I dissent from the majority opinion.

Id. at p. 35.³

³ Indeed, by virtue of his dissent's point heading, Member Johnson echoed Member Miscimarra's sentiments and further stated:

"Section 7 Does Not Protect Mechanisms That Exist Under Other Statutes For Aggregating Workplace Litigation" *Id.* at p. 39

"Congress Has Already Determined The Claim Aggregation Procedures For Litigation Under Federal Statutes And In The Federal Courts, And The Board Cannot Ignore Their Limits Or Rewrite Them By Labeling Them 'Section 7 Rights'" *Id.* at p. 42.

"Section 8(a)(1) Does Not Prohibit all Limits on Section 7 Activity: it Would Permit the Extremely Tangential Limit on Such Activity, if a Limit at all, Posed by Mere Restrictions on a Particular Litigation Procedure, and it Would Permit Employees to Agree to Such Restrictions" *Id.* at p. 44-45.

"The Board Must Accommodate The Act To The FAA And Other Statutes, Instead Of Subordinating All Of Them To The Act." *Id.* at p. 49.

"None Of The Majority's Asserted Rationales Work To Salvage D.R. Horton" *Id.* at p. 52.

"A Class Action Waiver is not the "Waiver of Statutory Remedies or Rights" That Mitsubishi Motors Would Prohibit" *Id.*

Several ALJs have already recognized that *D.R. Horton* and its progeny cannot remain valid in light of appellate and Supreme Court decisions. For example, in *Haynes Building Services, LLP*, Case No. 31-CA-093290, 2014 NLRB LEXIS 94 (Feb. 7, 2014), decided after the Fifth Circuit's decision in *D.R. Horton*, ALJ Keltner W. Locke declined to follow *D.R. Horton*. Judge Locke explained:

The *D. R. Horton* decision issued on January 3, 2012. One week later, the Supreme Court issued its opinion in *CompuCredit Corp. v. Greenwood*, ___ U.S. ___, 132 S. Ct. 665, 181 L. Ed. 2d 586 (2012). That case focused on a potential clash between the FAA's strong pro-arbitration policy and some language in the Credit Repair Organization Act (CROA), which required certain companies to place a "disclosure statement" in contracts with their customers. One part of the disclosure statement informed customers "You have the right to sue a credit repair organization that violates the Credit Repair Organization Act." Another provision stated, "You have a right to sue a credit repair organization that violates the Credit Repair Organization Act." Still another stated that "Any waiver by any consumer of any protection provided by or any right of the consumer under this subchapter--(1) shall be treated as void; and (2) may not be enforced by any Federal or State court or any other person."

Based on this language, lower courts concluded that Congress did not intend the FAA's pro-arbitration policy to apply to disputes arising under the CROA. The Supreme Court disagreed, concluding that these provisions were insufficient to overcome an arbitration clause in the contract customers signed. The "right to sue" did not necessarily mean a right to bring an action in court but also could refer to a proceeding before an arbitrator.

The Court compared the CROA's requirements with more specific language in certain other statutes. It quoted provisions which were quite specific about the right to sue in District Court but still had been insufficient to defeat the FAA's general pro-arbitration policy. For example, the Court noted that a provision of the Racketeer Influenced and Corrupt Organizations Act stated that a person injured by certain violations "may sue therefor *in any appropriate United States district court.* . ." 18 U.S.C. § 1964(c) (italics added). Similarly, the Court cited a

"Section 10(a) is Neither an Independent nor Supplemental Basis to Locate a Congressional Command Vitiating a Class Waiver Arbitration Provision" *Id.* at p. 53.

"The Majority's Arguments do not Make the Norris-LaGuardia Act Relevant Here" *Id.* at p. 54.

"D. R. Horton is Unwise Policy and Should be Rejected on That Basis Alone" *Id.* at p. 56.

section of the Clayton Act which provided that an injured party “may sue therefor *in any district court of the United States.* . . .” 15 U.S.C. § 15(a) (*italics added*). Notwithstanding these quite specific references to suing in district court, the language was not strong enough to override a contractual agreement to arbitrate.

Although these statutes indeed created causes of action, and even though they referred to lawsuits in “district court,” that language did not guarantee litigation before a federal judge. Parties could still enter into a contract providing for submission of the dispute to an arbitrator, and such contractual language would be binding.

To render an agreement to arbitrate unenforceable, the Supreme Court required that the statutory language go beyond a reference to a lawsuit in court. Rather, the statute must manifest a “Congressional command” that the FAA would not apply. With only slight exaggeration, I gather that to convey such a “command,” a statute must speak very specifically, best ending with “that’s an order, mister,” in a raised voice.

The Supreme Court issued its *CompuCredit Corp.* opinion a week after the Board’s *D. R. Horton* decision, but *CompuCredit* was not the Court’s last word on the subject. Almost a year and a half later, the Court decided *American Express Co. v. Italian Colors Restaurant*, ___ U.S. ___, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013). For the reasons discussed below, I conclude that, as a result of the *American Express Co.* holding, the Board’s *D. R. Horton* rationale no longer remains viable.

In *American Express Co.*, the Supreme Court forcefully applied the principle, articulated in earlier decisions, that courts must “rigorously enforce” arbitration agreements according to their terms. It further stressed that courts remain obligated to enforce an arbitration agreement even if the dispute concerns the alleged violation of a federal statute.

The Court noted one narrow exception to the principle that an arbitration agreement must be enforced. That exception arises when the FAA’s arbitration mandate has been “overridden by a contrary congressional command.” *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. at 2309. The word “command” again suggests that Congress must express clearly and unmistakably its intent to override the FAA’s mandate. Leaving no doubt, the Court cited its previous *CompuCredit Corp.* decision.

As discussed above, the *CompuCredit Corp.* opinion pointed out that even a specific statutory authorization to bring suit in “district court” did not neutralize the parties’ agreement to submit a dispute to arbitration and courts remained obligated to enforce that arbitration agreement. Thus, even when the law itself referred to litigation in district court, that language did not rise to the level of a “congressional command” contradicting the FAA’s mandate.

The National Labor Relations Act does not include any language resembling a “congressional command” to lift the FAA’s arbitration mandate. Therefore, I must conclude that the strong government policy favoring arbitration applies here. That conclusion is consistent with the Supreme Court’s decision in an earlier case, *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991).

In *Gilmer*, the Supreme Court considered whether an arbitration agreement should be honored in a dispute arising under the federal Age Discrimination in Employment Act (ADEA). Taking into account that the FAA “manifests a liberal federal policy favoring arbitration” and that neither the text nor the legislative history of the ADEA precluded arbitration, the Court found that the agreement to arbitrate was binding.

Although the Equal Employment Opportunity Commission plays a significant role in the enforcement of the ADEA, the Court held that the mere involvement of an administrative agency in the enforcement scheme was not sufficient to preclude arbitration. The Court cautioned that “questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.” *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. at 26, citing *Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983).

In *Gilmer*, the Court also noted that “the ADEA is designed not only to address individual grievances, but also to further important social policies.” *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. at 27, citing *EEOC v. Wyoming*, 460 U.S. 226, 103 S. Ct. 1054, 75 L. Ed. 2d 18 (1983). However, the Court did not perceive any inconsistency between these policies and the FAA policy favoring arbitration. It appears especially relevant here that the Court, as noted above, held that “an administrative agency’s mere involvement in a statute’s enforcement is insufficient to preclude arbitration.” *Id.* at 21.

...

Further support for this position can be found in the November 8, 2013, decision by ALJ Bruce D. Rosenstein in *Chesapeake Energy Corporation*, which recommended dismissal of Section 8(a)(1) allegations that were based on the Board’s *D.R. Horton* decision. The respondents in that case maintained a dispute resolution policy which included an arbitration agreement with a class action waiver. ALJ Rosenstein relied on *American Express* and the other Supreme Court decisions interpreting the FAA when he issued the following ruling:

The Supreme Court noted in the *American Express* decision that no contrary congressional command required us to reject the waiver of class arbitration here and the Sherman and Clayton Acts make no mention of class actions. In fact, they were enacted decades before the advent of *Federal Rule of Civil Procedure* 23, which was “designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.” As it concerns the subject case, the principles expressed by the Supreme Court equally apply to the Board since the Act does not mention class actions, and was enacted long before the advent of *Rule 23*.

For all of the above reasons, and principally relying on the decision of the Supreme Court in *American Express* discussed above, I find in agreement with the Respondents that the Board’s position that class and collective action waivers in arbitration agreements violate *Section 8(a)(1)* of the Act cannot be sustained. Accordingly, I recommend that paragraph 4(a) of the complaint be dismissed.

Chesapeake Energy Corp., 2013 NLRB LEXIS 693 at *23-24.

While ALJs Locke and Rosenstein’s decisions are not the decisions of the Board (and while *Haynes Building Services* and *Chesapeake Energy Corporation* are currently pending before the Board on exceptions and cross-exceptions filed by the parties),⁴ these decision further demonstrate the FAA preempts the Board’s decisions in *D.R. Horton and Murphy Oil*. Moreover, as noted by the Fifth Circuit in its decision setting aside *D.R. Horton*, “no court decision prior to the Board’s ruling under review today had held that the Section 7 right to engage in ‘concerted activities for the purpose of . . . other mutual aid or protection’ prohibited

⁴ Despite the fact that the Fifth Circuit set aside the Board’s order in *D.R. Horton*, several ALJs have maintained that until the Board or Supreme Court overrule the case, they remain bound by the Board’s erroneous decision. The rationale behind this non-acquiescence is purportedly to foster a uniform national labor relations policy. See e.g. *Brinker Int’l Payroll Co. LP*, 2014 NLRB LEXIS 426, at *12 (June 4, 2014); *Labor Ready Southwest, Inc.*, 2014 NLRB LEXIS 307, at *6 (Apr. 29, 2014). This position, however, is untenable. First, as discussed *supra*, each Circuit Court which has addressed *D.R. Horton* has rejected its principles in their entirety. Notably, the Eleventh Circuit, where the instant case geographically lies, has reversed the Board in the past when it sought enforcement of an order based on a legal theory that had been repeatedly rejected by that Court. See *Enerhaul, Inc. v. NLRB*, 710 F.2d 748, 751 (11th Cir. 1983). Second, the Fifth Circuit’s decision in *D.R. Horton* took issue with the Board’s interpretation of both the FAA and Norris-LaGuardia Act, statutes beyond the Board’s authority. 737 F.3d at 362, at n. 10. Finally, it should be noted that even though the Board ultimately decided not to file a petition for writ of certiorari in connection with the Fifth Circuit’s order to set aside *D.R. Horton*, the Supreme Court has effectively gutted the underlying rationales of the Board’s *D.R. Horton* decision. As a result, to perpetuate a policy of non-acquiescence with respect to the Board’s *D.R. Horton* decision will only serve to exacerbate the confusion regarding this issue.

class action waivers in arbitration agreements.” *D.R. Horton v. NLRB*, 737 F.3d at 356 (internal citations omitted).

Ultimately, the text of the FAA, the Supreme Court’s decisions in *American Express* and *Concepcion*, and the five circuit courts that have all rejected the NLRB’s decision in *D.R. Horton* clearly demonstrate that Respondent’s Policy does not violate the Act. When all the recent Supreme Court decisions interlock, they create a space in which the *D. R. Horton* rationale has no oxygen.⁵

D. This Case Falls Within the “Voluntariness” Carve-Out in Footnote 28 of the *D.R. Horton* Decision

Respondent’s Seventh Affirmative Defense alleges:

The Complaint is barred because Charging Party, by accepting employment with Respondent after having been fully informed regarding Respondent’s arbitration agreement, voluntarily agreed to arbitrate her employment disputes with Respondent.

(GC Ex. 1(l) at p. 3)

Here, there is no dispute Respondent’s arbitration agreement was already in place when Charging Party applied for employment in February 2013. (Jt. Ex. 2, at pp. 4, 6; Jt. Ex. 3; and Jt. Ex. 4, at 2) There is also no dispute that at the time Charging Party received her offer of

⁵ There does not appear to be a substantive allegation in the Amended Complaint alleging that Respondent’s Policy could be interpreted to preclude employees from filing charges with the Board. Even if there were such an allegation, it would be meritless because Respondent’s Policy expressly states:

“The Policy doesn’t exclude the National Labor Relations Board from jurisdiction over disputes covered by the National Labor Relations Act....”

-and-

“This Policy doesn’t exclude the jurisdiction of the Equal Employment Opportunity commission (“EEOC”) and/or state and local human rights agencies to investigate alleged violations of the laws enforced by the EEOC and/or these agencies. An employee isn’t waiving any right to file a charge of discrimination with the EEOC and/or state or local human rights agency.

(Jt. Ex. 3 at p. 2).

employment, she was specifically informed that if she accepted employment with Respondent, she would be bound by the Policy. Charging Party's offer letter explicitly stated:

Any controversy or dispute relating to your employment with or separation from Citi will be resolved in accordance with Citi's Employment Arbitration Policy as set forth in the Principles of Employment which you will be required to sign as a condition of your Citi employment, the terms of which are incorporated herein. A copy of the Principles of Employment is attached.

I acknowledge that I have received and read or have had the opportunity to read this arbitration agreement. I understand that this arbitration agreement requires that disputes that involve the matters subject to the agreement be submitted to mediation or arbitration pursuant to the arbitration agreement rather than to a judge and jury in court.

(Jt. Ex. 2 at 4)

Charging Party's situation is unlike that of the charging party in *D.R. Horton* who was already an employee when the company implemented its arbitration program. Here, Charging Party made a *choice* to accept employment with Respondent having full knowledge she would be agreeing to settle any disputes with Respondent by individual, as opposed to classwide, arbitration.⁶ Clearly, any applicant has to make a number of choices at the time he or she applies for a job: a choice to accept or reject the position offered, the rate of pay, the hours, the vacation program, the benefits package, and so forth. A dispute resolution procedure with an arbitration agreement is just one more choice. The applicant does not have to accept the job if he or she does not want to be covered by the arbitration agreement.

⁶ Respondent acknowledges that, in *Murphy Oil*, the charging party signed the applicable arbitration agreement when she applied for employment. However, the Board in *Murphy Oil* did not analyze whether the charging party's choice to *voluntarily* accept employment per the terms of the arbitration agreement was violative of the Act.

E. The Acting General Counsel Cannot Establish Charging Party Was Engaged in “Protected Concerted Activity”

1. The Standards for Determining Protected Concerted Activity

Respondent’s Ninth Affirmative Defense alleges:

The Complaint is barred because Charging Party acted alone and for her own benefit in filing her civil action, and by her conduct did not engage or seek to engage in protected, concerted activity under the National Labor Relations Act.

(GC Ex. 1(l) at p. 3)

The basic principles defining “protected concerted activity” emerge from the Board’s decisions in *Meyers Industries, Inc. and Prill*, 268 NLRB 493 (1984) (“*Meyers I*”) and *Meyers Industries, Inc. and Prill*, 281 NLRB 882 (1986) (“*Meyers II*”), enfd. 835 F.2d 1481 (D.C. Cir. 1987) 835 F.2d 1481, cert. denied, 487 U.S. 1205 (1988). Thus, in *Meyers I*, the Board defined concerted activity under Section 7 of the Act as an activity that is “engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.” *Meyers I*, 268 NLRB at 497. This definition was refined in *Meyers II* to make clear that concerted activity occurs when “individual employees seek to initiate or to induce or to prepare for group action.” *Meyers II*, 281 NLRB at 887. Importantly, in *Meyers I*, the Board overturned the doctrine of “constructive concerted activity,” which had been articulated in the Board’s earlier decision in *Alleluia Cushion Co.*, 221 NLRB 999 (1975). This doctrine allowed concerted activity to be established by a presumption that other employees supported an individual employee’s complaint. Since the decisions in *Meyers I* and *Meyers II*, it has been clear that concerted activity cannot be presumed, and must be established by *evidence* of group activity, or an individual seeking to initiate or invoke group activity, or an individual raising a group, rather than an individual, complaint.

The application of these principles to class action litigation were carefully analyzed by then General Counsel Ronald Meisburg in Memorandum GC 10-06. While the Board in *D.R. Horton* rejected the “reasoning in GC Memo 10-06,” it did not purport to overrule the well-established principles defining “protected concerted activity” set forth in *Meyers I* and *Meyers II*, nor did it purport to overrule *Meyers I*'s rejection of the doctrine of “constructive concerted activity.” As pointed out by the former General Counsel:

. . . an individual's pursuing class action litigation for purely personal reasons is not protected by Section 7 merely because of the incidental involvement of other employees as a result of normal class action procedures. Similarly, an individual employee's agreement not to utilize class action procedures in pursuit of purely personal individual claims does not involve a waiver of any Section 7 right. To conclude otherwise would be a return to the concept of “constructive concerted activity” that the Board rejected in *Meyers Industries (Meyers I)*, 268 NLRB 493, 495-96 (1984), remanded 755 F.2d 941, 957 (D.C. Cir. 1985), reaffirmed *Meyers Industries (Meyers II)*, 281 NLRB 882, n.11 (1986), affd. 835 F.2d 1481 (D.C. Cir. 1987) (overruling the holding in *Alleluia Cushion Co.*, 221 NLRB 999, 1000 (1975) that a single employee's seeking to enforce statutory provisions “designed for the benefit of all employees” is concerted activity “in the absence of any evidence that fellow employees disavow such representation”).

D.R. Horton notwithstanding, it is clear the General Counsel in this case has the burden of establishing the twin factors necessary to prove protected concerted activity, that is (a) group activity, which (b) is engaged in for mutual aid or protection. The General Counsel cannot simply presume that because the Charging Party joined a putative class action, she was engaged in *protected concerted activity* within the meaning of *Meyers I* and *Meyers II*, and there is no record evidence that this was the case.

2. **There Is No Evidence Charging Party Engaged in Protected Concerted Activity by Filing a Putative Class Action**

As stated in *Meyers II*, “the question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence.” *Meyers II*, 281 NLRB at 886. Here, there is simply no evidence of concerted activity. Indeed, the mere fact that

Charging Party participated in a demand for a putative class action arbitration, which if certified would result in a class of present and former employees, does not result in a presumption of concerted activity. *See id.* at 887-889; *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304, 309 (4th Cir. 1980).

Two other factors suggest that the Charging Party was not engaged in protected concerted activity when she submitted the demand for class-wide arbitration. In *Stationary Engineers Local 39*, 346 NLRB 336, 347 (2006) the Board affirmed an ALJ's decision which specifically found:

Sec. 2(3) of the Act defines who are employees. It includes individuals who have lost their jobs due to a labor dispute or because of an unfair labor practice. It does not include former employees who are filing personal lawsuits against their former employer and who have lost their jobs for other reasons.

Id. at 347, n. 9.

Stationary Engineers applies with equal force to the present case. First, the Charging Party was no longer an employee of Respondent, having resigned the same day that the demand for arbitration was filed with the AAA.⁷ Second, it is hard to see how the Charging Party's action in joining a putative class action was for the purpose of "mutual aid or protection," given that she no longer had any stake in the working conditions of Respondent's employees.⁸

⁷ As a result, this case is distinguishable from *Murphy Oil*, 361 NLRB No. 72, at p. 3, in which the charging party filed a collective action in federal court *while still employed* by the respondent.

⁸ The Board in *D.R. Horton* explicitly noted that "[n]othing in our holding guarantees class certification; it guarantees only employees' opportunity to pursue without employer coercion, restraint or interference such claims of a class or collective nature as may be available to them under Federal, State or local law." 357 NLRB No. 184, at n. 24. Notably, in *Haynes Building Services*, discussed *supra*, ALJ Locke held that where an employer "did not threaten to take any action against the [c]harging [p]arty except to respond to the lawsuit by seeking a court order to compel arbitration pursuant to the agreement... [it therefore] took no action to interfere with, restrain, or coerce an employee in the exercise of Section 7 rights." 2014 NLRB LEXIS 94, at *19.

Similarly, here, all Respondent did was advise the AAA of the Policy and request that the matter not proceed on a class basis. The AAA honored Respondent's request. As a result, even assuming Charging Party was engaged in protected concerted activity, which she was not, Respondent took no unlawful action against her. (Jt. Ex. 5-7)

III. CHARGING PARTY'S UNFAIR LABOR PRACTICE CHARGE IS BARRED BY SECTION 10(B) OF THE ACT

A. Charging Party's Unfair Labor Practice Charge is Untimely

Respondent's Eighth Affirmative Defense alleges:

The Complaint is barred by reason of the statute of limitations in Section 10(b) of the National Labor Relations Act because, among other reasons, Charging Party filed her Charge more than six months after they accepted employment with Respondent and thereby voluntarily agreed to Respondent's arbitration agreement.

(General Counsel Exhibit 1(l) at p. 4)

Section 10(b) of the Act provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and service of a copy thereof upon the person against whom such charge is made" 29 U.S.C. § 160(b). To the extent the Amended Complaint in this proceeding is premised on Respondent's actions in causing the Charging Party to be bound by Policy, those actions occurred more than six months before they filed their charge.

To illustrate, Charging Party originally entered into the Policy with Respondent when she commenced employment in February 2013. (Jt. Ex. 2, at pp. 4, 6; Jt. Ex. 3; and Jt. Ex. 4, at 2). Thus, the six month statute of limitations with respect to any challenges to the process by which Charging Party became bound to the Policy expired in August 2013. However, Charging Party did not file the present Unfair Labor Practice Charge until June 8, 2014, approximately 16 months after she entered into the Policy. (Jt. Ex. 2, at pp. 4, 6; Jt. Ex. 3; and Jt. Ex. 4, at 2) Therefore, Charging Party cannot claim in this proceeding that her Section 7 rights were violated when she became bound to Respondent's Policy in February 2013. This means, very simply, that the General Counsel is precluded from arguing that Charging Party did not enter into a valid and binding arbitration agreement with Respondent when she signed the Policy in February 2013 and

voluntarily elected to commence her employment knowing full well that she would be required to arbitrate any employment-related disputes on an individual, and not on a class-wide, basis. To put it another way, Charging Party cannot attack contract formation issues, including the voluntariness of the agreement, 16 months after the contract was formed. Thus, any allegations pertaining to Charging Party's execution of the Policy in February 2013 are clearly time barred pursuant to Section 10(b) of Act.⁹

B. Charging Party Cannot Sidestep the Statute of Limitations by Arguing that Respondent "Maintained" the Agreement to Arbitrate During the 10(b) Period

The General Counsel appears to be alleging that the maintenance of the Policy explicitly infringes on the employees' Section 7 rights and violates the Act irrespective of when it was established or whether it has ever been enforced. However, by signing the Policy in February 2013, Charging Party clearly created a voluntary and binding *contract* in which she agreed to arbitrate any employment-related disputes that might arise during her employment. While it might make sense to say an employer "maintained" a policy or a rule, it does not make sense to say an employer "maintained" a *contract* between an employer and employee to arbitrate disputes. A policy or a rule may be unilaterally promulgated, but a contract requires an agreement between two or more parties, as evidenced by words or conduct. A contract either exists or not, and it is either in effect or not—as determined by the terms of the contract. To the extent there is a valid and binding contract to arbitrate disputes, the contract is "maintained" by the terms of the contract, not by the unilateral choice of either the employer or the employee. As such, the concept of "mere maintenance" of a rule that chills Section 7 rights should not apply to an arbitration agreement that is binding on both an employer and an employee.

⁹ The Board did not address this Section 10(b) issue in *Murphy Oil*.

Because Charging Party is clearly time barred from claiming her Section 7 rights were violated when she entered into the arbitration contract in February 2013, she cannot attempt to sidestep the statute of limitations by claiming Respondent violated Section 7 by “maintaining” the Policy. Support for the Respondent’s position is found in *Albertson’s, LLC*, 359 NLRB No. 147, 2013 NLRB LEXIS 487, at *40-47 (July 2, 2013) *set aside on other grounds by NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), reaffirmed 361 NLRB No. 71 (Oct. 24, 2014). While this case did not involve an arbitration agreement, it involved a situation where Counsel for the Acting General Counsel characterized certain statements made by a manager to employees during a union organizing campaign as “rules” in an apparent attempt to “make an end run around the statute of limitations with the assertion that they were rules ‘maintained’ during the 10(b) period.” 2013 NLRB LEXIS 487, at *45. The ALJ concluded that the manager had not promulgated rules when she made statements to employees outside the Section 10(b) period, and dismissed the allegation of the complaint in question. *Id.* at *47.

Similarly, the General Counsel in the present case should not be allowed to “make an end run around the statute of limitations” by characterizing a binding contract as being “maintained” by Respondent. *Id.* at *25.

The same result follows to the extent the Amended Complaint is alleging Respondent “enforced” an unlawful arbitration agreement against Charging Party by submitting a request to the AAA to reject the demand at issue in this case for designation as a nationwide collective arbitration. Because Charging Party did not file a timely charge by August 2013 to contest the lawfulness of the Policy, she could not do so over eight months later when Respondent sought to reject the demand for designation as a nationwide collective arbitration. Of course, Charging Party could have claimed that *the AAA* should not enforce the Policy against her, but this does

not mean *the National Labor Relations Board* has the “power” under Section 10(b) of the Act to invalidate an arbitration agreement entered into 14 months before Respondent filed its request to reject the demand for designation as a nationwide collective arbitration.¹⁰ Ultimately, Charging Party cannot wait 14 months to file a charge claiming that the Policy she entered into in February 2013 was unlawful.

¹⁰ Respondent’s Fourth Affirmative Defense alleges:

Complaint is barred because its allegations and the remedies it seeks violate Respondent’s First Amendment Rights to defend itself in a lawsuit initiated by Charging Party by taking well-grounded and reasonably-based positions in the litigation. It is contrary to the decisions of the United States Supreme Court in *Bill Johnson’s Restaurants, Inc. v. NLRB*, 103 S.Ct. 2161 (1983) and *BE&K Construction Company v. NLRB*, 122 S.Ct. 2390 (2002). The Board’s Complaint should be stayed pending the final outcome of Charging Parties’ civil action.

(Jt. Ex. 1(l), at p. 3)

Respondent’s Sixth Affirmative Defense alleges:

The Complaint is barred because the National Labor Relations Board lacks jurisdiction to order Respondent to take actions, or not take actions, with respect to litigation initiated by Charging Party in other forums.

(Jt. Ex. 1(l), at p. 3)

Much of the stipulated record in this case consists of the pleadings, motions and other documents from the demand for arbitration filed with the AAA in the matter of *Darlene Echevarria, on her own behalf and other similarly situated v. Citigroup Inc., a Foreign Profit Corporation and Citibank N.A.* (Jt. Exs. 5-8) The AAA has, at this point, advised that it would not proceed with this action as a class arbitration based on the Policy. However, if for whatever reason, the AAA, or a court of competent jurisdiction, were to direct that the proceedings before the AAA be reopened, Respondent believes a stay of the unfair labor practice proceedings is mandated by *Bill Johnson’s Restaurants, Inc. v. NLRB* and *BE&K Construction Company* and by the Board’s own decision in *Bill Johnson’s Restaurants, Inc. and Myrland R. Helton*, 290 NLRB 29 (1988). These decisions make clear that the NLRB may not abrogate Respondent’s First Amendment right “to petition the government” by engaging in litigation that is not “objectively baseless.” Indeed, the Board stated in its *Bill Johnson’s Restaurants* decision, following remand of the case from the Supreme Court: “Should the Board determine that a reasonable basis for the suit exists, however, then the Board may not enjoin the suit, *but must stay its unfair labor practice proceeding until the state court suit has been concluded.*” *Bill Johnson’s Rests.*, 290 NLRB No. at 30 (emphasis added).

Although the *Murphy Oil* panel rejected the respondent’s reliance upon *Bill Johnson’s* and *BE&K Construction co.*, it did so because it specifically held that the underlying arbitration agreements were unlawful (and thus any enforcement was also unlawful). For the reasons described herein, the Policy is lawful, and any attempt to enforce the Policy is also lawful.

IV. CONCLUSION

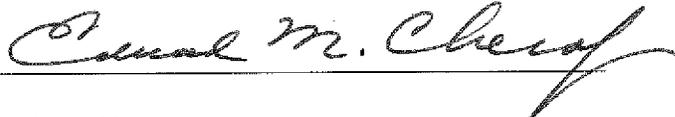
The General Counsel's case against Respondent is meritless based on a myriad of reasons. It is premised on the Board's decision in *D.R. Horton*, which has been rejected by numerous courts and cannot be reconciled with the Supreme Court's decisions interpreting the FAA, including the High Court's most recent decision in *American Express*. Significantly, the Board's rationale in *D.R. Horton* has been rejected by all five circuit courts that have reviewed the issue, including the Fifth Circuit which recently set aside the actual *D.R. Horton* itself. Even apart from *D.R. Horton* and now *Murphy Oil*, Respondent contends this proceeding should be dismissed because Charging Party was not engaged in protected concerted activity and the Amended Complaint is barred by Section 10(b) of the Act.

For all the reasons stated herein, Respondent respectfully submits that it has not violated any provision of the Act and that the Amended Complaint should be dismissed.

Dated: November 7, 2014

Respectfully submitted,

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

**CITIGROUP TECHNOLOGY, INC. and
CITICORP BANKING CORPORATION
(PARENT), a subsidiary of
CITIGROUP, INC.,**

and

Case 12-CA-130742

ANDREA SMITH, an Individual

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS TO THE DECISION
OF THE ADMINISTRATIVE LAW JUDGE**

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I. INTRODUCTION AND STATEMENT OF THE CASE

On December 23, 2014, Administrative Law Judge Donna N. Dawson (“ALJ Dawson”) issued her Decision in this case. Respondent Citigroup Technology, Inc. and Citicorp Banking Corporation (parent), a subsidiary of Citigroup, Inc. (“Respondent”) filed Exceptions to the Decision of the Administrative Law Judge and a Brief in Support of the same on March 3, 2015. Pursuant to Section 102.46(d) of the Board’s Rules and Regulations, Counsel for the General Counsel hereby submits this answering brief to Respondent’s exceptions.

At issue in this case is precisely the sort of arbitration agreement containing a “class action waiver” already found to be unlawfully maintained and enforced in violation of Section 8(a)(1) of the Act in *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), and, most recently, *Cellular Sales of Missouri, L.L.C.*, 362 NLRB No. 27 (2015), and *Flyte Tyme Worldwide*, 362 NLRB No. 46 (2015). Respondent admits that upon hire, its employees sign as a condition of employment its Employment Arbitration Policy (“EAP”), which precludes individuals from pursuing any group, class, collective, or other representative claims, in either an arbitral or judicial setting, pertaining to disputes concerning their wages, hours, terms and conditions of employment, and various federal statutory employment-related claims. Respondent further admits that on April 15, 2014, it filed a letter with the American Arbitration Association (“AAA”) along with a copy of its EAP, requesting that the AAA reject a demand for nationwide collective arbitration filed by former employee Darlene Echevarria (“Echevarria”), on behalf of herself and others, including Charging Party Andrea Smith (“Smith”). In short, Respondent has fully admitted to both maintaining and attempting to enforce the offensive class action waiver included in its EAP.

Respondent bases the bulk of its exceptions on the notion that the class action waiver

does not actually violate the Act because, it contends, the Board incorrectly decided *D. R. Horton* and *Murphy Oil* in light of various Supreme Court cases interpreting the Federal Arbitration Act, 9 U.S.C. § 1 et seq. (“FAA”), and because ALJ Dawson erred in adhering to Board precedent while deciding the instant case.

As the Board reiterated in *Cellular Sales*, no decision of the Supreme Court has expressly overruled the Board’s holding in *D.R. Horton*, nor does any Supreme Court precedent directly address the interplay between individual arbitration agreements and employees’ Section 7 rights. Because Board precedent is controlling unless and until it is overruled by the Supreme Court, and for the other reasons set forth below, Counsel for the General Counsel respectfully requests that the Board affirm ALJ Dawson’s Decision and deny each of Respondent’s exceptions thereto.

II. STATEMENT OF FACTS

A. The Pleadings

The original and amended charges in this matter were filed by Smith on June 12, 2014, and August 27, 2014, respectively, and allege, *inter alia*, that the Respondent sought to enforce an unlawful mandatory arbitration agreement. (ALJ Decision 1; GC Ex. 1(a) to 1(d)).¹ The operative pleadings are the amended complaint issued on September 10, 2014, and the amended answer. (ALJ Decision 1; GC Ex. 1(i) and 1(L)).

B. Respondent’s Mandatory Arbitration Agreements

Respondent is a global financial services institution, with over 1,000 employees working at its Tampa, Florida facility.² (ALJ Decision 2:13-14; GC Ex. 1(g), ¶ 2(a); GC Ex. 1(l), ¶ 3; SR ¶ 2). Respondent’s employees are not represented by a labor organization.

¹ Throughout this brief, reference to the General Counsel’s and Joint Exhibits will be indicated as “GC Ex. ___” and “Jt. Ex. ___,” respectively. References to the paragraphs of the Stipulated Record accepted by ALJ Dawson will be indicated as “SR ¶ ___.” References to ALJ Dawson’s Decision will be indicated as “ALJ Decision (page):(line).” Note page 1 of the ALJ Decision does not have numbered lines.

² Respondent admitted in its Amended Answer to facts demonstrating the Board’s jurisdiction and its status as an employer within the meaning of the Act. ALJ Dawson found jurisdiction over Respondent at ALJ Decision 2:12-15.

In or around January 2013, Echevarria was hired by Respondent as an Anti-Money Laundering Operations Analyst in Respondent's Tampa, Florida facility, and remained in that position until August 23, 2013. (ALJ Decision 3:14-16; SR ¶ 5). On or about January 31, 2013, Respondent offered Smith a position as an Anti-Money Laundering Operations Analyst in Respondent's Tampa, Florida facility, which Smith accepted on February 5, 2013. (ALJ Decision 3:18-20; SR ¶ 6; Jt. Ex. 2). Smith also electronically signed a receipt for Respondent's U.S. 2013 Employee Handbook ("Handbook") on February 5, 2013 and for Respondent's EAP, which incorporates by reference arbitration provisions from the Handbook. (ALJ Decision 4:29-31; SR ¶¶ 7-8; Jt. Ex. 3-4). Smith began work on February 19, 2013 and voluntarily resigned her employment with Respondent on March 28, 2014. (ALJ Decision 4:31-33; SR ¶ 9).

The EAP provides, in relevant part:

The Policy makes arbitration the required and exclusive forum for the resolution of all disputes arising out of or in any way related to employment based on legally protected rights (i.e. statutory, regulatory, contractual, or common-law rights) that may arise between an employee or former employee and Citi or its current and former parents, subsidiaries, and affiliates and its and their current and former officers, directors, employees, and agents (and that aren't resolved by the internal Dispute Resolution Procedure) including, without limitation, claims, demands, or actions under Title VII of the Civil Rights Act of 1964, the Civil Rights Acts of 1866 and 1991, the Age Discrimination in Employment Act of 1967, the Older Workers Benefit Protection Act of 1990, the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, the Family and Medical Leave Act of 1993, the Fair Labor Standards Act of 1938, the Equal Pay Act of 1963, the Employee Retirement Income Security Act of 1974, the Worker Adjustment and Retraining Notification Act, the Sarbanes-Oxley Act of 2002, and all amendments thereto, and any other federal, state, or local statute, regulation, or common-law doctrine regarding employment, employment discrimination, the terms and conditions of employment, termination of employment, compensation, breach of contract, defamation, retaliation, whistle-blowing, or any claims arising under the Citigroup Separation Pay Plan.

Except as otherwise required by applicable law, this Policy applies only to claims brought on an individual basis. Consequently neither Citi nor any employee may submit a class action, collective action, or other representative action for resolution under this Policy.

(ALJ Decision 2:24-3:2; GC Ex. 1(g) ¶ 4(a); Jt. Ex. 1). It is further undisputed that the Respondent has required all of its newly-hired employees within the United States to agree to the EAP as a condition of employment since at least December 26, 2012, and continuing to the present. (ALJ Decision 3:6-7; SR ¶ 4).

C. Demand for Arbitration

On March 28, 2014, Echevarria, through counsel, submitted a demand for arbitration entitled “Nationwide Class Action Arbitration Submission” (“arbitration demand”) to the AAA on her own behalf and on behalf of other similarly situated employees of the Respondent, including Smith, Danielle Lucas, Yadira Calderon, and Kelleigh S. Weeks (collectively, the “named class members”). (ALJ Decision 4:35-39; SR ¶ 10; Jt. Ex. 5). The named class members signed both a “Notice of Consent to Join Collective Action” and a “Notice of Filing Notice of Consent to Join,” submitted along with the arbitration demand. (ALJ Decision 4:39-40; SR ¶ 10 Jt. Ex. 5). The arbitration demand alleged that the Respondent violated the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (“FLSA”), by failing to pay overtime wages to Echevarria and other similarly situated employees of the Respondent, including the other named class members. (ALJ Decision 4:40-42; SR ¶ 10; Jt. Ex. 5).

On April 14, 2014, AAA Case Filing Coordinator Kristen Cottone (“Cottone”) requested from the parties a full copy of the arbitration agreement between them and other information so that the AAA could decide whether it could proceed with the case. (ALJ Decision 5:1-8; SR ¶ 11; Jt. Ex. 6). Counsel for Respondent replied on April 15, 2014, submitting a copy of the EAP and requesting that the AAA reject the arbitration demand insofar as Echevarria’s request for designation of a nationwide collective arbitration, and instead accept only her individual claim. (ALJ Decision 5:10-12; SR ¶ 12; Jt. Ex. 7). On April 28, 2014, Cottone sent the parties a letter stating that, in accordance with AAA’s policy on class arbitrations, it could not administer the matter as a class action, since the EAP prohibits class actions. (ALJ Decision 5:13-16; SR ¶ 13;

Jt. Ex. 8).

III. ARGUMENT AND CITATION TO AUTHORITY

A. The Appropriate Precedent for the Board to Follow is Its Own and that of the Supreme Court of the United States; Neither ALJ Dawson Nor the Board Owe Deference to District and Circuit Court Opinions. Exceptions 12 and 14 are Without Merit.

In Respondent's Brief submitted with its Exceptions to the Decision of the Administrative Law Judge ("Respondent's Brief"), Respondent excepts both to ALJ Dawson's following the Board's decisions in *D.R. Horton* and *Murphy Oil* (ALJ Decision 5:30-45, 6:13-14, 6:42-43, 7:3-9:32, 9:39-10:42, 11:25-33, 12:6-15), and to the Board itself deciding in *Murphy Oil* to reaffirm its own *D.R. Horton* holdings instead of accepting the Fifth Circuit's *D.R. Horton* opinion as controlling.³ In *Pathmark Stores*, the Board reiterated that

[i]t has been the Board's consistent policy for itself to determine whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court's opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise ... **[I]t remains the [judge's] duty to apply established Board precedent which the Supreme Court has not reversed.** Only by such recognition of the legal authority of Board precedent, will a uniform and orderly administration of a national act, such as the National Labor Relations Act, be achieved.

342 NLRB 378 n. 1 (2004) (emphasis added) (quoting *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 (1963), enfd. in part 331 F.2d 176 (8th Cir 1964) (quoting *Insurance Agents' International Union, AFL-CIO*, 119 NLRB 768, 773 (1957))). Therefore, the Board was correct to adhere to its own well-reasoned precedent in deciding *Murphy Oil* and ALJ Dawson was correct to follow that established Board precedent in reaching her conclusions of law in the instant case.

B. The Board Has Not Overstepped By Interpreting the FAA; It Has Merely Interpreted the NLRA as Including a Core Substantive Right to Collective Action. Exception 13 is Without Merit.

Equally unpersuasive is Respondent's argument that the Supreme Court's decision in

³ *D.R. Horton v. NLRB*, 737 F.3d 344 (5th Cir. 2013).

CompuCredit Corp. requires that its EAP be found lawful because there is no specific “Congressional command” to override the FAA within the text of the NLRA, and because for the Board to find otherwise is for it to overstep its authority as a federal agency by dispositively interpreting an act of Congress other than the one it is tasked to administer. 562 U.S. ___, 132 S.Ct. 665, 671, (2012). Boiled down to its core, Respondent’s essential argument on this point is that, as collective legal activity is generally considered a “procedural device” under other statutes, employees’ preference for that procedure should not be allowed to impede the Respondent’s substantive right to enforce its arbitration policy.

However, the Board emphasized in *D.R. Horton* that finding an arbitration agreement unlawful does not conflict with the FAA because “the intent of the FAA was to leave substantive rights undisturbed.” 357 NLRB No. 184, slip op. at 11. Although Respondent argues that the waiver is not of substantive rights but, rather, of procedural rights, the authorities it points to are, in fact, cases interpreting statutes that protect different substantive rights – such as consumer rights against lenders – which also *happen to* provide a procedural option for vindication of those rights through class action.

In contrast, the NLRA’s core substantive right is the Section 7 right of employees to act collectively for their mutual aid or protection. *Murphy Oil*, 361 NLRB No. 72, slip op. at 6. It is unquestionably a substantive, not a procedural, right, as indicated by the statement of purpose in Section 1 of the Act that the NLRA was enacted to correct “the inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and [corporate] employers” and to remove the impediments that same inequality presents to the free flow of commerce. “[T]he *D.R. Horton* Board was clearly correct when it observed that the ‘right to engage in collective action – including collective *legal* action – is the *core* substantive

right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest.” *Murphy Oil*, 361 NLRB No. 72, slip op. at 7 (quoting *D.R. Horton*, 357 NLRB No. 184, slip op. at 10) (emphasis original to *Murphy Oil*).

Although Respondent is technically correct that there is no explicit Congressional command to override the FAA contained in the text of the NLRA, the Board has already ruled on this issue and reconciled its opinion in *D.R. Horton* with that portion of the *CompuCredit* decision. The *Murphy Oil* Board emphatically affirmed that the FAA’s savings clause provides for the revocation of otherwise mandatory arbitration agreements, “upon such grounds as exist at law...” and that “Section 7... **amounts to** a ‘contrary congressional command’ overriding the FAA.” 361 NLRB No. 72, slip op. at 9 (emphasis added). As the *D.R. Horton* Board noted, the Supreme Court has not heretofore addressed whether an employer can infringe upon employees’ substantive Section 7 rights to concertedly pursue employment-related claims – *Concepcion*, for example, arose in the context of a commercial arbitration agreement and dealt with the preemption of a state consumer protection law, not employees’ federal collective action rights under Section 7. 357 NLRB No. 184, slip op. at 12.

Moreover, in *Murphy Oil*, the Board explained that when the NLRA was enacted in 1935 and reenacted in 1947, the FAA had not ever been applied to individual employment contracts, and noted:

[i]t is hardly self-evident that the FAA – to the extent that it would compel Federal courts to enforce mandatory individual arbitration agreements prohibiting concerted legal activity by employees – survived the enactment of the Norris-LaGuardia Act [in 1932] and its sweeping prohibition of “yellow dog” contracts.

361 NLRB No. 72, slip op. at 10.⁴ The Board found that even if there is a conflict between the

⁴ The FAA, a product of the *Lochner* era, was enacted in 1925; its own legislative history indicates that it was self-evident to the 68th Congress that the Act would *never* be applied to employment or consumer contracts. As Justice

NLRA and the FAA, the Norris-LaGuardia Act prevents enforcement of any private agreement inconsistent with the statutory policy of protecting employees' concerted activity, including an agreement that seeks to prohibit a "lawful means [of] aiding any person participating or interested in a" lawsuit arising out of a labor dispute. *Id.* The Board found that in the event of a conflict, the FAA would therefore have to yield to the NLRA insofar as necessary to accommodate Section 7 rights.

The Board has long held that the specific collective activity of jointly pursuing legal claims related to the terms and conditions of employment is a form of protected, concerted Section 7 activity, and the Board has held time and again that these agreements, barring employees from collectively pursuing their legal claims, constitute a patently unlawful waiver of Section 7's substantive right to act together for employees' mutual aid and protection. *Id.* at 9 ("The [Fifth Circuit's] first step was to determine that pursuit of legal claims concertedly is *not* a substantive right under Section 7 of the NLRA. We cannot accept that conclusion; it violates the long-established understanding of the Act and national labor policy, as reflected, for example, in the Supreme Court's decision in *Eastex*⁵..."). Thus, any claimed infringement on the FAA by

Black wrote in his dissent to *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 409, n. 2 (1965): "The principal support for the Act came from trade associations dealing in groceries and other perishables and from commercial and mercantile groups in the major trading centers. 50 A.B.A.Rep. 357 (1925). Practically all who testified in support of the bill before the Senate subcommittee in 1923 explained that the bill was designed to cover contracts between people in different States who produced, shipped, bought, or sold commodities. Hearing on S. 4213 and S. 4214 before the Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 3, 7, 9, 10 (1923). The same views were expressed in the 1924 hearings. When Senator Sterling suggested, 'What you have in mind is that this proposed legislation relates to contracts arising in interstate commerce,' Mr. Bernheimer, a chief exponent of the bill, replied: 'Yes; entirely. The farmer who will sell his carload of potatoes, from Wyoming, to a dealer in the State of New Jersey, for instance.' Joint Hearings on S. 1005 and H.R. 646 before the Subcommittees of the Committees on the Judiciary, 68th Con., 1st Sess., 7." Furthermore, "On several occasions they expressed opposition to a law which would enforce even a valid arbitration provision contained in a contract between parties of unequal bargaining power. Senator Walsh cited insurance, employment, construction, and shipping contracts as routinely containing arbitration clauses and being offered on a take-it-or-leave-it basis to captive customers or employees. [citation omitted] He noted that such contracts 'are really not voluntarily (sic) things at all' because 'there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court....' He was emphatically assured by the supporters of the bill that it was not their intention to cover such cases." 388 U.S. at 414 (Black, J., dissenting).

⁵ *Eastex v. NLRB*, 437 U.S. 556 (1978).

protecting employees' substantive Section 7 rights in these circumstances is entirely illusory. The EAP at issue in the instant case is unlawful not because it involves arbitration or specifies particular litigation procedures, but because it prohibits employees from exercising their Section 7 right to engage in concerted legal activity in any forum at all.

C. The Board's Holdings Have Accommodated Both the NLRA and the FAA: No Conflict Exists Between the Board's Decisions in *D.R. Horton*, *Murphy Oil*, *Cellular Sales*, and *Flyte Tyme* and the FAA. Exceptions 4 through 11 are Without Merit.

As the Board in *D.R. Horton* explained, “holding that an employer violates the NLRA by requiring employees, as a condition of employment, to waive their right to pursue collective legal redress in both judicial and arbitral forums accommodates the policies underlying both the NLRA and the FAA to the greatest extent possible.” 357 NLRB No. 184, slip. op. at 8. This is because Section 2 of the FAA “provides that arbitration agreements may be invalidated in whole or in part” for the same reasons any contract may be invalid, including if it is unlawful or contrary to public policy. *Id.*, slip. op. at 11. Therefore, inasmuch as the EAP is inconsistent with the NLRA, it is not enforceable under the FAA.

Respondent's Brief asserts that the Board's decisions in the *D.R. Horton* line of cases are in conflict with the FAA, and presumes to state that the Supreme Court has “implicitly” rejected the Board's *D.R. Horton* decision through precedents established in *AT&T Mobility v. Concepcion*, 563 U.S. 321, 131 S. Ct. 1740 (2011), *CompuCredit Corp. v. Greenwood*, 562 U.S. ___, 132 S.Ct. 665, (2012), and *American Express v. Italian Colors Restaurant*, ___ U.S. ___, 133 S. Ct. 2304 (2013). However, the Board addressed these same arguments at length in *D.R. Horton* and found them unavailing, and has reaffirmed the lack of a conflict between the NLRA and the FAA three more times.

Respondent argues in its Brief that finding the EAP unlawful would run afoul of the

Supreme Court's decisions requiring the enforcement of certain arbitration agreements, including class action waivers, according to their terms. However, Respondent mischaracterizes the high court's holdings in *Concepcion*, *CompuCredit*, and *American Express* as a mandate to enforce *all* arbitration agreements contracted for between parties, regardless of any other considerations. A "healthy regard" for the FAA does not require the Board to acquiesce to it as the juggernaut force Respondent represents it to be.

In *D.R. Horton*, the Board specifically rejected arguments that the Court's *Concepcion* decision required the Board to find that the arbitration agreement was enforceable as written, or that the Court had sanctioned class and collective action waivers in all categories of arbitration. 357 NLRB No. 184, slip op. at 11-12.

Nor does a finding that the class waiver contained in the EAP is unlawful mean that the Board's decisions effectively disfavor arbitration as a whole, as Respondent contends; rather, the *D.R. Horton* line of cases merely requires that any arbitration agreement sought by employers leave open the option for employees to choose to act collectively for their mutual aid and protection, i.e. ensure that arbitration agreements do not interfere with or restrict the exercise of employees' Section 7 rights. This could be accomplished either by permitting class and collective actions in judicial fora while limiting arbitrations to those between individuals, or by foreclosing judicial avenues of relief while permitting the arbitration of class and collective action claims. It is bewildering that Respondent believes it is self-evident, in light of these options, that the *D.R. Horton* line of decisions runs so thoroughly afoul of the FAA when in fact, the Board's decisions have done quite the opposite, striving to and succeeding in reconciling the two federal laws.

Furthermore, Respondent's argument that the agreement should be enforced as written

because the Board has no authority to order other entities, such as the AAA, to take or refrain from any action, falls flat in light of the actual facts of this case. The AAA did not inform Respondent that its rules forbade class arbitration, only that it read Respondent's EAP as binding it from accepting Echevarria's request for a nationwide class designation of the action. If the Board deems the EAP unlawful, the AAA will not be "forced" to accept Echevarria's class action claim. Rather, Respondent's EAP must be rescinded, and Echevarria, Smith and the other employees will be free to pursue a judicial class or collective action claim. In addition, Respondent will be free to revise its arbitration policy in a manner consistent with the NLRA.

Therefore, the Board should reaffirm once more its decisions in *D.R. Horton*, *Murphy Oil*, *Cellular Sales*, and *Flyte Tyme* by finding the same type of class waiver at issue here similarly unlawful under Section 8(a)(1) of the Act.

D. Respondent's Maintenance and Enforcement of the EAP Violates Section 8(a)(1) of the Act. Exceptions 1, 2, 3, 16 and 18 through 21 are Without Merit.

In *D.R. Horton*, 357 NLRB No. 184 (2012), the Board held that "an employer violates Section 8(a)(1) of the National Labor Relations Act when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer." *Id.*, slip op. at 1. As the Board observed, it "has consistently held that concerted legal action addressing wages, hours or working conditions is protected by Section 7," and that when an employer requires employees to waive this substantive right under the Act, the agreement unlawfully restricts employees' Section 7 right to engage in concerted action for mutual aid or protection. *Id.*, slip op. at 2.

In *D.R. Horton*, the Board made clear that the test for determining whether class action waivers contained in arbitration agreements constitute a rule that violates Section 8(a)(1) of the

Act is that set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Under that test, a policy such as Respondent's violates Section 8(a)(1) because it expressly restricts Section 7 activity or, alternatively, because (1) employees would reasonably read it as restricting such activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. 343 NLRB at 646-647, cited in *D.R. Horton* at 357 NLRB No. 184, slip op. at 7.

Respondent argues at length that ALJ Dawson's use of the *Lutheran Heritage* test was erroneous, arguing that a contract is not a "rule," before citing any authority to support this contention – and even then, the sole case it identifies as "support" for its position, *Albertson's, LLC*, involves spoken statements made by a manager, not written policies maintained by the employer.⁶ The Board has determined in the cases cited above that a contract can contain a rule for the purposes of 8(a)(1) of the Act. This is a reasonable interpretation of Section 8(a)(1) because the terms of a "contract" such as Respondent's EAP behave identically to other employer rules and can obviously, as the EAP's terms do here, interfere with Section 7 rights. *Albertson's* is wholly inapposite and the Board should disregard Respondent's entire argument on this point. In *Murphy Oil*, *Cellular Sales*, and *Flyte Tyme* the Board reaffirmed the relevant holdings of *D.R. Horton*, including that the *Lutheran Heritage* test is appropriately applied to arbitration agreement terms.

Respondent's EAP makes individual arbitration "the required and exclusive forum for the resolution of all" employment-related disputes with Respondent, expressly restricting employees from bringing joint claims as either a class or collective action, "or other representative action." (Jt. Ex. 1). Through use of the EAP as a condition of employment, the Respondent has thus

⁶ 359 NLRB No. 147 (2013), set aside by *Noel Canning* and subsequently reaffirmed by the Board, 361 NLRB No. 71 (2014).

attempted to foreclose all concerted employment-related litigation or arbitration by employees and effectively stripped employees of their Section 7 right to engage in this form of concerted activity for mutual aid and protection. ALJ Dawson correctly found that, like the agreement in *D.R. Horton*, Respondent's EAP explicitly restricts Section 7 activity, and therefore plainly violates Section 8(a)(1) under the *Lutheran Heritage* test (ALJ Decision 6:16-30).

Not only does the maintenance of the EAP on its face constitute a violation of the Act, it has been applied by Respondent to restrict the exercise of Section 7 activity, in violation of the Act. The record clearly demonstrates that Respondent presented the EAP to the AAA to support its request that the AAA reject Echevarria's demand for nationwide, class action designation of her arbitration. (ALJ Decision 5:10-12; SR ¶ 12; Jt. Ex. 7) In addition to seeking arbitration on behalf of all similarly-situated employees of Respondent with regard to her Fair Labor Standards Act claim, Echevarria had four other named employee signatories to the demand for arbitration, including Charging Party Smith, an undeniable example of collective action undertaken for mutual aid and protection. (SR ¶¶ 10, 12; Jt. Ex.5, 7). Thus, the five employees were exercising their rights guaranteed by Section 7 of the Act, as properly found by ALJ Dawson. (ALJ Decision 11:6-23). Employee Smith joined the class action arbitration claim on the same day that she resigned her employment. (S.R. ¶¶ 8, 9).

In this regard, contrary to Respondent's claim and as found by the ALJ, former employees who pursue employment claims, such as Smith, are considered statutory employees as defined in Section 2(3) of the Act and are entitled to the Act's protection. (ALJ Decision 11:20-23; see generally, *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941)). The Board has broadly construed the term employee to include members of the working class generally, including "former employees of a particular

employer.” *Little Rock Crate & Basket Co.*, 227 NLRB 1406, 1406 and cases cited therein at n.4 (1977); *Waco, Inc.*, 273 NLRB 746, 747 n. 8 (1984).

Furthermore, as in *D.R. Horton*, the Board found in *Murphy Oil, Cellular Sales*, and *Flyte Tyme* that it is “well-established that an employer’s enforcement of an unlawful rule, including a mandatory arbitration policy like the one at issue here, **independently violates** Section 8(a)(1).” *Cellular Sales*, 362 NLRB No. 27, slip op. at 2 (2015) (emphasis added) (citing *Murphy Oil*, 361 NLRB No. 72, slip op. at 19-21)); see also *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16-17 (1962) and other authorities cited by the Board in n. 9 of the *Cellular Sales* decision.

In summary, Respondent’s maintenance of the EAP expressly prohibiting employees from engaging in Section 7 activity, and Respondent’s enforcement of the EAP against employees Echevarria, Smith and the other employees who joined in the class action arbitration claim against Respondent, both violate Section 8(a)(1) of the Act, as found by the ALJ (ALJ Decision 6:39-43).

E. *Bill Johnson’s and the First Amendment Do Not Save Respondent from a Violation, and Do Not Prevent the Board from Remedying Its Violations. Respondent’s Exceptions 17 and 29 through 31 are Without Merit.*

Respondent excepts to ALJ Dawson’s finding that *Bill Johnson’s Restaurants v. NLRB*, 461 U.S. 731 (1983), does not preclude the Board from proceeding against Respondent’s request to the AAA to, in essence, compel individual arbitration of Echevarria’s FLSA claim (ALJ Decision 12:1-15). Respondent’s desired outcome would cut out the Charging Party and the other named class members who had voluntarily sought to join the action, effectively halting their protected, concerted activity before they can even commence litigating their joint claims of FLSA violations against their employer.

Respondent’s entire argument on this point is based on the false premise that its endeavor

to halt the class arbitration of Echevarria, Charging Party, and other class members' FLSA claims was "well-founded" on a valid arbitration agreement. "Just as false statements are not immunized by the First Amendment right to freedom of speech,⁷ baseless litigation is not immunized by the First Amendment right to petition." *Bill Johnson's*, 461 U.S. at 743. The EAP is invalid, because it violates Section 8(a)(1). Whether or not any of the *Bill Johnson's* exceptions come into play is moot because the legal basis for Respondent's act to enforce the EAP is non-existent.

Even if they did, the Board has made clear that it will apply *Bill Johnson's* footnote 5 exceptions to particular litigation tactics, as well as to entire lawsuits. Thus, for example, in *Wright Electric, Inc.*, the Board found that an employer's discovery request had an illegal objective and violated the Act, even though the lawsuit itself could not be enjoined. 327 NLRB 1194, 1195 (1999, enfd. 200 F.3d 1162 (8th Cir. 2000)); see also, *Dilling Mechanical Contractors*, 357 NLRB No. 56, slip op. at 2-3 (2011) (finding that employer's discovery requests had an illegal objective, although the lawsuit itself did not). A lawsuit or litigation tactic has a footnote 5 illegal objective "if it is aimed at achieving a result incompatible with the objectives of the Act." *Manno Electric*, 321 NLRB 278, 297 (1996), enfd. 127 F.3d 34 (5th Cir. 1997) (unpublished). In such circumstances, "the legality of the lawsuit enjoys no special protection under *Bill Johnson's*." *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 834 (1991), enfd., 973 F.2d 230 (3d Cir. 1992), cert. denied, 507 U.S. 959 (1993).

In particular, an illegal objective may be found where a grievance or lawsuit is itself aimed at preventing employees' protected conduct. In such cases, the lawsuit is not merely retaliatory for employees' protected conduct, but also seeks to use the arbitrator or the court to

⁷ See *Herbert v. Lando*, 441 U.S. 153, 171, 99 S.Ct. 1635, 1646, 60 L.Ed.2d 115 (1979); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 94 S.Ct. 2997, 3007, 41 L.Ed.2d 789 (1974).

directly interfere with the Section 7 activity. *Long Elevator*, 289 NLRB 1095 (1988), *enfd.* 902 F.2d 1297 (8th Cir. 1990). Respondent's tactics are akin to those used by the employers in *D.R. Horton* and *Murphy Oil* to compel individual arbitration of employees' claims in accordance with their respective arbitration agreements. In *Murphy Oil*, the Board specifically considered and rejected the company's *Bill Johnson* arguments. Indeed, the *only* objective of Respondent's request to the AAA is to prohibit employees from engaging in Section 7 activity. Respondent's request would impose individual arbitration, which specifically attempts to prevent employees' protected concerted legal activity. Therefore, Respondent's request has a footnote 5 illegal objective and is unlawful under Section 8(a)(1) of the Act.

F. No Allegations of the Complaint are Time Barred by Section 10(b) of the Act. The EAP is a Mandatory Condition of Employment. Respondent's Exceptions 15 and 22 through 28 are Without Merit.

Respondent excepts to ALJ Dawson's findings that none of the allegations in the Complaint are time-barred by Section 10(b) of the Act. (ALJ Decision 11:35-45; SR ¶¶ 20- 21) However, it is well-established that Section 10(b) permits finding a violation based on the mere maintenance of an unlawful rule within the 10(b) period, and/or based on the enforcement of an unlawful rule within the 10(b) period, "regardless of when the rule was first promulgated." *Cellular Sales*, 362 NLRB No. 27, slip op. at 2; see also *Control Services*, 305 NLRB 435, n. 2 & 442 (1991), *enfd. mem.*, 961 F.2d 1568 (3d Cir. 1992). As the Board recently reaffirmed in *Cellular Sales*, this is the case even when the unlawful rule is contained in a contract executed outside the 10(b) period, because maintenance of the unlawful rule is considered a continuing violation by the Board. *Id.* at 2; see also *Carney Hospital*, 350 NLRB 627, 627 (2007); *Eagle-Pincher Industries*, 331 NLRB 169, 174, n. 7 (2000); *Wire Products Mfg. Corp.*, 326 NLRB 625, 633 (1998), *enfd. sub nom. NLRB v. R.T. Blankenship & Associates, Inc.*, 210 F.3d 375 (7th Cir.

2000); *St. Luke's Hospital*, 300 NLRB 836 (1990).

The stipulated record shows that Respondent has maintained and enforced the EAP “since on or about December 26, 2012, and continuing to the present.” (SR ¶ 3).⁸ As noted above, the ongoing maintenance of an unlawful rule such as the EAP is a continuing violation of the Act. Therefore, Respondent has maintained the EAP within the Section 10(b) period. Moreover, Respondent enforced the EAP within the Section 10(b) period by asking the AAA to reject Echevarria’s request for a nationwide, class designation of her arbitration demand on April 15, 2014, less than six months before the filing and service of both the original and amended charges in this matter. (GC 1(a) to 1(d)).

With respect to Respondent’s assertion that the its unrepresented employees can “voluntarily agree to waive a judicial forum in favor of arbitration” just as a union can so act voluntarily, the ALJ correctly rejected this argument and concluded that “it matters not when an employee signs a mandatory arbitration agreement forfeiting his or her Section 7 rights” in light of *Murphy Oil*. (ALJ Decision 11:25-33) It is undisputed that all employees are required to agree to Respondent’s EAP, including the class action waiver, as a condition of employment. Similarly, Respondent’s assertion that the “voluntariness” of the EAP cannot be attacked 16 months after the contract was formed is without merit because it is evident from the circumstances – Respondent requires job applicants to sign an EAP agreement as a condition of gaining employment – that the EAP is imposed by Respondent without negotiation and uniformly applied to its entire workforce on an ongoing basis. (S.R. ¶¶ 3, 4). There is no evidence that Respondent has ever considered deviating from or negotiating about the standard, uniformly required, EAP language, and individual employees, especially job applicants, simply

⁸ The stipulated record was signed by Respondent and the Union on October 7, 2014, so the EAP was clearly maintained until at least at least that date, and Respondent presented no evidence that it has rescinded or revised the EAP.

do not have the collective bargaining power of a union to voluntarily waive in any meaningful way the right to file lawsuits on employment matters in exchange for the promise to arbitrate. Respondent's 10(b) defense, and its claim that employees' execution of the EAP is voluntary rather than mandatory, should be summarily rejected.

G. The ALJ's Conclusions of Law, Recommended Order and Notice to Employees Are Appropriate and Should Be Adopted by the Board. Respondent's Exceptions 32 through 37 are without merit.

Counsel for the General Counsel respectfully urges the Board deny Respondent's exceptions and to adopt the full range of remedies set forth in the Order and Notice to Employees recommended by ALJ Dawson, which is consistent with the remedies ordered by the Board in *D.R. Horton* and its progeny. ALJ Dawson's recommendation that Respondent be required to post a Notice to Employees at all of its locations where the EAP is maintained is appropriate in view of Respondent's admitted maintenance and enforcement of the EAP with respect to all of its thousands of employees at its Tampa, Florida location and throughout the United States. (S.R. ¶¶ 2, 3). Counsel for the General Counsel further seeks any other relief the Board determines to be appropriate to remedy Respondent's unlawful conduct.

IV. CONCLUSION

In sum, Respondent presents arguments that muddle the issue, failing to distinguish that the element of the arbitration agreement the General Counsel takes issue with is the class action waiver, not the fact that it sought to enter into an arbitration agreement at all. (See, e.g. p. 23 of Respondent's Brief, "Employer-Imposed Arbitration Agreements Do Not Restrict Section 7 Rights.>"). In the *D.R. Horton* line of cases, the Board has used the proverbial scalpel to analyze and excise the offending portion of the agreements that infringe on Section 7 rights, the class action waivers. Respondent mischaracterizes these decisions as the axe fundamentally destroying an employer's ability to enter into employment contracts with its employees. This is

obviously not the case. It is more than possible for Respondent and other corporations to craft employment contracts – even ones that include arbitration agreements – that preserve employees’ Section 7 rights to act collectively.

The practical effect of arbitration agreements that contain class action waivers is to silence workers by relegating them to “the inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association...” which Congress sought to eradicate by “restoring equality of bargaining power between employers and employees” as set forth in Section 1 of the Act, and by guaranteeing employees the substantive right to engage in protected concerted activities, as set forth in Section 7 of the Act. For the Board to adopt Respondent’s position on class action waivers would not only be a significant departure from its established precedent, but also a sea change in the way labor policy is established and enforced in this country and a betrayal of the congressional mandate carried by the Agency to balance the competing needs of the free flow of commerce and the workers who participate in it.

The General Counsel respectfully urges the Board to deny Respondent’s exceptions in their entirety.

Dated at Tampa, Florida on April 7, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 7, 2015, she electronically filed the foregoing Counsel for the General Counsel's **Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge** and served said document by electronic mail on the below-named parties, as follows:

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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE**

**CITIGROUP TECHNOLOGY, INC.
AND CITICORP BANKING
CORPORATION (PARENT),
A SUBSIDIARY OF CITIGROUP, INC.**

and

CASE 12-CA-130742

ANDREA SMITH, An Individual

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DECISION

STATEMENT OF THE CASE

DONNA N. DAWSON, Administrative Law Judge. This case involves issues related to *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), and *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. granted in part and denied in part 737 F.3d 344 (5th Cir. 2013). On June 12, 2014, Andrea Smith (“Charging Party” or “Smith”) filed an initial charge, and on August 27, 2014, she filed a first amended charge. A complaint issued on August 29, 2014, and an amended complaint issued on September 10, 2014 (“the complaint”). The complaint alleges that Citigroup Technology, Inc. and Citicorp Banking Corporation (parent), a subsidiary of Citigroup, Inc. (“Respondent”) violated Section 8 (a)(1) of the National Labor Relations Act (the “NLRA” or the “Act”) by maintaining and enforcing a mandatory employment arbitration policy precluding its employees from pursuing any group, class, or collective actions, arbitration or otherwise, concerning wages, hours, and other terms and conditions of employment. Although Respondent admits in its amended answer that it maintained and enforced its arbitration policy, it denies that any of its actions violated the Act and sets forth several affirmative defenses.

On October 8, 2014, the parties jointly requested that the case be decided without a hearing based on a stipulated record, with attachments. The motion was granted on October 9, 2014, and the parties subsequently filed their briefs.

5 Having considered the entire stipulated record and the briefs, for the reasons set forth below, I make the following

FINDINGS OF FACT

10 I. JURISDICTION

At all material times, Respondent, a Delaware corporation with an office and place of business in Tampa, Florida (Respondent's Tampa facility), has been engaged in the business of providing global financial services. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

20 Since about December 26, 2012, Respondent has "maintained and enforced" as part of its U.S. Employee Handbook, "Appendix A: The Employment Arbitration Policy" revised ("EAP") which is applicable to all of its employees in the United States, including those employed at its Tampa facility. This arbitration policy includes the following relevant provision:

25 The Policy makes arbitration the required and exclusive forum for the resolution of all disputes arising out of or in any way related to employment based on legally protected rights (i.e., statutory, regulatory, contractual, or common-law rights) that may arise between an employee or former employee and Citi or its current and former parents, subsidiaries, and affiliates and its and their current and former officers, directors, employees, and agents (and that aren't resolved by the internal Dispute Resolution Procedure) including, without limitation, claims, demands, or actions under Title VII of the Civil Rights Act of 1964, the Civil Rights Acts of 1866 and 1991, the Age Discrimination in Employment Act of 1967, the Older Workers Benefit Protection Act of 1990, the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, the Family and Medical Leave Act of 1993, the Fair Labor Standards Act of 1938, the Equal Pay Act of 1963, the Employee Retirement Income Security Act of 1974, the Worker Adjustment and Retraining Notification Act, the Sarbanes-Oxley Act of 2002, and the amendments thereto, and any other federal, state, or local statute, regulation, or common-law doctrine regarding employment, employment discrimination, the terms and conditions of employment, termination of employment, compensation, breach of contract, defamation, retaliation, whistle-blowing, or any claims arising under the Citigroup Separation Pay Plan.

45 Except as otherwise required by applicable law, this Policy applies only to claims brought on an individual basis. Consequently[,] neither Citi nor any employee

may submit a class action, collective action, or other representation action for resolution under this Policy.

(Jt. Exh. 4).

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Since about December 26, 2012, and at all material times thereafter, Respondent has required its newly hired employees to agree to and accept its EAP as a condition of employment. Based on this agreement, Respondent has precluded these employees from filing any “group, class, collective, or other representative action claims in arbitration,” or otherwise, in connection with disputes identified in the EAP concerning wages, hours, and other terms and condition of employment. Of note, Respondent’s EAP also states that it does not “exclude the National Labor Relations Board from jurisdiction over disputes covered by the [Act]...” (Id.).

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In January 2013, Respondent hired Darlene Echevarria (Echevarria) as an anti-money laundering operations analyst in its Tampa facility. Echevarria worked in this position from January 7 until August 23, 2013.

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Similarly, Respondent hired Charging Party Smith. By letter dated January 31, 2013, Respondent offered Smith the position of anti-money laundering operations analyst in its Tampa facility. The job offer letter includes an arbitration provision which reads in relevant part:

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Arbitration:

Any controversy or dispute relating to your employment with or separation from Citi will be resolved in accordance with Citi's Employment Arbitration Policy as set forth in the Principles of Employment which you will be required to sign as a condition of your Citi employment, the terms of which are incorporated herein. A copy of the Principles of Employment is attached.

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I acknowledge that I have received and read or have had the opportunity to read this arbitration agreement. I understand that this arbitration agreement requires that disputes that involve the matters subject to the agreement be submitted to mediation or arbitration pursuant to the arbitration agreement rather than to a judge and jury in court.

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(Jt. Exh. 2, p. 4). The referenced “Principles of Employment,” state in relevant part:

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[Y]ou agree to follow our dispute resolution/arbitration procedure for resolving all disputes (other than disputes which by statute are not arbitrable) arising out of or relating to your employment with and separation from Citi.* This applies while you are employed by us as well as after your employment ends. While we hope that disputes with our employees will never arise, we want them resolved promptly if they do arise. These procedures do not preclude us from taking disciplinary actions (including terminations) at any time, but if you dispute those actions, we both agree that the disagreement will be resolved through these procedures. Our procedures are divided into two parts:

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1. An internal dispute resolution procedure that allows you to seek review of any action taken regarding your employment or termination of your employment which you think is unfair.

2. In the unusual situation when this procedure does not fully resolve a dispute, and such dispute is based upon a legally protected right (i.e., statutory, contractual, or common law), we both agree to submit the dispute, within the time provided by the applicable statute(s) of limitations, to binding arbitration as follows:

....

- Before the American Arbitration Association ("AAA") where you don't meet the criteria above for FINRA [Financial Industry Regulatory Authority, Inc.] arbitration, FINRA declines the use of its facilities, or you are a Dual Employee and your dispute does not involve CGMI [Citigroup Global Markets Inc.] or activities related to your securities license(s).

Arbitrations shall be conducted in accordance with the respective arbitration rules of the FINRA or AAA, as applicable, then in effect and as supplemented by Citi's Arbitration Policy then in effect ("Arbitration Policy"). A detailed description of the Arbitration Policy is included in the Employee Handbook, and is available for review prior to your acceptance of employment if you choose to review it. Again, it is your responsibility to read and understand the dispute resolution/arbitration procedure.

(Jt. Exh. 2, pp. 7-8).

On February 5, 2013, Smith accepted and signed the January 31, 2013 job offer as a condition of her employment. She also electronically signed the receipt for Respondent's U.S. 2013 Employee Handbook and EAP. (Jt. Exhs. 2-3). Smith worked for Respondent as an anti-money laundering operations analyst from about February 19, 2013, until March 28, 2014, when she voluntarily resigned.

On March 28, 2014, Echevarria, on her own behalf, and also on the behalf of other similarly situated employees of Respondent, including Smith and Danielle Lucas (Lucas), Yadira Calderon (Calderon), and Kelleigh S. Weeks (Weeks), through counsel, filed a demand for arbitration with the American Arbitration Association (the AAA), titled "Nationwide Class Action Arbitration Submission," (class arbitration action), along with a "Notice of Filing Notice of Consent to Join," and notices of "Consent to Join" collective action.¹ They sought designation of the action as a collective action and alleged that Respondent violated the Fair Labor Standards Act (FLSA), 29 U.S.C. Sec. 201 et. seq., by failing to pay overtime premium pay. (Jt. Exh. 5).

¹ Darlene Echevarria, on her own behalf and others similarly situated v. Citigroup, Inc., a Foreign Corporation and Citibank, N.A., Case No. 01-14-0000-0324.

On April 14, 2014, the AAA case filing coordinator, Kristen Cottone (Cottone) sent a letter to the representatives of the parties to the class arbitration action, requesting a copy of the complete arbitration agreement so that the AAA could determine whether to proceed with the class action. The letter stated that, “[t]he Association requests that either Claimant or Respondent provide a contract clause providing for administration by the [AAA].” Cottone also requested any additional documents that “discuss arbitration procedures to be followed, such as an employee handbook,” as well a court order or joint stipulation, if any, compelling the dispute to arbitration. (Jt. Exh. 6).

On April 15, 2014, counsel for Respondent sent a letter to the AAA, along with a copy of the EAP, and requested that the AAA reject Echevarria’s demand for designation of the claim as a nationwide collective arbitration action, and instead, only accept her individual claim. (Jt. Exh. 7). On April 28, 2014, Cottone, on behalf of the AAA, notified the parties that the AAA had received a copy of the EAP, and that, “[i]n accordance with the AAA’s policy on class arbitrations, we cannot administer this matter as a class action since the agreement between the parties prohibits class claims.” She further advised the parties that they “may proceed with this matter on an individual basis.” (Jt. Exh. 8). Thus, as admitted by Respondent, it successfully enforced its EAP.

III. DECISION AND ANALYSIS

A. Respondent’s Maintenance and Enforcement of Its EAP Violates Section 8(a)(1) of the Act

The complaint asserts violations of Section 8(a)(1) of the Act. Under Section 8(a)(1), it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right “to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .”

In *D.R. Horton*, 357 NLRB No. 184, slip op. at 1, the Board found that an employer violates Section 8(a)(1) of the Act by imposing, as a condition of employment, a mandatory arbitration agreement that precludes employees from “filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial.” Citing to *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948–949 (1942), *Salt River Valley Water Users Assn.*, 99 NLRB 849, 853–854 (1952), enfd. 206 F.2d 325 (9th Cir. 1953), and many other cases, the Board noted that such concerted legal action addressing wages, hours, and working conditions has consistently fallen within Section 7’s protections. Most recently, in *Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. at 1–2, the Board adopted and reaffirmed the rationale and decision in *D.R. Horton*. The *Murphy Oil* Board found that the respondent violated Section 8(a)(1) of the Act by requiring its employees to agree to mandatory arbitration agreements requiring them to resolve all employment-related disputes through individual arbitration, and by taking steps to enforce the unlawful agreements in Federal district court when the charging party and three other employees filed a collective action under the FLSA. *Id.*

The complaint here specifically alleges that Respondent violated the Act by maintaining and enforcing the EAP as a condition of its employees' employment, including that of the Charging Party (Smith), by precluding them from filing any group, class, collective, or other representative action claims, through arbitration or the judicial system, of disputes identified in the EAP concerning wages, hours, and other terms and conditions of employment.

First, it is undisputed that Respondent's EAP has been maintained as a condition of the newly hired employees' employment from December 26, 2012, and continuing to the present, as evidenced by the stipulated record. This includes, of course, Smith's employment. Further, Smith electronically signed the EAP on February 5, 2013, when she accepted Respondent's employment offer and acknowledged receipt of the principles of employment and the U.S. 2013 Employee Handbook receipt form. (Jt. Exh. 4). Therefore, I find the EAP was a mandatory rule imposed by Respondent as a condition of employment. As such, the EAP is evaluated in the same manner as any other workplace rule. See *D.R. Horton*, 357 NLRB No. 184, slip op. at 5.

To determine if such a rule, including a mandatory arbitration policy, violates Section 8(a)(1) of the Act, the Board applies the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). See *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed.Appx. 527 (D.C. Cir. 2007); *D.R. Horton*, supra, 357 NLRB No. 184. Under *Lutheran Heritage*, the first inquiry is whether the rule explicitly restricts activities protected by Section 7. If it does, the rule is unlawful. If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to [Section 7] activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage*, supra at 647. In the instant case, I find that the EAP explicitly restricts activities protected by Section 7, in that it states:

Except as otherwise required by applicable law, this Policy applies only to claims brought on an individual basis. Consequently neither Citi nor any employee may submit a class action, collective action, or other representation action for resolution under this Policy.

Further, Respondent admitted, in its answer, to paragraph 4(c) of the complaint that by maintenance of its EAP, it "has precluded employees from filing any group, class, collective, or other representative action claims in arbitration with respect to disputes identified in the [EAP] which concern wages, hours and other terms and conditions of employment." In addition, Respondent admitted, to paragraph 5(b) of the complaint, that since on or about April 15, 2014, it made efforts to enforce its EAP when it requested that the AAA reject the nation-wide class action submission filed by Echevarria, on her own behalf, and on behalf of other of Respondent's similarly situated employees, including Smith. (Jt. Exh. 5). Accordingly, I find that Respondent's maintenance of its EAP and efforts to enforce it violate the Act because the EAP expressly precludes any class or collective actions. In doing so, I find that Respondent restricted the exercise of employees' Section 7 rights in violation of Section 8(a)(1) of the Act. This finding is fully supported by the Board's decisions in *D.R. Horton* and *Murphy Oil*.

B. D.R. Horton and Murphy Oil Are Controlling

Respondent insists that this matter is not one to be “decided in a vacuum of [NLRB] precedent,” but “a proceeding that brings into question the jurisdiction of the Board to act in a matter Congress has chosen to regulate through...the [FAA]...,” and not the NLRA or Board law. In support of this argument, Respondent presents a litany of recent United States Supreme Court decisions which “have established the broad preemptive sweep of the FAA,” by mandating “that arbitration agreements must be enforced according to their terms.” Respondent contends that these decisions “reject the application of other state and federal statutes” in order to deem arbitration agreements invalid in the absence of an express ‘congressional command’ to override the FAA. See (R. Br. citing and discussing, e.g., *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013); *CompuCredit*, 132 S.Ct. 665, 669 (2012); and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985)). In the same vein, Respondent argues that the NLRA has not vested the Board with authority to dictate or guarantee how other courts or agencies would or should adjudicate non-NLRA legal claims, whether they be class, collective, joinder of individual claims, or otherwise, citing Board Member Miscimarra’s dissent in *Murphy Oil*. Respondent also asserts that the Board’s holding in *D.R. Horton* is incorrect based on its rejection by the U.S. Court of Appeals for the Fifth Circuit in its opinion on appeal of *D.R. Horton* (737 F.3d 344 (Dec. 3, 2013)), and based on other federal court opinions. In sum, Respondent urges that I ignore the Board’s decisions in *D.R. Horton* and *Murphy Oil*, and instead, follow its interpretation of Supreme Court precedent, Federal court opinions, and Board member dissent.

However, I decline to deviate from Board precedent. The Board majority, in both *D.R. Horton* and *Murphy Oil*, considered all arguments, and most court decisions, raised and relied on by Respondent, to support a different conclusion, by which I am bound unless and until it is reversed by the Supreme Court. See *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004); *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984) (“it is a judge’s duty to apply established Board precedent which the Supreme Court has not reversed,” and “for the Board, not the judge, to determine whether precedent should be varied.”) (citation omitted).²

In *American Express Co.*, supra, the Supreme Court dismissed claims by multiple merchants that their agreements to arbitrate individual claims as the sole method of resolving disputes was invalid, and concluded that when federal statutory claims are involved, such as federal antitrust laws, the FAA’s directive can only be “overridden by a contrary congressional command.”³ However, the Board in *D.R. Horton* distinguished *American Express*, finding that it did not involve the substantive Section 7 right of employees to engage in collective action, including collective legal action, for mutual aid and protection concerning wages, hours, and work conditions.

² Respondent’s argument, in its brief, that the Board’s non-acquiescence position is untenable because of Federal Circuit Court opinions rejecting *D.R. Horton* is without merit. See (R. Br. fn. 4).

³ The merchants in *American Express* challenged the rates that American Express charged them, and argued that it would only be cost effective to proceed collectively. The Court found that the Federal antitrust laws at issue failed to guarantee “an affordable procedural path to the vindication of every claim.” *American Express*, supra at 2039.

Although the Supreme Court has upheld the enforcement of individual mutual arbitration agreements in these and other cases, the Board recognizes that the Court has never addressed or resolved the issue of exclusive individual arbitration over class and/or collective actions under the Act. The Board understands that the FAA establishes a liberal policy favoring arbitration agreements. *D.R. Horton*, 357 NLRB No. 184, slip op. at 8. However, as noted in *D.R. Horton*, the Supreme Court has “repeatedly emphasized” that the FAA protects agreements to arbitrate federal statutory claims “so long as ‘a party does not forgo the substantive rights afforded by the statute.’” *Id.* at 9–10, citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi Motors Corp.*, *supra* at 628.⁴

Respondent further contends that the Supreme Court in *American Express* makes clear that it is improper to find a congressional command where none exists, and therefore, since none exists in the language or legislative history of the NLRA, there should be no such finding here. However, as stated, the Board decisions in *D.R. Horton* and *Murphy Oil* establish that such a command exists in that Section 7 substantively guarantees employees the right to engage in collective action, including collective legal action, for mutual aid and protection concerning wages, hours, and working conditions. For the same reasons, the Supreme Court’s decision in *CompuCredit*, *supra*, and other cases cited by Respondent are distinguishable.⁵ Further, these general consumer litigation and commercial cases do not address the central questions of how and to what extent the FAA may be used to interfere with, by way of private agreements, the fundamental substantive right of workers to engage in concerted activity established and protected by the NLRA—the gravamen of the violation here and in *D.R. Horton*.

Respondent also points to *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011),⁶ *Marmet Health Care Center v. Brown*, 133 S.Ct. 1201 (2012) (requirement that courts enforce the parties’ bargain to arbitrate), and other Supreme Court cases to support its argument that the validity of their EAP and class action waiver contained therein must be based only on the FAA. Similarly, the Supreme Court in these cases did not address the issue of mandatory arbitration agreements in the context of individual employment agreements and the well-established substantive right of employees under the NLRA to engage in concerted legal action against their employer. The *Murphy Oil* Board has reaffirmed, and thoroughly and convincingly explained its rationale as to why *D.R. Horton* was correctly decided, despite the FAA’s liberal arbitration policy. Thus, Respondent’s argument that the FAA must always override the NLRA in these mandatory arbitration agreement cases fails.

The Board in *Murphy Oil* noted the Supreme Court’s recent confirmation “that the Federal policy favoring arbitration, however, liberal, has its limits. It does not permit a ‘prospective waiver of a party’s right to pursue statutory remedies.’” *Murphy Oil*, 361 NLRB

⁴ The Board distinguished *Gilmer*, in that it “addresses neither Section 7 nor the validity of a class action waiver,” and involved an individual claim and an arbitration agreement without any language specifically waiving class or collective actions. *D.R. Horton*, 357 NLRB No. 184, slip op. at 10, fn. 22.

⁵ The Supreme Court in *CompuCredit* invalidated an arbitration agreement waiving the ability of consumers to sue a credit card marketer and the card’s issuing bank in court for alleged violations of the Credit Repair Organization Act (CROA).

⁶ In *AT&T Mobility LLC v. Concepcion*, the Supreme Court found the FAA preempted California state law making class-action waivers in consumer adhesion contracts unconscionable.

No. 72, slip op. at 8, citing *Italian Colors*, supra, 133 S.Ct. at 2310 (quoting *Mitsubishi Motors Corp.*, supra, at 637) (emphasis in original). In doing so, the Board established that an arbitration agreement that prevents employees from exercising their substantive Section 7 right to pursue legal claims concertedly to address work conditions in any forum “amounts to a prospective waiver of a right guaranteed by the NLRA,” and is unlawful. *Id.* at 9.

The Board in *Murphy Oil* also found that even applying the framework applied by the Fifth Circuit Court of Appeals, *D.R. Horton* is good law. The Board established that both exceptions to the FAA’s requirement that arbitration agreements must be enforced according to their terms, apply to cases such as *D.R. Horton*. First, the *Murphy Oil* Board found the arbitration agreement in its case “invalid under Section 2 of the FAA, the statute’s savings clause, which provides for the revocation ‘upon such grounds as exist at law or in equity for the revocation of any contract.’” *Murphy Oil*, 361 NLRB No. 72, slip op. at 9, citing 9 U.S.C. § 2. The Board found that such grounds existed in its case, and relied on earlier Supreme Court decisions to establish that, “any individual employment contract that purports to extinguish rights guaranteed by Section 7 of the National Labor Relations Act is unlawful.” *Id.* at 9, citing *National Licorice, Co. v. NLRB*, 309 U.S. 350, 361 (1940) and *J.I. Case, Co. v. NLRB*, 321 U.S. 332, 337 (1944).

Second, the Board agreed with the *D.R. Horton* Board’s opinion regarding the second exception of the FAA’s mandate, that Section 7 of the Act does constitute a “contrary congressional command” overriding the FAA. It saw “no compelling basis for the court’s conclusion that to override the FAA, Section 7 was required to explicitly provide for a private cause of action for employees, a right to file a collective legal action, and the procedures to be employed.” Further, the Board emphasized the substantive right to engage in collective legal activity “plainly authorized by the broad language of Section 7, as it has been authoritatively construed by the Supreme Court in [*Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978)] as part of the protected ‘resort to administrative and judicial forums.’” *Murphy Oil*, 361 NLRB No. 72, slip op. at 9. All other cases cited by Respondent in support of its positions favoring the FAA over the NLRA and discrediting Board precedent are not specifically addressed here as they are so thoroughly explained in *D.R. Horton* and *Murphy Oil*.

C. Respondent’s Remaining Arguments Are Unsupported

Respondent’s assertion that unrepresented employees are on an equal playing field with unions that, on behalf of its members, can voluntarily agree to waive a judicial forum in favor of arbitration is without merit. The Act clearly recognizes the inequality of bargaining power between employees without benefit of a collective-bargaining agreement or union representation and employers who are corporately or otherwise organized. See 29 U.S.C. § 151. Therefore, a mandatory arbitration agreement, such as Respondent’s EAP, which embodies a waiver restricting employees’ substantive rights under the Act, “is the antithesis of an arbitration agreement providing for union representation in arbitration that was reached through the statutory process of collective bargaining...” *Murphy Oil*, 361 NLRB No. 72, slip op. at 10. Although the *D.R. Horton* and *Murphy Oil* Boards recognize the importance of such balancing of power under the Act, neither claims the inequality in bargaining power between individual employees and employers is the only reason to invalidate mandatory arbitration agreements.

Respondent argues that its EAP is distinguishable from the agreement that the Board found unlawful in *D.R. Horton* because it specifically states that it does not “exclude the National Labor Relations Board from jurisdiction over disputes covered by the [Act]...” Similarly, Respondent
5 claims that its EAP would not preclude the U.S. Department of Labor, or similar state agency, from seeking class-wide or collective action on behalf of the Charging Party. See (R. br., fn 2). However, there is nothing in Respondent’s EAP which allows for employees, past or present, to pursue in any way, even as parties in an FLSA or DOL action, class, joint, or collective claims in arbitration or court. Moreover, Respondent’s EAP “makes arbitration the required and exclusive
10 forum for the resolution of all disputes arising out of or in any way related to employment based on legally protected rights.” (Jt. Exh. 1). It does not leave open any judicial forum, as required by the Board in *D.R. Horton*, nor does it allow for collective or class arbitration. See *D.R. Horton*, 357 NLRB No. 184, slip op. at 12. Of note, the *Murphy Oil* Board rejected a similar argument where a revised arbitration agreement stated that employees would not waive their
15 Section 7 right to file a class or collective action in court, but maintained its original language under which employees “explicitly waive their right” to file or be a party or class member in a class or collective action in arbitration or other forum. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 19.

Respondent also asserts that the Board has no authority to order it to take action
20 regarding litigation initiated by the Charging Party in another forum, and which involves another federal statute, the FLSA. The Board, in *D.R. Horton* and *Murphy Oil*, explained how the Board and court decisions recognized this authority in cases, such as this one, where mandatory arbitration agreements “restrict the exercise of the *substantive* right to act concertedly for mutual
25 aid or protection that is central to the [NLRA].” *Murphy Oil*, 361 NLRB No. 72, slip op. at 5, citing *D.R. Horton*, 357 NLRB No. 184, slip op. at 2–3 & fn. 4. The *Murphy Oil* Board recognized that while the underlying claims before it involved the FLSA, the NLRA “is the source of the relevant, substantive right to pursue those claims concertedly.” *Id.* at 5. Further, the Board and courts have held that the filing of FLSA cases, and seeking support of others in
30 pursuit of those cases, constitutes the kind of concerted activity protected by the Act. See, *Murphy Oil*, *Id.*, citing *Spandso Oil & Royalty Co.*, 42 NLRB 942, 949–950 (1942); *Salt River Valley Water Users’ Assn. v. NLRB*, 206 F.2d 325 (9th Cir. 1953).

Next, Respondent contends that even if the EAP was mandatory, it did not violate the Act
35 because the use of class action procedures is not a substantive right. Similarly, Respondent denies that Smith, Echevarria, and other similarly situated employees, engaged in concerted activities with other employees for the purpose of mutual aid and protection by filing a nationwide collective action arbitration submission before the AAA on about March 28, 2014. This contention fails on both counts. First, the Board has made clear that the Act does not create or ensure a right to “class
40 certification or the equivalent,” but a right “to *pursue* joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint.” *Murphy Oil*, 361 NLRB No. 72, slip op. at 2, citing *D.R. Horton*, 357 NLRB No. 184, slip op. at 10 & fn. 14.

Second, Smith and other employees joined the nationwide class action submission filed by
45 Echevarria, as is evidenced by the “Notice of filing Notice of Consent to Join” and “Notices of Consent to Join Collective Action” signed by Echevarria, Smith, Lucas, Calderon, and Weeks. (Jt.

Exh. 5.) There is simply no evidence in this case that Smith, Eschevarria, and the other designated, similarly situated employees were acting on their own behalf. Thus, I reject Respondent's argument that concerted activity in this case is merely presumed, and not based on actual evidence as required by the Board. See *Meyers Industries, Inc. & Prill*, 268 NLRB 493 ("Meyers I") and
5 *Meyers Industries, Inc. & Prill*, 281 NLRB 882 (1986) ("Meyers II").

Respondent also contends, in the same context, that since Smith was no longer an employee at the time she filed the underlying charge, she could not have been engaged in protected concerted activity when she submitted a demand for class-wide arbitration, or have
10 joined a putative class action for the purpose of mutual aid or protection. Respondent relies on *Statutory Engineers, Local 39*, 346 NLRB 336, 347 fn. 9, in which the Board affirmed an administrative law judge's decision finding that Sec. 2(3) of the Act does not include in its definition of employees former employees who are filing personal lawsuits against their former
15 employer and who have lost their jobs for reasons other than a labor dispute or because of an unfair labor practice. Accepting this argument would mean that Smith would not have standing to have filed the underlying charge, which she clearly does. Unlike this case, in *Statutory Engineers*, supra, the affected employee was found to have been terminated for good cause, and had filed a personal lawsuit. Here, Smith did not file a personal lawsuit. Moreover, the Act does not place such a limitation on who may file a charge. See Sec. 10 of the Act and *NLRB v.*
20 *Indiana & Michigan Electric Co.*, 318 U.S. 9, 17 (1943). It is well established that the term "employee" under the Act includes former employees of the employer. See Section 2(3) of the Act; *Redwood Empire, Inc.*, 296 NLRB 369, 391 (1989); *Waco, Inc.*, 273 NLRB 746, 747 fn. 8 (1984).

25 Next, Respondent asserts this claim should be barred due to the "Voluntariness Carve-Out" in footnote 28 of *D.R. Horton*. In other words, Respondent argues that because Smith, unlike the charging party in *D.R. Horton*, signed and agreed to the terms of the EAP when she applied for employment, she was fully informed, and voluntarily agreed to individually arbitrate any employment disputes with Respondent. However, as Respondent acknowledged, the
30 charging party in *Murphy Oil*, like Smith, did in fact sign the arbitration agreement when she applied for employment. Although the *Murphy Oil* Board did not specifically address the matter of voluntariness, it clearly establishes that it matters not when an employee signs a mandatory arbitration agreement forfeiting his or her Section 7 substantive rights.

35 Next, Respondent argues that this claim is untimely under Section 10(b) of the Act because Respondent's alleged actions causing Smith to be bound by its EAP occurred more than six months before she filed her charge on June 8, 2014. Respondent contends that the 6-month statute of limitations commenced in February 13, 2013, when Smith began employment with Respondent, and agreed to its EAP. However, this argument is without merit under controlling
40 case law holding that a continuing violation exists as long as the rule is still being enforced at the time the charge is filed. See e.g., *Carney Hospital*, 350 NLRB 627, 640 (2007). Further, Respondent did not attempt to enforce its EAP until April 14, 2014, when it sent a letter to the AAA requesting that the class-action arbitration submission be rejected. See *Alamo Cement Co.*, 277 NLRB 1031, 1036-1037 (1985) (not time barred where enforcement allegation could
45 not have been litigated sooner).

Finally, in its answer, Respondent relied on the Supreme Court decisions *Bill Johnson's v. NLRB*, 461 U.S. 731, 741 (1983), and *BE&K Construction*, 536 U.S. 516 (2002), to argue that its request for the AAA to preclude class arbitration pursuant to its EAP is constitutionally protected by the First Amendment, and should therefore be stayed pending the final outcome of Smith's FLSA claim. This argument is admittedly based on Respondent's belief that its EAP and enforcement thereof are lawful. As Respondent acknowledges, the *Murphy Oil* Board rejected this argument and reliance on *Bill Johnson's* and *BE&K* because it found the underlying arbitration agreements and enforcement of those agreements unlawful. Further, the First Amendment does not protect the right to file lawsuits or motions that have an illegal objective under the Act. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 20-21; *Allied Trades Council (Duane Reade)*, 342 NLRB 1010, 1013 fn. 4 (2004), citing *Bill Johnson's*, supra at 738. I reject these First Amendment arguments, as well as Respondent's claim that its efforts did not constitute enforcement of its EAP. I find that Respondent's efforts to enforce its unlawful EAP, by petitioning the AAA to reject the nation-wide class action claim pursuant to the EAP, clearly had an illegal basis pursuant to the Board decisions in *D.R. Horton* and *Murphy Oil*.

Based on the foregoing, I find that Respondent's maintenance of its EAP and enforcement efforts through the AAA violate Section 8(a)(1) of the Act as alleged in complaint.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(6) and (7) of the Act.
2. Respondent violated Section 8(a)(1) of the Act by maintaining the EAP, and by enforcing that policy by moving to compel individual arbitration of the Charging Party's class-action submission before the AAA.
3. Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As I have concluded that the EAP is unlawful, the recommended order requires that Respondent revise or rescind it and advise its employees in writing that said rule has been so revised or rescinded. Because Respondent utilized the EAP on a corporate-wide basis, Respondent shall post a notice at all locations where the EAP, or any portion of it requiring all and/or enumerated employment-related disputes to be submitted to individual arbitration, was in effect. See, e.g., *U-Haul Co. of California*, supra, fn. 2 (2006); *D.R. Horton*, supra, slip op. at 17. Respondent is also ordered to distribute appropriate remedial notices to its employees electronically, such as by email, posting on an intranet or internet site, and/or other appropriate electronic means, if it customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB No. 9 (2010).

I recommend Respondent be required to reimburse Charging Party Andrea Smith and other grievants for any litigation and related expenses, with interest, to date and in the future, directly related to Respondent's filing its request/petition for the AAA to reject their demand for a nationwide collective or class arbitration in *Darlene Echevarria et al. v. Citigroup, Inc., et al.* (Case No. 01-14-0000-0324). Determining the applicable rate of interest on the reimbursement will be as outlined in *New Horizons for the Retarded*, 283 NLRB 1173 (1987) (adopting the Internal Revenue Service rate for underpayment of Federal taxes). Interest on all amounts due to Ms. Smith shall be computed on a daily bases as prescribed in *Kentucky River Medical Center*, 356 NLRB 8 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.⁷

ORDER

Respondent, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining an EAP that precludes employees from filing and/or maintaining class or collective actions in any arbitral or judicial forum.

(b) Enforcing (or attempting to enforce) the EAP to prohibit class or collective actions;

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind or revise the EAP, in all forms and places, to make it clear to employees that the policy does not require them, as a condition of their employment, to waive their right to maintain employment-related class or collective actions in all forums, whether arbitral or judicial.

(b) Notify the employees of the rescinded or revised EAP, to include providing them with a copy of any revised policies, acknowledgement forms or other related documents, or specific notification that the EAP has been rescinded.

(c) Reimburse Smith and all grievants for all reasonable expenses and legal fees, if any, incurred in opposing Respondent's request/petition to compel individual arbitration

⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

before the AAA, with interest, in *Darlene Echevarria et al. v. Citigroup, Inc., et al.* (Case No. 01-14-0000-0324).

5 (d) Ensure that the Charging Party Andrea Smith, and all similarly situated employees, have a forum to litigate or arbitrate their class complaint by either moving the AAA, jointly with the Charging Party upon request, to vacate its decision to not administer the matter as a class action, or permitting her/their claims, upon request, to be arbitrated on a class-wide basis.

10 (e) Within 14 days after service by the Region, post at its facility in Tampa, Florida, and in all facilities where it has maintained and/or enforced the EAP, copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 26, 2012.

25 (f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

30 Dated, Washington, D.C. December 23, 2014

35

Donna N. Dawson
Administrative Law Judge

⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX**NOTICE TO EMPLOYEES****Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce an employment arbitration policy (EAP) or agreement that requires employees, as a condition of their employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial, and/or requires disputes relating to wages, hours, or other working conditions be submitted to individual binding arbitration.

WE WILL NOT enforce a mandatory arbitration program by asserting it in class-action arbitration or litigation regarding wages that the Charging Party Andrea Smith brought against us.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

WE WILL rescind or revise the EAP to arbitrate in all of its forms to make it clear to employees that the policy does not constitute a waiver of their right in all forums to maintain class or collective actions about wages, hours, and other working conditions.

WE WILL notify all former and current employees who were required to sign or otherwise agree to the EAP in any form at our facilities at any time since December 26, 2012, of the rescinded or revised mandatory arbitration program set forth in our EAP, to include providing them with a copy of any revised agreements, acknowledgement forms, or other related documents, or specific notification that the EAP has been rescinded.

WE WILL reimburse Charging Party Andrea Smith and other grievants for any litigation expenses directly related to opposing Respondent's (Citigroup Technology, Inc. and Citigroup Citicorp Banking Corporation (parent), a subsidiary of Citigroup, Inc.) request/petition to compel individual arbitration before the AAA, in *Darlene Echevarria et al. v. Citigroup, Inc.*, et al. (Case No. 01-14-0000-0324).

WE WILL ensure that the Charging Party Andrea Smith, and all similarly situated employees, have a forum to litigate or arbitrate their class complaint by either moving the AAA, jointly with the Charging Party upon request to vacate its decision to not administer the matter as a class action, or permitting her/their claims, upon request, to be arbitrated on a class-wide basis.

**CITIGROUP TECHNOLOGY, INC.
AND CITIGROUP CITICORP
BANKING CORPORATION (Parent),
A SUBSIDIARY OF CITIGROUP, INC.
(Employer)**

Dated: _____ **By:** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

South Trust Plaza, 201 East Kennedy Blvd., Suite 530, Tampa, FL 33602-5824
(813) 228-2641, Hours: 8:00 a.m. to 4:30 p.m. (E.T.)

The Administrative Law Judge's decision can be found at www.nlr.gov/case/12-CA-130742 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (813) 228-2455.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CITIGROUP TECHNOLOGY, INC.
AND CITICORP BANKING
CORPORATION (PARENT),
A SUBSIDIARY OF CITIGROUP, INC.

and

ANDREA SMITH, An Individual

Case 12-CA-130742

ORDER TRANSFERRING PROCEEDING TO
THE NATIONAL LABOR RELATIONS BOARD

A hearing in the above-entitled proceeding having been held before a duly designated Administrative Law Judge and the Decision of the said Administrative Law Judge, a copy of which is annexed hereto, having been filed with the Board in Washington, D.C.,

IT IS ORDERED, pursuant to Section 102.45 of the National Labor Relations Board's Rules and Regulations, that the above-entitled matter be transferred to and continued before the Board.

Dated, Washington, D.C., December 23, 2014.

By direction of the Board:

Gary Shinnors

Executive Secretary

NOTE: Communications concerning compliance with the Decision of the Administrative Law Judge should be with the Director of the Regional Office issuing the complaint.

Attention is specifically directed to the excerpts from the Board's Rules and Regulations and on size of paper, and that requests for extension of time must be served in accordance appearing on the pages attached hereto. **Note particularly the limitations on length of briefs with the requirements of the Board's Rules and Regulations Section 102.114(a) & (i).**

Exceptions to the Decision of the Administrative Law Judge in this proceeding must be received by the Board's Office of the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570, on or before **January 20, 2015.**

Confirmation Number	1042017
Date Submitted	1/6/2015 4:35:10 PM (GMT-05:00) Eastern Time (US & Canada)
Case Name	Citigroup Technology, Inc., and Citicorp Banking Corporation (parent), a subsidiary of Citigroup, Inc.
Case Number	12-CA-130742
Filing Party	Charged Party / Respondent
Name	Cherof, Edward M
Email	cherofe@jacksonlewis.com
Address	1155 Peachtree Street Suite 1000 Atlanta, GA 30309
Telephone	(404)525-8200 Ext:
Fax	(404)525-1173
Original Due Date	01/20/2015
Date Requested	02/03/2015
Reason for Extension of Time	We respectfully request a brief extension of time from January 20, 2015, until February 3, 2015, to submit Respondent's Exceptions to Judge's Decision. While the Decision was posted on December 23, 2014, the parties did not receive a copy of the Decision until December 26, 2014. Counsel for the General Counsel and Counsel for Charging Party consent to Respondent's request.
What Document is Due	Exceptions to ALJD
Parties Served	Andrew Frisch, Esq. Morgan and Morgan 600 N. Pine Island Rd, Suite 400 Plantation, FL 33324 AFrisch@ForThePeople.com Chris Zerby, Esq. National Labor Relations Board 1099 14th Street NW Washington, DC 20570 chris.zerby@nlr.gov

**UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
1099 14th Street, N.W.
Washington, D.C. 20570-0001**

January 7, 2015

Re: Citigroup Technology, Inc. and
Citicorp Banking Corporation (Parent)
a subsidiary of Citigroup, Inc.
Case 12-CA-130742

EXTENSION OF TIME TO FILE EXCEPTIONS AND SUPPORTING BRIEF

The due date for the receipt in Washington, D.C. of Exceptions and Supporting Brief is extended to **FEBRUARY 3, 2015**. This extension of time applies to all parties.



Henry S. Breiteneicher
Associate Executive Secretary

cc: Parties

Confirmation Number	1055954
Date Submitted	1/29/2015 4:08:17 PM (GMT-05:00) Eastern Time (US & Canada)
Case Name	Citigroup Technology, Inc., and Citicorp Banking Corporation (parent), a subsidiary of Citigroup, Inc.
Case Number	12-CA-130742
Filing Party	Charged Party / Respondent
Name	Cherof, Edward M
Email	cherofe@jacksonlewis.com
Address	1155 Peachtree Street Suite 1000 Atlanta, GA 30309
Telephone	(404)525-8200 Ext:
Fax	(404)525-1173
Original Due Date	02/03/2015
Date Requested	03/03/2015
Reason for Extension of Time	The reason for this request is that the Charging Party just recently reached an agreement with the Respondent to settle the underlying civil case. As one of the terms of the settlement, Charging Party has agreed to withdraw the instant unfair labor practice charge. We request the extension to allow the parties to finalize and execute the settlement agreement.
What Document is Due	Exceptions to ALJD
Parties Served	Andrew Frisch, Esq. Morgan & Morgan 600 North Pine Island Rd, Suite 400 Plantation, Florida 33324 Email - AFrisch@ForthePeople.com Christopher Zerby, Esq. National Labor Relations Board Region 12 201 E. Kennedy Blvd., Suite 530 Tampa, Florida 33602 Email - chris.zerby@nlrb.gov

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12**

**CITIGROUP TECHNOLOGY, INC. and
CITICORP BANKING CORPORATION (PARENT),
A SUBSIDIARY OF CITIGROUP, INC.**

and

Case 12-CA-130742

ANDREA SMITH, an Individual

**OPPOSITION TO REQUEST FOR A
FURTHER EXTENSION OF TIME TO FILE EXCEPTIONS**

On October 8, 2014, Associate Chief Administrative Law Judge William N. Cates granted the parties' Joint Motion and Stipulated Record, waived the hearing and assigned this matter to Administrative Law Judge Donna N. Dawson. On December 23, 2014, ALJ Dawson issued the decision and recommended order in this case, and found that Respondent violated the Act as alleged in the Complaint. On January 7, 2015, the Board granted Respondent's unopposed motion for an extension of time to file exceptions to February 3, 2015.

On January 29, 2015, Respondent filed a request with the Board seeking that the time for filing exceptions be extended to March 3, 2015. As Counsel for the General Counsel informed Respondent's attorney by electronic mail on January 29, 2014, the General Counsel opposes any further extension beyond February 17, 2015. This second request for an extension, by which Respondent seeks an additional month for the filing of exceptions, is not necessary here because there are no facts in dispute, the

case is relatively straightforward, and an extension has already been granted. Furthermore, Counsel for the General Counsel intends to oppose any request to withdraw the unfair labor practice charge based on settlement of the underlying civil claim, since that settlement will not provide a remedy for the unfair labor practice, which may impact as many as 8,000 employees.

DATED at Tampa, Florida, this 30th day of January 2015.

/S/ Christopher C. Zerby
Christopher C. Zerby
Counsel for the General Counsel
National Labor Relations Board, Region 12
201 E. Kennedy Blvd., Suite 530
Tampa, FL 33602-5824

CERTIFICATE OF SERVICE

I hereby certify that the General Counsel's Opposition to Request for A Further Extension of Time to File Exceptions in Case 12-CA-130742 was electronically filed and served as stated below on the 30th day of January, 2015:

By electronic filing at www.nlr.gov to:

Hon. Gary Shinnors
Executive Secretary
National Labor Relations Board
1099 14th ST. N.W.
Washington, D.C. 20570

By electronic mail to:

Edward M. Cherof, Esq.
Jonathan J. Spitz, Esq.
Jackson Lewis, LLP
1155 Peachtree St NE, Suite 1000
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390 N Orange Avenue, Suite 1285
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Tel. (954)318-0268
Fax (954)333-3515
AFrisch@ForthePeople.com

/s/ Christopher C. Zerby
Christopher C. Zerby
Counsel for the General Counsel

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
1099 14th Street, N.W.
Washington, D.C. 20570-0001

January 30, 2015

Re: Citigroup Technology, Inc. and
Citicorp Banking Corporation (Parent)
a subsidiary of Citigroup, Inc.
Case 12-CA-130742

EXTENSION OF TIME TO FILE EXCEPTIONS AND SUPPORTING BRIEF

The due date for the receipt in Washington, D.C. of Exceptions and Supporting Brief is extended to **MARCH 3, 2015**. This extension of time applies to all parties. No additional extensions of time will be granted for the filing of exceptions.

/s/ Henry S. Breiteneicher
Associate Executive Secretary

cc: Parties

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CITIGROUP TECHNOLOGY, INC. and
CITICORP BANKING CORPORATION
(PARENT), A SUBSIDIARY OF CITIGROUP,
INC.

Case 12-CA-130742

and

ANDREA SMITH, an Individual,

**RESPONDENT CITIGROUP TECHNOLOGY, INC. AND CITICORP BANKING
CORP. (PARENT), A SUBSIDIARY OF CITIGROUP, INC.'S
EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board (“NLRB” or “Board”), Respondent Citigroup Technology, Inc. and Citicorp Banking Corp. (Parent), a subsidiary of Citigroup, Inc. (“Respondent”) excepts to the following parts of the record in the above-captioned case: the Decision of the Administrative Law Judge (“ALJ”), dated December 23, 2014, as identified below.

Exceptions to the Decision of the ALJ

Respondent respectfully excepts to:

1. The ALJ’s finding/conclusion that Respondent’s Employment Arbitration Policy (“Policy”) “was a mandatory rule imposed by Respondent as a condition of employment.” (ALJ Decision, “ALJ Dec.,” 6:12-14; Joint Exhibits 1-8 (“Jt. Ex. ___”).
2. The ALJ’s conclusion that the Policy is subject to the Board’s test for “rules” set forth in such cases as *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). (ALJ Dec., 6:21-25).

3. The ALJ's finding/conclusion that Respondent's "maintenance of its [Policy] and efforts to enforce it violate the Act because the [Policy] expressly precludes any class or collective actions." (ALJ Dec., 6:39-42; Jt. Exs. 1-8).

4. The ALJ's finding/conclusion that the Supreme Court's decisions in *American Express v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), *Compucredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012), *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011), and *Marmet Health Care Center v. Brown*, 133 S. Ct. 1201 (2012) do not render the NLRB's decision in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), *enf. denied*, 737 F.3d 344 (5th Cir. 2013) and *Murphy Oil*, 361 NLRB No. 72 (2014) unenforceable under the circumstances of this case. (ALJ Dec., 7:9-14; 18-24; 8:2-39; 9:2-5; Jt. Exs. 1-8).

5. The ALJ's failure to find/conclude that Respondent's Policy is a contract that must be enforced according to its terms in compliance with the Federal Arbitration Act ("FAA") 9 U.S.C. § 1, *et seq.* (ALJ Dec. 7:3-40; 8:2-39; 9:1-31; Jt. Exs. 1-8).

6. The ALJ's failure to find/conclude that the FAA, as interpreted by the U.S. Supreme Court, prevails over the Board's decision in *D.R. Horton*. (ALJ Dec. 7:3-40; 8:2-39; 9:1-31; Jt. Exs. 1-8).

7. The ALJ's failure to find/conclude that, under the FAA, Respondent's Policy is valid and lawful, and must be enforced according to its terms. (ALJ Dec. 7:3-40; 8:2-39; 9:1-31; Jt. Exs. 1-8).

8. The ALJ's failure to find/conclude that the class action waiver in Respondent's Policy is valid and enforceable pursuant to the FAA, as interpreted by recent decisions of the U.S. Supreme Court. (ALJ Dec. 7:3-40; 8:2-39; 9:1-31; Jt. Exs. 1-8).

9. The ALJ's failure to find/conclude that the FAA's savings clause does not apply in this case. (ALJ Dec. 9:7-18; Jt. Exs. 1-8).

10. The ALJ's failure to find/conclude that the NLRA does not contain an express congressional command that exempts the Board from following the U.S. Supreme Court's interpretation of the FAA. (ALJ Dec. 9:20-31; Jt. Exs. 1-8).

11. The ALJ's finding/conclusion that the Board has the "authority to dictate or guarantee how other courts or agencies would or should adjudicate non-NLRA legal claims, whether they be class, collective, joinder of individual claims, or otherwise." (ALJ Dec., 7:14-17; Jt. Exs. 1-8).

12. The ALJ's finding/conclusion not to deviate from Board precedent as set forth in *D.R. Horton* and *Murphy Oil*. (ALJ Dec. 7:3-40; 8:2-39; 9:1-31; Jt. Exs. 1-8).

13. The ALJ's failure to conclude that a class action is a procedural device used in civil litigation, not a substantive legal right. (ALJ Dec. 8:25-35; 10:34-35; Jt. Exs. 1-8).

14. The ALJ's finding/conclusion that the Board's decision in *D.R. Horton* survives the United States Circuit Court of Appeals for the Fifth Circuit's decision in *D.R. Horton* as determined by the Board in *Murphy Oil*. (ALJ Dec., 9:7-31; Jt. Exs. 1-8).

15. The ALJ's finding/conclusion that "Respondent's assertion that unrepresented employees are on an equal playing field with unions that, on behalf of its members, can voluntarily agree to waive a judicial forum in favor of arbitration is without merit." (ALJ Dec., 9:35-37; Jt. Exs. 1-8).

16. The ALJ's finding/conclusion that the Policy violates the Act notwithstanding the fact that it does not "exclude the National Labor Relations Board from jurisdiction over disputes covered by the Act..." or "preclude the U.S. Department of Labor, or similar state agency, from

seeking class-wide or collective action on behalf of the Charging Party.” (ALJ Dec., 10:2-18; Jt. Exs. 1-8).

17. The ALJ’s finding/conclusion that the “Board has...authority to order [Respondent] to take action regarding litigation initiated by the Charging Party in another forum, and which involves another federal statute, the FLSA.” (ALJ Dec., 10:20-32; Jt. Exs. 1-8).

18. The ALJ’s conclusion that the mere filing of a class or collective action constitutes protected concerted activity. (ALJ Dec. 10:34-46; 11:1-23; Jt. Exs. 1-8).

19. The ALJ’s finding/conclusion that Charging Party was engaged in concerted activities by filing the collective action with the AAA on March 28, 2014. (ALJ Dec., 10:35-46; 11:1-5; Jt. Exs. 1-8).

20. The ALJ’s finding/conclusion that Charging Party was an employee as defined by Section 2(3) of the Act. (ALJ Dec., 11:7-18; Jt. Exs. 1-8).

21. The ALJ’s finding/conclusion that Charging Party did not file a personal lawsuit. (ALJ Dec., 11:18; Jt. Exs. 1-8).

22. The ALJ’s finding/conclusion that “it matters not when an employee signs a mandatory arbitration agreement forfeiting his or her Section 7 substantive rights” and that Charging Party was not fully informed and did not voluntarily agree to the Policy when she applied for employment. (ALJ Dec., 11:25-33; Jt. Exs. 1-8).

23. The ALJ’s finding/conclusion that Charging Party’s claim was timely pursuant to Section 10(b) of the Act. (ALJ Dec. 11:35-45; Jt. Exs. 1-8).

24. The ALJ's failure to find that Charging Party filed her unfair labor practice charge in this proceeding approximately 16 months after she became bound by the Policy in February 2013. (ALJ Dec. 11:35-45; Jt. Exs. 1-8).

25. The ALJ's failure to find/conclude that Charging Party and the General Counsel are barred by Section 10(b) of the Act from contending that Charging Party did not voluntarily enter into a valid and binding arbitration agreement with Respondent, when Charging Party voluntarily elected to remain employed with Respondent, knowing full well that a term of her employment would be to arbitrate any employment-related disputes on an individual and not on a class-wide basis. (ALJ Dec. 11:35-45; Jt. Exs. 1-8).

26. The ALJ's failure to find/conclude that neither Charging Party nor the General Counsel can attack contract formation issues, including the voluntariness of the Policy, 16 months after the contract was formed. (ALJ Dec. 11:35-45; Jt. Exs. 1-8).

27. The ALJ's failure to find/conclude that Section 10(b) of the Act forecloses the General Counsel from litigating the alleged "unlawfulness" of Respondent's the Policy that Charging Party signed in February 2013. (ALJ Dec. 11:35-45; Jt. Exs. 1-8).

28. The ALJ's conclusion that Respondent's Policy is a "rule" and that "a continuing violation exists as long as the rule is still being enforced at the time the charge is filed." (ALJ Dec., 11:39-40; Jt. Exs. 1-8).

29. The ALJ's finding/conclusion that Respondent's request of the AAA that it preclude class arbitration did not violate Respondent's First Amendment rights to petition the government. (ALJ Dec. 12:1-9; Jt. Exs. 1-8).

30. The ALJ's finding/conclusion that Respondent's request of the AAA to enforce the Policy had an illegal basis. (ALJ Dec. 12:11-15; Jt. Exs. 1-8).

31. The ALJ's failure to find/conclude that Respondent asserted the Policy as an affirmative defense and filed the request with the AAA to preclude class arbitration only because Charging Party breached her contract to arbitrate her employment claims by joining a putative wage and hour class action against Respondent. (ALJ Dec. 12:1-15; Jt. Exs. 1-8).

32. The ALJ's Conclusions of Law Nos. 2, and 3 in their entirety. (ALJ Dec. 12:24-29; Jt. Exs. 1-8).

33. The ALJ's Remedy requiring Respondent to revise or rescind its the Policy, provide all employees with a revised copy of the Policy, and post notices in all locations where the Policy was utilized. (ALJ Dec., 12:37-46; Jt. Exs. 1-8).

34. The ALJ's Remedy requiring Respondent to reimburse Charging Party and other grievants for any litigation and related expenses pertaining to Respondent's request that the AAA to reject the class action arbitration demand. (ALJ Dec., 13:1-5; Jt. Exs. 1-8).

35. The ALJ's conclusion that the Board has the authority to order reimbursement of litigation expenses for actions taken before the AAA. (ALJ Dec., 13:1-9; Jt. Exs. 1-8).

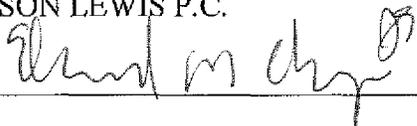
36. The ALJ's recommended Order in its entirety. (ALJ Dec., 13:16-42; 14:1-27; Jt. Exs. 1-8).

37. The ALJ's proposed Notice to Employees in its entirety. (ALJ Dec., Appendix; Jt. Exs. 1-8).

Dated: March 3, 2015

Respectfully submitted,
JACKSON LEWIS P.C.

By: _____


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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12**

CITIGROUP TECHNOLOGY, INC. and
CITICORP BANKING CORPORATION (PARENT),
A SUBSIDIARY OF CITIGROUP, INC.

and

Case 12-CA-130742

ANDREA SMITH, an Individual

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of March, 2015, I served a true copy of **Respondent Citigroup Technology, Inc., and Citicorp Banking corp. (Parent), a Subsidiary of Citigroup, Inc.'s Exceptions to the Decision of the Administrative Law Judge** via U.S. Mail, postage pre-paid addressed to:

Margaret J. Diaz
Regional Director
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By:



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Corporation (Parent), a Subsidiary of
Citigroup, Inc.**

Confirmation Number	946809674
Date Submitted	3/5/2015 3:30:29 PM (GMT-05:00) Eastern Time (US & Canada)
Case Name	Citigroup Technology, Inc., and Citicorp Banking Corporation (parent), a subsidiary of Citigroup, In
Case Number	12-CA-130742
Filing Party	Counsel for GC / Region
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Original Due Date	3/17/2015
Date Requested	4/7/2015
Reason for Extension of Time	Counsel for the General Counsel requests an extension of time to file its Answering Brief and Cross-Exceptions due to other work, including a hearing in Case 12-CA-130805, which is set to open on 3/19/15. The parties do not oppose this request.
What Document is Due	Answering Brief to Exceptions
Parties Served	Edward M. Cherof, Esq., Jackson Lewis, LLP, 1155 Peachtree St NE, Suite 1000, Atlanta, GA 30309. Email: cherofe@jacksonlewis.com. Andrew Frisch, Esq., Morgan & Morgan, 600 N. Pine Island Rd., Suite 400, Plantation, FL 33324-1311. Email: AFrisch@Forthepeople.com

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
1099 14th Street, N.W.
Washington, D.C. 20570-0001

March 12, 2015

Re: Citigroup Technology, Inc. and
Citicorp Banking Corporation (Parent)
a subsidiary of Citigroup, Inc.
Case 12-CA-130742

EXTENSION OF TIME TO FILE ANSWERING BRIEF AND CROSS EXCEPTIONS

The due date for the receipt in Washington, D.C. of the Answering Brief to the Respondent's Exceptions, and Cross Exceptions and Supporting Brief, is extended to **APRIL 7, 2015**.

Henry S. Breiteneicher
Associate Executive Secretary

cc: Parties

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

**CITIGROUP TECHNOLOGY, INC. and
CITICORP BANKING CORPORATION
(PARENT), a subsidiary of
CITIGROUP, INC.,**

and

Case 12-CA-130742

ANDREA SMITH, an Individual

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS TO THE DECISION
OF THE ADMINISTRATIVE LAW JUDGE**

Submitted by:
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I. INTRODUCTION AND STATEMENT OF THE CASE

On December 23, 2014, Administrative Law Judge Donna N. Dawson (“ALJ Dawson”) issued her Decision in this case. Respondent Citigroup Technology, Inc. and Citicorp Banking Corporation (parent), a subsidiary of Citigroup, Inc. (“Respondent”) filed Exceptions to the Decision of the Administrative Law Judge and a Brief in Support of the same on March 3, 2015. Pursuant to Section 102.46(d) of the Board’s Rules and Regulations, Counsel for the General Counsel hereby submits this answering brief to Respondent’s exceptions.

At issue in this case is precisely the sort of arbitration agreement containing a “class action waiver” already found to be unlawfully maintained and enforced in violation of Section 8(a)(1) of the Act in *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), and, most recently, *Cellular Sales of Missouri, L.L.C.*, 362 NLRB No. 27 (2015), and *Flyte Tyme Worldwide*, 362 NLRB No. 46 (2015). Respondent admits that upon hire, its employees sign as a condition of employment its Employment Arbitration Policy (“EAP”), which precludes individuals from pursuing any group, class, collective, or other representative claims, in either an arbitral or judicial setting, pertaining to disputes concerning their wages, hours, terms and conditions of employment, and various federal statutory employment-related claims. Respondent further admits that on April 15, 2014, it filed a letter with the American Arbitration Association (“AAA”) along with a copy of its EAP, requesting that the AAA reject a demand for nationwide collective arbitration filed by former employee Darlene Echevarria (“Echevarria”), on behalf of herself and others, including Charging Party Andrea Smith (“Smith”). In short, Respondent has fully admitted to both maintaining and attempting to enforce the offensive class action waiver included in its EAP.

Respondent bases the bulk of its exceptions on the notion that the class action waiver

does not actually violate the Act because, it contends, the Board incorrectly decided *D. R. Horton* and *Murphy Oil* in light of various Supreme Court cases interpreting the Federal Arbitration Act, 9 U.S.C. § 1 et seq. (“FAA”), and because ALJ Dawson erred in adhering to Board precedent while deciding the instant case.

As the Board reiterated in *Cellular Sales*, no decision of the Supreme Court has expressly overruled the Board’s holding in *D.R. Horton*, nor does any Supreme Court precedent directly address the interplay between individual arbitration agreements and employees’ Section 7 rights. Because Board precedent is controlling unless and until it is overruled by the Supreme Court, and for the other reasons set forth below, Counsel for the General Counsel respectfully requests that the Board affirm ALJ Dawson’s Decision and deny each of Respondent’s exceptions thereto.

II. STATEMENT OF FACTS

A. The Pleadings

The original and amended charges in this matter were filed by Smith on June 12, 2014, and August 27, 2014, respectively, and allege, *inter alia*, that the Respondent sought to enforce an unlawful mandatory arbitration agreement. (ALJ Decision 1; GC Ex. 1(a) to 1(d)).¹ The operative pleadings are the amended complaint issued on September 10, 2014, and the amended answer. (ALJ Decision 1; GC Ex. 1(i) and 1(L)).

B. Respondent’s Mandatory Arbitration Agreements

Respondent is a global financial services institution, with over 1,000 employees working at its Tampa, Florida facility.² (ALJ Decision 2:13-14; GC Ex. 1(g), ¶ 2(a); GC Ex. 1(l), ¶ 3; SR ¶ 2). Respondent’s employees are not represented by a labor organization.

¹ Throughout this brief, reference to the General Counsel’s and Joint Exhibits will be indicated as “GC Ex. ___” and “Jt. Ex. ___,” respectively. References to the paragraphs of the Stipulated Record accepted by ALJ Dawson will be indicated as “SR ¶ ___.” References to ALJ Dawson’s Decision will be indicated as “ALJ Decision (page):(line).” Note page 1 of the ALJ Decision does not have numbered lines.

² Respondent admitted in its Amended Answer to facts demonstrating the Board’s jurisdiction and its status as an employer within the meaning of the Act. ALJ Dawson found jurisdiction over Respondent at ALJ Decision 2:12-15.

In or around January 2013, Echevarria was hired by Respondent as an Anti-Money Laundering Operations Analyst in Respondent's Tampa, Florida facility, and remained in that position until August 23, 2013. (ALJ Decision 3:14-16; SR ¶ 5). On or about January 31, 2013, Respondent offered Smith a position as an Anti-Money Laundering Operations Analyst in Respondent's Tampa, Florida facility, which Smith accepted on February 5, 2013. (ALJ Decision 3:18-20; SR ¶ 6; Jt. Ex. 2). Smith also electronically signed a receipt for Respondent's U.S. 2013 Employee Handbook ("Handbook") on February 5, 2013 and for Respondent's EAP, which incorporates by reference arbitration provisions from the Handbook. (ALJ Decision 4:29-31; SR ¶¶ 7-8; Jt. Ex. 3-4). Smith began work on February 19, 2013 and voluntarily resigned her employment with Respondent on March 28, 2014. (ALJ Decision 4:31-33; SR ¶ 9).

The EAP provides, in relevant part:

The Policy makes arbitration the required and exclusive forum for the resolution of all disputes arising out of or in any way related to employment based on legally protected rights (i.e. statutory, regulatory, contractual, or common-law rights) that may arise between an employee or former employee and Citi or its current and former parents, subsidiaries, and affiliates and its and their current and former officers, directors, employees, and agents (and that aren't resolved by the internal Dispute Resolution Procedure) including, without limitation, claims, demands, or actions under Title VII of the Civil Rights Act of 1964, the Civil Rights Acts of 1866 and 1991, the Age Discrimination in Employment Act of 1967, the Older Workers Benefit Protection Act of 1990, the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, the Family and Medical Leave Act of 1993, the Fair Labor Standards Act of 1938, the Equal Pay Act of 1963, the Employee Retirement Income Security Act of 1974, the Worker Adjustment and Retraining Notification Act, the Sarbanes-Oxley Act of 2002, and all amendments thereto, and any other federal, state, or local statute, regulation, or common-law doctrine regarding employment, employment discrimination, the terms and conditions of employment, termination of employment, compensation, breach of contract, defamation, retaliation, whistle-blowing, or any claims arising under the Citigroup Separation Pay Plan.

Except as otherwise required by applicable law, this Policy applies only to claims brought on an individual basis. Consequently neither Citi nor any employee may submit a class action, collective action, or other representative action for resolution under this Policy.

(ALJ Decision 2:24-3:2; GC Ex. 1(g) ¶ 4(a); Jt. Ex. 1). It is further undisputed that the Respondent has required all of its newly-hired employees within the United States to agree to the EAP as a condition of employment since at least December 26, 2012, and continuing to the present. (ALJ Decision 3:6-7; SR ¶ 4).

C. Demand for Arbitration

On March 28, 2014, Echevarria, through counsel, submitted a demand for arbitration entitled “Nationwide Class Action Arbitration Submission” (“arbitration demand”) to the AAA on her own behalf and on behalf of other similarly situated employees of the Respondent, including Smith, Danielle Lucas, Yadira Calderon, and Kelleigh S. Weeks (collectively, the “named class members”). (ALJ Decision 4:35-39; SR ¶ 10; Jt. Ex. 5). The named class members signed both a “Notice of Consent to Join Collective Action” and a “Notice of Filing Notice of Consent to Join,” submitted along with the arbitration demand. (ALJ Decision 4:39-40; SR ¶ 10 Jt. Ex. 5). The arbitration demand alleged that the Respondent violated the Fair Labor Standards Act, 29 U.S.C. § 201 et seq. (“FLSA”), by failing to pay overtime wages to Echevarria and other similarly situated employees of the Respondent, including the other named class members. (ALJ Decision 4:40-42; SR ¶ 10; Jt. Ex. 5).

On April 14, 2014, AAA Case Filing Coordinator Kristen Cottone (“Cottone”) requested from the parties a full copy of the arbitration agreement between them and other information so that the AAA could decide whether it could proceed with the case. (ALJ Decision 5:1-8; SR ¶ 11; Jt. Ex. 6). Counsel for Respondent replied on April 15, 2014, submitting a copy of the EAP and requesting that the AAA reject the arbitration demand insofar as Echevarria’s request for designation of a nationwide collective arbitration, and instead accept only her individual claim. (ALJ Decision 5:10-12; SR ¶ 12; Jt. Ex. 7). On April 28, 2014, Cottone sent the parties a letter stating that, in accordance with AAA’s policy on class arbitrations, it could not administer the matter as a class action, since the EAP prohibits class actions. (ALJ Decision 5:13-16; SR ¶ 13;

Jt. Ex. 8).

III. ARGUMENT AND CITATION TO AUTHORITY

A. The Appropriate Precedent for the Board to Follow is Its Own and that of the Supreme Court of the United States; Neither ALJ Dawson Nor the Board Owe Deference to District and Circuit Court Opinions. Exceptions 12 and 14 are Without Merit.

In Respondent’s Brief submitted with its Exceptions to the Decision of the Administrative Law Judge (“Respondent’s Brief”), Respondent excepts both to ALJ Dawson’s following the Board’s decisions in *D.R. Horton* and *Murphy Oil* (ALJ Decision 5:30-45, 6:13-14, 6:42-43, 7:3-9:32, 9:39-10:42, 11:25-33, 12:6-15), and to the Board itself deciding in *Murphy Oil* to reaffirm its own *D.R. Horton* holdings instead of accepting the Fifth Circuit’s *D.R. Horton* opinion as controlling.³ In *Pathmark Stores*, the Board reiterated that

[i]t has been the Board's consistent policy for itself to determine whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court's opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise ... **[I]t remains the [judge's] duty to apply established Board precedent which the Supreme Court has not reversed.** Only by such recognition of the legal authority of Board precedent, will a uniform and orderly administration of a national act, such as the National Labor Relations Act, be achieved.

342 NLRB 378 n. 1 (2004) (emphasis added) (quoting *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 (1963), *enfd.* in part 331 F.2d 176 (8th Cir 1964) (quoting *Insurance Agents' International Union, AFL-CIO*, 119 NLRB 768, 773 (1957))). Therefore, the Board was correct to adhere to its own well-reasoned precedent in deciding *Murphy Oil* and ALJ Dawson was correct to follow that established Board precedent in reaching her conclusions of law in the instant case.

B. The Board Has Not Overstepped By Interpreting the FAA; It Has Merely Interpreted the NLRA as Including a Core Substantive Right to Collective Action. Exception 13 is Without Merit.

Equally unpersuasive is Respondent’s argument that the Supreme Court’s decision in

³ *D.R. Horton v. NLRB*, 737 F.3d 344 (5th Cir. 2013).

CompuCredit Corp. requires that its EAP be found lawful because there is no specific “Congressional command” to override the FAA within the text of the NLRA, and because for the Board to find otherwise is for it to overstep its authority as a federal agency by dispositively interpreting an act of Congress other than the one it is tasked to administer. 562 U.S. ___, 132 S.Ct. 665, 671, (2012). Boiled down to its core, Respondent’s essential argument on this point is that, as collective legal activity is generally considered a “procedural device” under other statutes, employees’ preference for that procedure should not be allowed to impede the Respondent’s substantive right to enforce its arbitration policy.

However, the Board emphasized in *D.R. Horton* that finding an arbitration agreement unlawful does not conflict with the FAA because “the intent of the FAA was to leave substantive rights undisturbed.” 357 NLRB No. 184, slip op. at 11. Although Respondent argues that the waiver is not of substantive rights but, rather, of procedural rights, the authorities it points to are, in fact, cases interpreting statutes that protect different substantive rights – such as consumer rights against lenders – which also *happen to* provide a procedural option for vindication of those rights through class action.

In contrast, the NLRA’s core substantive right is the Section 7 right of employees to act collectively for their mutual aid or protection. *Murphy Oil*, 361 NLRB No. 72, slip op. at 6. It is unquestionably a substantive, not a procedural, right, as indicated by the statement of purpose in Section 1 of the Act that the NLRA was enacted to correct “the inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and [corporate] employers” and to remove the impediments that same inequality presents to the free flow of commerce. “[T]he *D.R. Horton* Board was clearly correct when it observed that the ‘right to engage in collective action – including collective *legal* action – is the *core* substantive

right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest.” *Murphy Oil*, 361 NLRB No. 72, slip op. at 7 (quoting *D.R. Horton*, 357 NLRB No. 184, slip op. at 10) (emphasis original to *Murphy Oil*).

Although Respondent is technically correct that there is no explicit Congressional command to override the FAA contained in the text of the NLRA, the Board has already ruled on this issue and reconciled its opinion in *D.R. Horton* with that portion of the *CompuCredit* decision. The *Murphy Oil* Board emphatically affirmed that the FAA’s savings clause provides for the revocation of otherwise mandatory arbitration agreements, “upon such grounds as exist at law...” and that “Section 7... **amounts to** a ‘contrary congressional command’ overriding the FAA.” 361 NLRB No. 72, slip op. at 9 (emphasis added). As the *D.R. Horton* Board noted, the Supreme Court has not heretofore addressed whether an employer can infringe upon employees’ substantive Section 7 rights to concertedly pursue employment-related claims – *Concepcion*, for example, arose in the context of a commercial arbitration agreement and dealt with the preemption of a state consumer protection law, not employees’ federal collective action rights under Section 7. 357 NLRB No. 184, slip op. at 12.

Moreover, in *Murphy Oil*, the Board explained that when the NLRA was enacted in 1935 and reenacted in 1947, the FAA had not ever been applied to individual employment contracts, and noted:

[i]t is hardly self-evident that the FAA – to the extent that it would compel Federal courts to enforce mandatory individual arbitration agreements prohibiting concerted legal activity by employees – survived the enactment of the Norris-LaGuardia Act [in 1932] and its sweeping prohibition of “yellow dog” contracts.

361 NLRB No. 72, slip op. at 10.⁴ The Board found that even if there is a conflict between the

⁴ The FAA, a product of the *Lochner* era, was enacted in 1925; its own legislative history indicates that it was self-evident to the 68th Congress that the Act would *never* be applied to employment or consumer contracts. As Justice

NLRA and the FAA, the Norris-LaGuardia Act prevents enforcement of any private agreement inconsistent with the statutory policy of protecting employees' concerted activity, including an agreement that seeks to prohibit a "lawful means [of] aiding any person participating or interested in a" lawsuit arising out of a labor dispute. *Id.* The Board found that in the event of a conflict, the FAA would therefore have to yield to the NLRA insofar as necessary to accommodate Section 7 rights.

The Board has long held that the specific collective activity of jointly pursuing legal claims related to the terms and conditions of employment is a form of protected, concerted Section 7 activity, and the Board has held time and again that these agreements, barring employees from collectively pursuing their legal claims, constitute a patently unlawful waiver of Section 7's substantive right to act together for employees' mutual aid and protection. *Id.* at 9 ("The [Fifth Circuit's] first step was to determine that pursuit of legal claims concertedly is *not* a substantive right under Section 7 of the NLRA. We cannot accept that conclusion; it violates the long-established understanding of the Act and national labor policy, as reflected, for example, in the Supreme Court's decision in *Eastex*⁵..."). Thus, any claimed infringement on the FAA by

Black wrote in his dissent to *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 409, n. 2 (1965): "The principal support for the Act came from trade associations dealing in groceries and other perishables and from commercial and mercantile groups in the major trading centers. 50 A.B.A.Rep. 357 (1925). Practically all who testified in support of the bill before the Senate subcommittee in 1923 explained that the bill was designed to cover contracts between people in different States who produced, shipped, bought, or sold commodities. Hearing on S. 4213 and S. 4214 before the Subcommittee of the Senate Committee on the Judiciary, 67th Cong., 4th Sess., 3, 7, 9, 10 (1923). The same views were expressed in the 1924 hearings. When Senator Sterling suggested, 'What you have in mind is that this proposed legislation relates to contracts arising in interstate commerce,' Mr. Bernheimer, a chief exponent of the bill, replied: 'Yes; entirely. The farmer who will sell his carload of potatoes, from Wyoming, to a dealer in the State of New Jersey, for instance.' Joint Hearings on S. 1005 and H.R. 646 before the Subcommittees of the Committees on the Judiciary, 68th Con., 1st Sess., 7." Furthermore, "On several occasions they expressed opposition to a law which would enforce even a valid arbitration provision contained in a contract between parties of unequal bargaining power. Senator Walsh cited insurance, employment, construction, and shipping contracts as routinely containing arbitration clauses and being offered on a take-it-or-leave-it basis to captive customers or employees. [citation omitted] He noted that such contracts 'are really not voluntarily (sic) things at all' because 'there is nothing for the man to do except to sign it; and then he surrenders his right to have his case tried by the court....' He was emphatically assured by the supporters of the bill that it was not their intention to cover such cases." 388 U.S. at 414 (Black, J., dissenting).

⁵ *Eastex v. NLRB*, 437 U.S. 556 (1978).

protecting employees' substantive Section 7 rights in these circumstances is entirely illusory. The EAP at issue in the instant case is unlawful not because it involves arbitration or specifies particular litigation procedures, but because it prohibits employees from exercising their Section 7 right to engage in concerted legal activity in any forum at all.

C. The Board's Holdings Have Accommodated Both the NLRA and the FAA: No Conflict Exists Between the Board's Decisions in *D.R. Horton*, *Murphy Oil*, *Cellular Sales*, and *Flyte Tyme* and the FAA. Exceptions 4 through 11 are Without Merit.

As the Board in *D.R. Horton* explained, “holding that an employer violates the NLRA by requiring employees, as a condition of employment, to waive their right to pursue collective legal redress in both judicial and arbitral forums accommodates the policies underlying both the NLRA and the FAA to the greatest extent possible.” 357 NLRB No. 184, slip. op. at 8. This is because Section 2 of the FAA “provides that arbitration agreements may be invalidated in whole or in part” for the same reasons any contract may be invalid, including if it is unlawful or contrary to public policy. *Id.*, slip. op. at 11. Therefore, inasmuch as the EAP is inconsistent with the NLRA, it is not enforceable under the FAA.

Respondent's Brief asserts that the Board's decisions in the *D.R. Horton* line of cases are in conflict with the FAA, and presumes to state that the Supreme Court has “implicitly” rejected the Board's *D.R. Horton* decision through precedents established in *AT&T Mobility v. Concepcion*, 563 U.S. 321, 131 S. Ct. 1740 (2011), *CompuCredit Corp. v. Greenwood*, 562 U.S. ___, 132 S.Ct. 665, (2012), and *American Express v. Italian Colors Restaurant*, ___ U.S. ___, 133 S. Ct. 2304 (2013). However, the Board addressed these same arguments at length in *D.R. Horton* and found them unavailing, and has reaffirmed the lack of a conflict between the NLRA and the FAA three more times.

Respondent argues in its Brief that finding the EAP unlawful would run afoul of the

Supreme Court's decisions requiring the enforcement of certain arbitration agreements, including class action waivers, according to their terms. However, Respondent mischaracterizes the high court's holdings in *Concepcion*, *CompuCredit*, and *American Express* as a mandate to enforce *all* arbitration agreements contracted for between parties, regardless of any other considerations. A "healthy regard" for the FAA does not require the Board to acquiesce to it as the juggernaut force Respondent represents it to be.

In *D.R. Horton*, the Board specifically rejected arguments that the Court's *Concepcion* decision required the Board to find that the arbitration agreement was enforceable as written, or that the Court had sanctioned class and collective action waivers in all categories of arbitration. 357 NLRB No. 184, slip op. at 11-12.

Nor does a finding that the class waiver contained in the EAP is unlawful mean that the Board's decisions effectively disfavor arbitration as a whole, as Respondent contends; rather, the *D.R. Horton* line of cases merely requires that any arbitration agreement sought by employers leave open the option for employees to choose to act collectively for their mutual aid and protection, i.e. ensure that arbitration agreements do not interfere with or restrict the exercise of employees' Section 7 rights. This could be accomplished either by permitting class and collective actions in judicial fora while limiting arbitrations to those between individuals, or by foreclosing judicial avenues of relief while permitting the arbitration of class and collective action claims. It is bewildering that Respondent believes it is self-evident, in light of these options, that the *D.R. Horton* line of decisions runs so thoroughly afoul of the FAA when in fact, the Board's decisions have done quite the opposite, striving to and succeeding in reconciling the two federal laws.

Furthermore, Respondent's argument that the agreement should be enforced as written

because the Board has no authority to order other entities, such as the AAA, to take or refrain from any action, falls flat in light of the actual facts of this case. The AAA did not inform Respondent that its rules forbade class arbitration, only that it read Respondent's EAP as binding it from accepting Echevarria's request for a nationwide class designation of the action. If the Board deems the EAP unlawful, the AAA will not be "forced" to accept Echevarria's class action claim. Rather, Respondent's EAP must be rescinded, and Echevarria, Smith and the other employees will be free to pursue a judicial class or collective action claim. In addition, Respondent will be free to revise its arbitration policy in a manner consistent with the NLRA.

Therefore, the Board should reaffirm once more its decisions in *D.R. Horton*, *Murphy Oil*, *Cellular Sales*, and *Flyte Tyme* by finding the same type of class waiver at issue here similarly unlawful under Section 8(a)(1) of the Act.

D. Respondent's Maintenance and Enforcement of the EAP Violates Section 8(a)(1) of the Act. Exceptions 1, 2, 3, 16 and 18 through 21 are Without Merit.

In *D.R. Horton*, 357 NLRB No. 184 (2012), the Board held that "an employer violates Section 8(a)(1) of the National Labor Relations Act when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer." *Id.*, slip op. at 1. As the Board observed, it "has consistently held that concerted legal action addressing wages, hours or working conditions is protected by Section 7," and that when an employer requires employees to waive this substantive right under the Act, the agreement unlawfully restricts employees' Section 7 right to engage in concerted action for mutual aid or protection. *Id.*, slip op. at 2.

In *D.R. Horton*, the Board made clear that the test for determining whether class action waivers contained in arbitration agreements constitute a rule that violates Section 8(a)(1) of the

Act is that set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Under that test, a policy such as Respondent's violates Section 8(a)(1) because it expressly restricts Section 7 activity or, alternatively, because (1) employees would reasonably read it as restricting such activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. 343 NLRB at 646-647, cited in *D.R. Horton* at 357 NLRB No. 184, slip op. at 7.

Respondent argues at length that ALJ Dawson's use of the *Lutheran Heritage* test was erroneous, arguing that a contract is not a "rule," before citing any authority to support this contention – and even then, the sole case it identifies as "support" for its position, *Albertson's, LLC*, involves spoken statements made by a manager, not written policies maintained by the employer.⁶ The Board has determined in the cases cited above that a contract can contain a rule for the purposes of 8(a)(1) of the Act. This is a reasonable interpretation of Section 8(a)(1) because the terms of a "contract" such as Respondent's EAP behave identically to other employer rules and can obviously, as the EAP's terms do here, interfere with Section 7 rights. *Albertson's* is wholly inapposite and the Board should disregard Respondent's entire argument on this point. In *Murphy Oil*, *Cellular Sales*, and *Flyte Tyme* the Board reaffirmed the relevant holdings of *D.R. Horton*, including that the *Lutheran Heritage* test is appropriately applied to arbitration agreement terms.

Respondent's EAP makes individual arbitration "the required and exclusive forum for the resolution of all" employment-related disputes with Respondent, expressly restricting employees from bringing joint claims as either a class or collective action, "or other representative action." (Jt. Ex. 1). Through use of the EAP as a condition of employment, the Respondent has thus

⁶ 359 NLRB No. 147 (2013), set aside by *Noel Canning* and subsequently reaffirmed by the Board, 361 NLRB No. 71 (2014).

attempted to foreclose all concerted employment-related litigation or arbitration by employees and effectively stripped employees of their Section 7 right to engage in this form of concerted activity for mutual aid and protection. ALJ Dawson correctly found that, like the agreement in *D.R. Horton*, Respondent's EAP explicitly restricts Section 7 activity, and therefore plainly violates Section 8(a)(1) under the *Lutheran Heritage* test (ALJ Decision 6:16-30).

Not only does the maintenance of the EAP on its face constitute a violation of the Act, it has been applied by Respondent to restrict the exercise of Section 7 activity, in violation of the Act. The record clearly demonstrates that Respondent presented the EAP to the AAA to support its request that the AAA reject Echevarria's demand for nationwide, class action designation of her arbitration. (ALJ Decision 5:10-12; SR ¶ 12; Jt. Ex. 7) In addition to seeking arbitration on behalf of all similarly-situated employees of Respondent with regard to her Fair Labor Standards Act claim, Echevarria had four other named employee signatories to the demand for arbitration, including Charging Party Smith, an undeniable example of collective action undertaken for mutual aid and protection. (SR ¶¶ 10, 12; Jt. Ex.5, 7). Thus, the five employees were exercising their rights guaranteed by Section 7 of the Act, as properly found by ALJ Dawson. (ALJ Decision 11:6-23). Employee Smith joined the class action arbitration claim on the same day that she resigned her employment. (S.R. ¶¶ 8, 9).

In this regard, contrary to Respondent's claim and as found by the ALJ, former employees who pursue employment claims, such as Smith, are considered statutory employees as defined in Section 2(3) of the Act and are entitled to the Act's protection. (ALJ Decision 11:20-23; see generally, *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85 (1995); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941)). The Board has broadly construed the term employee to include members of the working class generally, including "former employees of a particular

employer.” *Little Rock Crate & Basket Co.*, 227 NLRB 1406, 1406 and cases cited therein at n.4 (1977); *Waco, Inc.*, 273 NLRB 746, 747 n. 8 (1984).

Furthermore, as in *D.R. Horton*, the Board found in *Murphy Oil, Cellular Sales*, and *Flyte Tyme* that it is “well-established that an employer’s enforcement of an unlawful rule, including a mandatory arbitration policy like the one at issue here, **independently violates** Section 8(a)(1).” *Cellular Sales*, 362 NLRB No. 27, slip op. at 2 (2015) (emphasis added) (citing *Murphy Oil*, 361 NLRB No. 72, slip op. at 19-21)); see also *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16-17 (1962) and other authorities cited by the Board in n. 9 of the *Cellular Sales* decision.

In summary, Respondent’s maintenance of the EAP expressly prohibiting employees from engaging in Section 7 activity, and Respondent’s enforcement of the EAP against employees Echevarria, Smith and the other employees who joined in the class action arbitration claim against Respondent, both violate Section 8(a)(1) of the Act, as found by the ALJ (ALJ Decision 6:39-43).

E. *Bill Johnson’s and the First Amendment Do Not Save Respondent from a Violation, and Do Not Prevent the Board from Remedying Its Violations. Respondent’s Exceptions 17 and 29 through 31 are Without Merit.*

Respondent excepts to ALJ Dawson’s finding that *Bill Johnson’s Restaurants v. NLRB*, 461 U.S. 731 (1983), does not preclude the Board from proceeding against Respondent’s request to the AAA to, in essence, compel individual arbitration of Echevarria’s FLSA claim (ALJ Decision 12:1-15). Respondent’s desired outcome would cut out the Charging Party and the other named class members who had voluntarily sought to join the action, effectively halting their protected, concerted activity before they can even commence litigating their joint claims of FLSA violations against their employer.

Respondent’s entire argument on this point is based on the false premise that its endeavor

to halt the class arbitration of Echevarria, Charging Party, and other class members' FLSA claims was "well-founded" on a valid arbitration agreement. "Just as false statements are not immunized by the First Amendment right to freedom of speech,⁷ baseless litigation is not immunized by the First Amendment right to petition." *Bill Johnson's*, 461 U.S. at 743. The EAP is invalid, because it violates Section 8(a)(1). Whether or not any of the *Bill Johnson's* exceptions come into play is moot because the legal basis for Respondent's act to enforce the EAP is non-existent.

Even if they did, the Board has made clear that it will apply *Bill Johnson's* footnote 5 exceptions to particular litigation tactics, as well as to entire lawsuits. Thus, for example, in *Wright Electric, Inc.*, the Board found that an employer's discovery request had an illegal objective and violated the Act, even though the lawsuit itself could not be enjoined. 327 NLRB 1194, 1195 (1999, enfd. 200 F.3d 1162 (8th Cir. 2000)); see also, *Dilling Mechanical Contractors*, 357 NLRB No. 56, slip op. at 2-3 (2011) (finding that employer's discovery requests had an illegal objective, although the lawsuit itself did not). A lawsuit or litigation tactic has a footnote 5 illegal objective "if it is aimed at achieving a result incompatible with the objectives of the Act." *Manno Electric*, 321 NLRB 278, 297 (1996), enfd. 127 F.3d 34 (5th Cir. 1997) (unpublished). In such circumstances, "the legality of the lawsuit enjoys no special protection under *Bill Johnson's*." *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 834 (1991), enfd., 973 F.2d 230 (3d Cir. 1992), cert. denied, 507 U.S. 959 (1993).

In particular, an illegal objective may be found where a grievance or lawsuit is itself aimed at preventing employees' protected conduct. In such cases, the lawsuit is not merely retaliatory for employees' protected conduct, but also seeks to use the arbitrator or the court to

⁷ See *Herbert v. Lando*, 441 U.S. 153, 171, 99 S.Ct. 1635, 1646, 60 L.Ed.2d 115 (1979); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340, 94 S.Ct. 2997, 3007, 41 L.Ed.2d 789 (1974).

directly interfere with the Section 7 activity. *Long Elevator*, 289 NLRB 1095 (1988), enfd. 902 F.2d 1297 (8th Cir. 1990). Respondent's tactics are akin to those used by the employers in *D.R. Horton* and *Murphy Oil* to compel individual arbitration of employees' claims in accordance with their respective arbitration agreements. In *Murphy Oil*, the Board specifically considered and rejected the company's *Bill Johnson* arguments. Indeed, the *only* objective of Respondent's request to the AAA is to prohibit employees from engaging in Section 7 activity. Respondent's request would impose individual arbitration, which specifically attempts to prevent employees' protected concerted legal activity. Therefore, Respondent's request has a footnote 5 illegal objective and is unlawful under Section 8(a)(1) of the Act.

F. No Allegations of the Complaint are Time Barred by Section 10(b) of the Act. The EAP is a Mandatory Condition of Employment. Respondent's Exceptions 15 and 22 through 28 are Without Merit.

Respondent excepts to ALJ Dawson's findings that none of the allegations in the Complaint are time-barred by Section 10(b) of the Act. (ALJ Decision 11:35-45; SR ¶¶ 20- 21) However, it is well-established that Section 10(b) permits finding a violation based on the mere maintenance of an unlawful rule within the 10(b) period, and/or based on the enforcement of an unlawful rule within the 10(b) period, "regardless of when the rule was first promulgated." *Cellular Sales*, 362 NLRB No. 27, slip op. at 2; see also *Control Services*, 305 NLRB 435, n. 2 & 442 (1991), enfd. mem., 961 F.2d 1568 (3d Cir. 1992). As the Board recently reaffirmed in *Cellular Sales*, this is the case even when the unlawful rule is contained in a contract executed outside the 10(b) period, because maintenance of the unlawful rule is considered a continuing violation by the Board. *Id.* at 2; see also *Carney Hospital*, 350 NLRB 627, 627 (2007); *Eagle-Pincher Industries*, 331 NLRB 169, 174, n. 7 (2000); *Wire Products Mfg. Corp.*, 326 NLRB 625, 633 (1998), enfd. sub nom. *NLRB v. R.T. Blankenship & Associates, Inc.*, 210 F.3d 375 (7th Cir.

2000); *St. Luke's Hospital*, 300 NLRB 836 (1990).

The stipulated record shows that Respondent has maintained and enforced the EAP “since on or about December 26, 2012, and continuing to the present.” (SR ¶ 3).⁸ As noted above, the ongoing maintenance of an unlawful rule such as the EAP is a continuing violation of the Act. Therefore, Respondent has maintained the EAP within the Section 10(b) period. Moreover, Respondent enforced the EAP within the Section 10(b) period by asking the AAA to reject Echevarria’s request for a nationwide, class designation of her arbitration demand on April 15, 2014, less than six months before the filing and service of both the original and amended charges in this matter. (GC 1(a) to 1(d)).

With respect to Respondent’s assertion that the its unrepresented employees can “voluntarily agree to waive a judicial forum in favor of arbitration” just as a union can so act voluntarily, the ALJ correctly rejected this argument and concluded that “it matters not when an employee signs a mandatory arbitration agreement forfeiting his or her Section 7 rights” in light of *Murphy Oil*. (ALJ Decision 11:25-33) It is undisputed that all employees are required to agree to Respondent’s EAP, including the class action waiver, as a condition of employment. Similarly, Respondent’s assertion that the “voluntariness” of the EAP cannot be attacked 16 months after the contract was formed is without merit because it is evident from the circumstances – Respondent requires job applicants to sign an EAP agreement as a condition of gaining employment – that the EAP is imposed by Respondent without negotiation and uniformly applied to its entire workforce on an ongoing basis. (S.R. ¶¶ 3, 4). There is no evidence that Respondent has ever considered deviating from or negotiating about the standard, uniformly required, EAP language, and individual employees, especially job applicants, simply

⁸ The stipulated record was signed by Respondent and the Union on October 7, 2014, so the EAP was clearly maintained until at least at least that date, and Respondent presented no evidence that it has rescinded or revised the EAP.

do not have the collective bargaining power of a union to voluntarily waive in any meaningful way the right to file lawsuits on employment matters in exchange for the promise to arbitrate. Respondent's 10(b) defense, and its claim that employees' execution of the EAP is voluntary rather than mandatory, should be summarily rejected.

G. The ALJ's Conclusions of Law, Recommended Order and Notice to Employees Are Appropriate and Should Be Adopted by the Board. Respondent's Exceptions 32 through 37 are without merit.

Counsel for the General Counsel respectfully urges the Board deny Respondent's exceptions and to adopt the full range of remedies set forth in the Order and Notice to Employees recommended by ALJ Dawson, which is consistent with the remedies ordered by the Board in *D.R. Horton* and its progeny. ALJ Dawson's recommendation that Respondent be required to post a Notice to Employees at all of its locations where the EAP is maintained is appropriate in view of Respondent's admitted maintenance and enforcement of the EAP with respect to all of its thousands of employees at its Tampa, Florida location and throughout the United States. (S.R. ¶¶ 2, 3). Counsel for the General Counsel further seeks any other relief the Board determines to be appropriate to remedy Respondent's unlawful conduct.

IV. CONCLUSION

In sum, Respondent presents arguments that muddle the issue, failing to distinguish that the element of the arbitration agreement the General Counsel takes issue with is the class action waiver, not the fact that it sought to enter into an arbitration agreement at all. (See, e.g. p. 23 of Respondent's Brief, "Employer-Imposed Arbitration Agreements Do Not Restrict Section 7 Rights."). In the *D.R. Horton* line of cases, the Board has used the proverbial scalpel to analyze and excise the offending portion of the agreements that infringe on Section 7 rights, the class action waivers. Respondent mischaracterizes these decisions as the axe fundamentally destroying an employer's ability to enter into employment contracts with its employees. This is

obviously not the case. It is more than possible for Respondent and other corporations to craft employment contracts – even ones that include arbitration agreements – that preserve employees’ Section 7 rights to act collectively.

The practical effect of arbitration agreements that contain class action waivers is to silence workers by relegating them to “the inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association...” which Congress sought to eradicate by “restoring equality of bargaining power between employers and employees” as set forth in Section 1 of the Act, and by guaranteeing employees the substantive right to engage in protected concerted activities, as set forth in Section 7 of the Act. For the Board to adopt Respondent’s position on class action waivers would not only be a significant departure from its established precedent, but also a sea change in the way labor policy is established and enforced in this country and a betrayal of the congressional mandate carried by the Agency to balance the competing needs of the free flow of commerce and the workers who participate in it.

The General Counsel respectfully urges the Board to deny Respondent’s exceptions in their entirety.

Dated at Tampa, Florida on April 7, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 7, 2015, she electronically filed the foregoing Counsel for the General Counsel's **Answering Brief to Respondent's Exceptions to the Decision of the Administrative Law Judge** and served said document by electronic mail on the below-named parties, as follows:

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Confirmation Number	433066840
Date Submitted	4/9/2015 1:09:50 PM (GMT-05:00) Eastern Time (US & Canada)
Case Name	Citigroup Technology, Inc., and Citicorp Banking Corporation (parent), a subsidiary of Citigroup, In
Case Number	12-CA-130742
Filing Party	Charged Party / Respondent
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Original Due Date	4/21/2015
Date Requested	5/5/2015
Reason for Extension of Time	This request is being made due to work conflicts during the next three weeks. We have contacted both the Counsel for the General Counsel and Charging Party's attorney and they have no objection to this extension.
What Document is Due	Unknown
Parties Served	Gary Shinnors, Exec. Secy, NLRB, 1099 14th Street NW, Washington DC 20570; Caroline Leonard, Counsel for GC, Region 12-NLRB, 201 E. Kennedy Blvd, Suite 530, Tampa FL 33602, Caroline.Leonard@nrlb.gov; Andrew Frisch, Morgan & Morgan, 600 N. Pine Island Rd, Suite 400, Plantation FL 33324, afrisch@forthepeople.com.

UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
1099 14th Street, N.W.
Washington, D.C. 20570-0001

April 10, 2015

Re: Citigroup Technology, Inc. and
Citicorp Banking Corporation (Parent)
a subsidiary of Citigroup, Inc.
Case 12-CA-130742

EXTENSION OF TIME TO FILE REPLY BRIEF

The due date for the receipt in Washington, D.C. of the Respondent's Reply Brief to the General Counsel's Answering Brief is extended to **MAY 5, 2015**.

Henry S. Breiteneicher
Associate Executive Secretary

cc: Parties

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CITIGROUP TECHNOLOGY, INC. and
CITICORP BANKING CORPORATION
(PARENT), A SUBSIDIARY OF CITIGROUP,
INC.

and

ANDREA SMITH, an Individual,

Case 12-CA-130742

**RESPONDENT CITIGROUP TECHNOLOGY, INC. AND CITICORP BANKING
CORP. (PARENT), A SUBSIDIARY OF CITIGROUP, INC.'S
REPLY BRIEF IN FURTHER SUPPORT OF EXCEPTIONS TO THE DECISION OF
THE ADMINISTRATIVE LAW JUDGE**

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Attorneys for Respondent

Respondent Citigroup Technology, Inc. and Citicorp Banking Corp. (Parent), a subsidiary of Citigroup, Inc. (“Respondent”), submits the following brief in response to the General Counsel’s Answering Brief. For the reasons described below, as well as in Respondent’s initial brief, Administrative Law Judge Donna Dawson’s decision is erroneous and should be reversed because Respondent’s Employment Arbitration Policy (“Policy”) is lawful.

I. THE BOARD SHOULD HOLD THE INSTANT CASE IN ABEYANCE UNTIL THE SUPREME COURT RULES ON THE VALIDITY OF THE BOARD’S DECISIONS IN *D.R. HORTON* AND *MURPHY OIL*

The General Counsel argues that the Board should continue to follow its own precedent (i.e. *D.R. Horton*, 357 NLRB No. 184 (2012) and *Murphy Oil, USA Inc.*, 361 NLRB No. 72 (2014))¹ until the Supreme Court reaches an opposite conclusion. This contention is baseless because the Board explicitly declined to appeal the United States Court of Appeals for the Fifth Circuit’s decision in *D.R. Horton v. NLRB*, 737 F.3d 344 (5th Cir. 2013) to the Supreme Court. As Respondent noted in its opening brief, when an appellate court issues an adverse decision against the Board, it should abstain from issuing another decision that would fall within the same line of precedent until the Supreme Court has ruled upon the issue. *See Ithaca College v. NLRB*, 623 F.2d 224, 228 (2d Cir. 1980) *cert denied* 449 U.S. 975 (1980):

....When it disagrees in a particular case, it should seek review in the Supreme Court. During the interim before it has sought review or while review is still pending, it would be reasonable for the Board to stay its proceedings in another case that arguably falls within the precedent of the first one. However, the Board cannot, as it did here, choose to ignore the decision as if it had no force or effect. Absent reversal, that decision is the law which the Board must follow.

Given the fact that the Fifth Circuit has already declined enforcement of the Board’s decision in *D.R. Horton*, the Board should resist from issuing a decision in this case until after *Murphy Oil* is resolved by the Fifth Circuit (where it is pending) and, if the Board does not

¹ *Flyte Tyme*, 362 NLRB No. 46 (2015) was not a final determination. In fact, the Board expressed its intent to continue evaluating the respondent’s exceptions.

prevail in *Murphy Oil*, until the Board exhausts any appeal to the Supreme Court. As a result, Exceptions 4-8, 12 and 14 should be sustained.

II. THE NLRA DOES NOT AFFORD EMPLOYEES A SUBSTANTIVE RIGHT IN THIS CONTEXT

The General Counsel asserts that “the NLRA’s core substantive right is the Section 7 right of employees to act collectively for their mutual aid or protection.” (General Counsel Brief, at 6). While this may be true in other contexts, it is not true in this case. First, if the NLRA truly afforded employees the substantive rights to pursue collective or class action arbitration alleging violations of statutes other than the NLRA, the NLRA would be specifically incorporated into other employment law statutes. This textual omission is not a coincidence.

Second, on a related point, the General Counsel ignores that for the NLRA to have any relevance in this regard, employees must first avail themselves of substantive rights afforded *under other statutes*. The following scenario is illustrative. A single employee may file an age discrimination claim under the Age Discrimination in Employment Act (“ADEA”) and would have no need to assert rights under the NLRA. However, the converse in this example is not true. For a group of employees to assert rights under the NLRA, they would also *necessarily* have to avail themselves of their rights under the ADEA. In other words, the NLRA cannot have any sustenance without the ADEA or some other employment-related statute just as a procedural rule has no viability unless a substantive claim is asserted. That is precisely why, under these circumstances, the NLRA is nothing more than a procedural right which can be waived pursuant to well-established Supreme Court jurisprudence. *See e.g. Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32-33 (1991); *D.R. Horton*, 737 F.3d 344, 359 (5th Cir. 2013). Accordingly, Exception 13 should be sustained.

III. THERE IS NO CONTRARY CONGRESSIONAL COMMAND SUPPORTING AN ARGUMENT THAT THE NLRA PREVAILS OVER THE FAA

Although it is clear that a congressional command may serve to invalidate a conflicting arbitration agreement, that is not the case here. The General Counsel points to no text or legislative history to support the meritless argument that the NLRA trumps the FAA in this case. In fact, the General Counsel acknowledges that “Respondent is technically correct that there is no explicit Congressional command to override the FAA contained in the text of the NLRA....” (General Counsel Brief, at 7). The General Counsel then relies upon the Board’s conclusion in *D.R. Horton* that “the Supreme Court has not heretofore addressed whether an employer can infringe upon employees’ substantive Section 7 rights to concerted employment-related claims.” (General Counsel Brief, at 7). As noted above, of course the Supreme Court has not ruled on this issue yet because the Board declined to seek review of the Fifth Circuit’s decision in *D.R. Horton*. The Board’s failure to do so (whether or not strategically motivated) estops the General Counsel from relying upon this argument. Therefore, Exception 10 should be sustained.²

IV. THE FAA’S SAVING CLAUSE DOES NOT APPLY

In *D.R. Horton*, the Fifth Circuit correctly ruled that the right to participate in a class or collective action is not a substantive right, but rather, is a “procedural device.” *Id.* at 357. The Fifth Circuit also held that the Board could not rely on the FAA’s “saving clause” to justify its invalidation of arbitration agreements. On this point, the court explained that “[r]equiring the availability of class actions ‘interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.’” *Id.* (Internal citations omitted). Additionally, the Fifth Circuit determined that the Board’s prohibition of class action waivers disfavors arbitration, as it

² Moreover, the General Counsel ignores that only Congress is empowered to modify the FAA or the NLRA. Until Congress does so, and creates a clear congressional command evidencing that the NLRA trumps the FAA in this regard, the General Counsel’s position is meritless.

ruled that “[w]hile the Board’s interpretation is facially neutral—requiring only that employees have access to collective procedures in an arbitral or judicial forum—the effect of this interpretation is to disfavor arbitration.” *Id.* at 360. Therefore, the court ruled that “[a] detailed analysis of *Concepcion* leads to the conclusion that the Board’s rule does not fit within the FAA’s saving clause.” *Id.* at 359.

The General Counsel asserts that the FAA’s saving clause applies in this case because the Policy is “inconsistent with the NLRA.” (General Counsel Brief, at 9). Although the Board has repeatedly reiterated that the FAA and NLRA are “capable of co-existence,” see *Murphy Oil*, 361 NLRB No. 72 at slip op. 9, the General Counsel fails to illustrate a framework under which the FAA would ever prevail over the NLRA.³ The Board’s holdings in *D.R. Horton* and *Murphy Oil*, taken to their core, would serve to *always* nullify arbitration agreements that, in the Board’s view, infringe upon the NLRA. These stances are particularly troubling given the Board’s acknowledgment that its findings with respect to statutes *other* than the NLRA are not entitled to deference. As a matter of course, the clash between the NLRA and FAA can only be resolved in a federal appellate court or the United States Supreme Court because these are the only bodies that have jurisdiction to exercise review of both statutes.⁴

³ The General Counsel ignores that the Board is charged to balance competing interests. For example, the Board must balance an employer’s right to communicate with employees pursuant to Section 8(c) of the NLRA with employees’ Section 7 rights to be free from employer coercion. See *Shepherd Tissue*, 326 NLRB 369, 370 (1998)(Gould, concurring)(“In attempting to balance the employer’s free speech right with the equal right of employees to associate freely as guaranteed by Section 7 of the Act and protected by Section 8(a)(1) and the proviso to Section 8(c), the Court [in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969)] concluded that an employer may freely communicate his general views about unionization or his specific views about a particular union as long as that communication contains neither a threat of reprisal nor a promise of benefits.” The Board in *D.R. Horton* and *Murphy Oil* have heretofore failed to consider, much less balance, an employer’s right to enter into agreements with employees containing class/collective action arbitration waivers.

⁴ Moreover, in its opening brief, Respondent cited extensive Supreme Court precedent which casts significant doubt on the validity of *D.R. Horton* and *Murphy Oil*. As a result, the fact that the Board has “reaffirmed the lack of a conflict between the NLRA and the FAA” is of, at best, trivial value given the Board’s unwillingness to test its stance before the Supreme Court. (General Counsel Brief, at 9).

Additionally, the General Counsel suggests that finding the Policy unlawful does not serve to disfavor arbitration and that employees' Section 7 rights would be preserved if employers "permit[ed] class and collective actions in judicial fora while limiting arbitration to those between individuals, or by foreclosing judicial avenues of relief while permitting the arbitration of class and collective action claims." (General Counsel Brief, at 10).

This argument fails for two reasons. First, the Supreme Court has held that arbitration agreements are to be enforced according to their terms. *See e.g. Marmet Health Care Ctr. v. Brown*, 133 S. Ct. 1201 (2012). Therefore, to compel Respondent to rewrite the Policy to accommodate the General Counsel's stance would run counter to this well-established tenet. Second, the Board has held that employees are fully capable of entering into individual agreements with their employer waiving Section 7 rights so long as the waiver is clear and unmistakable. *Lockheed*, 302 NLRB 322, 327 (1991), a case involving dues checkoff authorizations and the Section 7 right to *refrain* from supporting a union, is instructive. There, the Board first noted that "a checkoff authorization under Section 302(c)(4) is a contract between an employee and his employer." *Id.* at 327. The issue the Board faced was whether an employee who resigns union membership is nevertheless required to continue paying dues pursuant to the checkoff authorization. *Id.* The Board held that the checkoff authorization would remain valid under those circumstances except if the checkoff authorization contained sufficient waiver language. *Id.* at 328-329. Specifically, the Board held that it would "require clear and unmistakable language waiving the right to refrain from assisting a union, just as [it would] require such evidence of waiver with regard to other statutory rights." *Id.* at 328. Similarly, in *Boehringer Ingelheim Vetmedica*, 350 NLRB 678, 680-681 (2007), the Board held that during a lockout, after a union failed to provide the employer with no-strike assurances, the employer

lawfully entered into no-strike assurance agreements with individual employees who would be permitted to return to work. As a result, in exchange for reinstatement, employees waived their Section 7 right to strike. *Id.* at 680-681.

Lockheed and *Boehringer* are illustrative as to why the Board's paternalistic approach cannot stand in the way of an enforceable arbitration agreement. Even presuming employees have the Section 7 right to collectively pursue legal action, this Section 7 right can be waived so long as that waiver is clear and unmistakable. In the present case, the Policy unequivocally specifies that employees will forego their right to participate in collective legal action in exchange for the benefit of new or continued employment. The Board has no right to interfere with this voluntary arrangement. Accordingly, Exceptions 9, 11, and 32-37 should be sustained.⁵

V. RESPONDENT LAWFULLY ENFORCED THE POLICY

The General Counsel also baselessly contends that Respondent unlawfully enforced the Policy. Here, the General Counsel cannot seriously dispute that Respondent successfully persuaded the AAA to resist group-based arbitration (a decision which Smith and her co-

⁵ The General Counsel also erroneously argues that entering into the Policy is not voluntarily because applicants are required to sign the Policy as a condition of employment. The General Counsel notes that "[t]here is no evidence that Respondent has ever considered deviating from or negotiating about the standard, uniformly required, [Policy] language, and individual employees, especially job applicants, simply do not have the collective bargaining power of a union to voluntarily waive in any meaningful way the right to file lawsuits on employment matters in exchange for the promise to arbitrate." (General Counsel Brief, at 17-18).

The General Counsel misses the mark. First, the General Counsel presumes that unions will always secure superior terms and conditions of employment for members than members can obtain on their own. Second, this contention ignores that in a unionized setting, new hires are similarly subject to previously-set terms and conditions of employment to which they had no voice in negotiating. Finally, nothing in the Policy prohibits employees from organizing, selecting a bargaining representative, and then, through collective bargaining, seeking to modify their terms and conditions of employment to no longer include a class/collective action arbitration waiver. Moreover, the Policy does not prohibit employees from engaging in other forms of protected concerted activity, such as a group protest, in an attempt to persuade Respondent to modify the Policy. Therefore, Exceptions 15-17 should be sustained.

petitioners never sought to appeal or nullify in a judicial forum).⁶ The General Counsel erroneously argues that “[t]he AAA did not inform Respondent that its rules forbade class arbitration, only that it read Respondent’s [Policy] as binding it from accepting Echevarria’s request for a nationwide class designation of the action.” (General Counsel Brief, at 11). This is a difference without significance because the AAA refused to proceed with the arbitration against Respondent in the collective manner specifically requested to by Smith and her co-petitioners. The AAA’s conclusion is in concert with dozens of federal and state courts which have ruled upon this issue since the Board issued its decision in *D.R. Horton*. See *Murphy Oil*, 361 NLRB No. 72, at slip op. 36, n. 5 (citing cases). In doing so, the General Counsel effectively suggests that employers like Respondent *should waive* a well-founded defense to an arbitration demand (despite the fact that other authorities have almost uniformly credited such a defense).⁷

Additionally, the General Counsel misses the point of *Bill Johnson’s Rests. v. NLRB*, 461 U.S. 731, 747 (1983). First, the General Counsel ignores that Respondent did not initiate any litigation against Smith or her co-petitioners. Second, even assuming *arguendo* that Respondent’s request of the AAA not to proceed on a class basis qualifies as initiating litigation, in *Bill Johnson’s*, the Supreme Court held that if an employer’s lawsuit in another forum “proves meritorious and he has judgment against the employees, the employer should also prevail before the Board, for the filing of a meritorious lawsuit, even for a retaliatory motive, is not an unfair

⁶ Notably, the General Counsel does not cite, much less distinguish, *Stationary Engineers Local 39*, 346 NLRB 336, 347 (2006), which Respondent argued in its initial brief supports the argument that Charging Party was not engaged in protected concerted activity at the time she participated in the AAA proceeding because she was not a statutory employee after her voluntary resignation. As a result, Exceptions 18-22 should be affirmed.

⁷ Further, according to the General Counsel, if the Policy is deemed unlawful, Smith and her co-petitioners “will be free to pursue a judicial class or collective action claim.” (General Counsel Brief, at 11). This is demonstrably false. At least one federal district court has held that judicial class/collective action waivers are enforceable, notwithstanding the NLRA. See *Palmer v. Convergys Corp.*, No. 10-cv-145, 2012 U.S. Dist. LEXIS 16200 (M.D. Ga. Feb. 9, 2012)(finding that class action waiver in non-arbitration context was not unlawful). Moreover, even if the Board decides that the Policy must be rescinded, which it should not do, it should not require Respondent to waive its right to designate an arbitral, as opposed to judicial, forum for employment-related claims.

labor practice.” Here, it is undisputed that the AAA credited Respondent’s argument that Charging Party’s arbitration should not proceed on a class basis. Thus, the AAA considered Respondent’s argument to be meritorious.⁸ Therefore, for the Board to reach an opposite conclusion in this case would fly in the face of *Bill Johnson’s* and well-established precedent. Accordingly, Exceptions 29-31 should be sustained.

VI. THE COMPLAINT IS BARRED BY SECTION 10(b) OF THE ACT

The General Counsel also incorrectly contends that the Policy is a rule as opposed to a contract. As noted by Respondent in its initial brief, a rule can be unilaterally modified by an employer, but a contract may not. A contract is binding and enforceable according to its terms. While it might make sense to say an employer “maintained” a policy or a rule, it does not make sense to say an employer “maintained” a *contract* between an employer and employee to arbitrate disputes. A rule may be unilaterally promulgated, but a contract requires an agreement between two or more parties, as evidenced by words or conduct. A contract either exists or not, and it is either in effect or not—as determined by the terms of the contract. To the extent there is a valid and binding contract to arbitrate disputes, the contract is “maintained” by the terms of the contract, not by the unilateral choice of either the employer or the employee. General Counsel’s attempt to distinguish *Albertson’s*, 359 NLRB No. 147 (2013), 2013 NLRB LEXIS 487, at *40-47 (July 2, 2013) *set aside on other grounds by NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014), *reaffirmed* 361 NLRB No. 71 (Oct. 24, 2014) on the grounds the case involved “spoken statements made by a manager, not written policies maintained by the employer” misses Respondent’s point in its entirety. (General Counsel Brief, at 12). The key to *Albertson’s* is that

⁸ Notably, nothing precluded Charging Party or her co-petitioners from filing a judicial complaint seeking to compel arbitration on a class or collective basis. However, for the reasons described above, given the overwhelming authority enforcing class and collective action arbitration waivers in spite of the Board’s holdings in *D.R. Horton* and *Murphy Oil*, it is highly unlikely that such a maneuver would have been successful in any case.

the term “rule” is not as overbroad as the General Counsel makes it out to be and the General Counsel’s mere labeling something as a “rule” does not necessarily make it a “rule” for Section 10(b) purposes.

The Board’s recent decision in *Cellular Sales of Missouri*, 362 NLRB No. 27 (2015) is also instructive as to why Charging Party’s claims are untimely. In that case, the Board majority mistakenly concluded the class action waiver, promulgated more than six months prior to the charge being filed, was unlawful based upon a continuing violation theory (as General Counsel asserts here as well). *Id.* at slip op. 2. To support this finding, the Board cited to several cases involving employer rules as well as *Teamsters Local 293 (Lipton Distributing)*, 311 NLRB 538, 539 (1993) with the following parenthetical: “finding violation for maintenance of unlawful contractual provision executed outside 10(b) period.” *Id.* at n. 7. In *Teamsters Local 293*, the Board granted the General Counsel’s motion for summary judgment, finding the union unlawfully entered into a collective bargaining agreement containing a clause requiring shop stewards to be paid a premium over other employees in contravention of Sections 8(b)(1)(A) and 8(b)(2). The charging party in *Teamsters Local 293* did not enter into the unlawful agreement with the employer; his union did. As a result, there were equitable grounds in *Teamsters Local 293* for the continuing violation theory to apply (i.e. to permit an aggrieved individual who was not a party to the initial contract to challenge the purported illegality). The same logic applies to “rules” cases because the employer unilaterally promulgates rules.

Unlike in *Teamsters Local 293* or the “rules” cases, Charging Party and Respondent were the only parties to the Agreement. Therefore, there is no equitable reason to conclude the continuing violation theory should apply in the present case because Hobson was a party to the

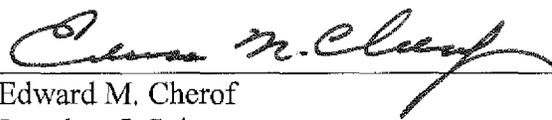
Agreement and thus was directly affected by its terms. Therefore, the claims in this case are time barred and Exceptions 1-3, 22-28 should be sustained.

VII. CONCLUSION

For the reasons set forth herein as well as in Respondent's opening brief, the ALJ's decision finding that Respondent has violated Section 8(a)(1) is meritless based on a myriad of reasons. It is premised on the Board's erroneous decisions in *Murphy Oil* and *D.R. Horton*, the latter of which has been rejected by numerous courts and cannot be reconciled with the Supreme Court's decisions interpreting the FAA. The Board has no authority to take the proverbial sledgehammer and interfere with voluntary agreements between employers and employees and create an obstacle to the accomplishment of Congress' objectives under the FAA. For all the reasons stated herein, and contrary to the ALJ's findings, conclusions, and recommended order/remedies, Respondent respectfully submits that it has not violated any provision of the Act and that the Amended Complaint should be dismissed.

Dated: May 5, 2015

Respectfully submitted,
JACKSON LEWIS P.C.

By: 

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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12**

CITIGROUP TECHNOLOGY, INC. and
CITICORP BANKING CORPORATION (PARENT),
A SUBSIDIARY OF CITIGROUP, INC.

and

Case 12-CA-130742

ANDREA SMITH, an Individual

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of May, 2015, I served a true copy of Respondent Citigroup Technology, Inc., and Citicorp Banking Corp. (Parent), a Subsidiary of Citigroup, Inc.'s **Reply Brief in Further Support of Exceptions to the Decision of the Administrative Law Judge** via electronic mail and U. S. Mail, postage-paid, addressed to:

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NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Citigroup Technology, Inc. and Citicorp Banking Corporation (parent), a subsidiary of Citigroup, Inc. and Andrea Smith. Case 12–CA–130742

December 1, 2015

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA,
AND MCFERRAN

On December 23, 2014, Administrative Law Judge Donna N. Dawson issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.¹

There are two issues in this case: (1) whether the Respondent violated Section 8(a)(1) of the Act by maintaining the Employment Arbitration Policy (EAP), which requires employees, as a condition of employment, to agree to resolve certain employment-related disputes exclusively through individual arbitration; and (2) whether the Respondent violated Section 8(a)(1) of the Act by enforcing the EAP by opposing class treatment of the arbitration demand filed with the American Arbitration Association (AAA) by a former employee for claims brought under the Fair Labor Standards Act.

Applying the Board's decisions in *D.R. Horton*, 357 NLRB No. 184 (2012), enf. denied in rel. part, 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA*, 361 NLRB No. 72 (2014), enf. denied, --F.3d-- (5th Cir. Oct. 26, 2015), the judge found that the Respondent violated Section 8(a)(1) of the Act by maintaining the EAP. We adopt that finding.²

The judge also found that the Respondent violated Section 8(a)(1) of the Act by enforcing the EAP because, after the demand for class arbitration was filed with the AAA, the Respondent called to the AAA's attention the fact that the arbitration agreement did not provide for class treatment of arbitration demands. Based on the fact that the former employee initiated the arbitration pro-

¹ We have amended the remedy and modified the judge's recommended Order and notice to conform to our findings.

² For the reasons stated in *Murphy Oil*, supra, we disagree with the views of our dissenting colleague.

ceeding, and considering the provisions and policies of the Federal Arbitration Act, we find, contrary to the judge, that the Respondent's conduct did not amount to enforcement of the EAP in violation of Section 8(a)(1).³ Accordingly, we reverse the judge and dismiss the enforcement allegation.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Citigroup Technology, Inc. and Citigroup Banking Corporation (Parent), a Subsidiary of Citigroup, Inc., Tampa, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Delete paragraphs 1(b), 2(c), and 2(d) and reletter the subsequent paragraphs.

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. December 1, 2015

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring in part and dissenting in part.

In this case, my colleagues find that the Respondent's Employment Arbitration Policy (EAP) violates Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) because the EAP waives the right to participate in class or collective actions regarding non-NLRA employment claims. I respectfully dissent from this finding for the reasons explained in my partial dissenting opinion in *Murphy Oil USA, Inc.*¹ Charging Party Andrea Smith signed the EAP and later participated in a demand for

³ If the former employee's claims had been brought in court as a collective action, and the Respondent had moved to dismiss based on the EAP, we would have found that the Respondent violated Sec. 8(a)(1) by enforcing the unlawful policy. See *Murphy Oil*, supra at 26–28.

¹ 361 NLRB No. 72, slip op. at 22–35 (2014) (Member Miscimarra, dissenting in part). The Board majority's holding in *Murphy Oil* invalidating class-action waiver agreements was recently denied enforcement by the Court of Appeals for the Fifth Circuit. *Murphy Oil USA, Inc. v. NLRB*, No. 14–60800, 2015 WL 6457613 (5th Cir. Oct. 26, 2015).

class arbitration filed by employee Darlene Echevarria with the American Arbitration Association (AAA) alleging violations of the Fair Labor Standards Act. The EAP does not authorize group or class arbitration. In reliance on the EAP, the Respondent requested that the AAA reject Echevarria's demand for class arbitration and instead only accept her individual claim. The AAA granted the request. For the reasons that follow, I agree with my colleagues that the Respondent's request did not violate the Act.

I agree that an employee may engage in "concerted" activities for "mutual aid or protection" in relation to a claim asserted under a statute other than NLRA.² However, Section 8(a)(1) of the Act does not vest authority in the Board to dictate any particular procedures pertaining to the litigation of non-NLRA claims, nor does the Act render unlawful agreements in which employees waive class-type treatment of non-NLRA claims. To the contrary, as discussed in my partial dissenting opinion in *Murphy Oil*, NLRA Section 9(a) protects the right of every employee as an "individual" to "present" and "adjust" grievances "at any time."³ This aspect of Section 9(a) is reinforced by Section 7 of the Act, which protects each employee's right to "refrain from" exercising the collective rights enumerated in Section 7. Thus, I believe it is clear that (i) the NLRA creates no substantive right for employees to insist on class-type treatment of

non-NLRA claims;⁴ (ii) a class-waiver agreement pertaining to non-NLRA claims does not infringe on any NLRA rights or obligations, which has prompted the overwhelming majority of courts to reject the Board's position regarding class-waiver agreements;⁵ and (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA).⁶ Although questions may arise regarding the enforceability of particular agreements that waive class or collective litigation of non-NLRA claims, I believe these questions are exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims.

The majority properly finds that the Respondent's successful invocation of the EAP before the AAA to preclude class arbitration was lawful. See *Stolt-Nielsen S.A. v. Animal Feeds International Corp.*, 559 U.S. 662, 684–685 (2010) (holding that a "party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed to do so*") (emphasis in original). Accordingly, I join my colleagues in dismissing this complaint allegation.

Because I believe the Respondent's EAP was lawful under the NLRA, however, I respectfully disagree with the majority's assertion that the Respondent would have violated the Act if, based on the EAP, it had moved to dismiss claims filed in court. A multitude of court deci-

² I agree that non-NLRA claims can give rise to "concerted" activities engaged in by two or more employees for the "purpose" of "mutual aid or protection," which would come within the protection of NLRA Sec. 7. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 23–25 (Member Miscimarra, dissenting in part). However, the existence or absence of Sec. 7 protection does not depend on whether non-NLRA claims are pursued as a class or collective action, but on whether Sec. 7's statutory requirements are met—an issue separate and distinct from whether an individual employee chooses to pursue a claim as a class or collective action. *Id.*; see also *Beyoglu*, 362 NLRB No. 152, slip op. at 4–5 (2015) (Member Miscimarra, dissenting).

³ *Murphy Oil*, above, slip op. at 30–34 (Member Miscimarra, dissenting in part). Sec. 9(a) states: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment" (emphasis added). The Act's legislative history shows that Congress intended to preserve every individual employee's right to "adjust" any employment-related dispute with his or her employer. See *Murphy Oil*, above, slip op. at 31–32 (Member Miscimarra, dissenting in part).

⁴ When courts have jurisdiction over non-NLRA claims that are potentially subject to class treatment, the availability of class-type procedures does not rise to the level of a substantive right. See *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) ("The use of class action procedures . . . is not a substantive right.") (citations omitted), petition for rehearing en banc denied No. 12-60031 (5th Cir. 2014); *Deposit Guaranty National 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.").

⁵ The Fifth Circuit has twice denied enforcement of Board orders invalidating a mandatory arbitration agreement that waived class-type treatment of non-NLRA claims. See *Murphy Oil USA, Inc. v. NLRB*, above; *D.R. Horton, Inc. v. NLRB*, above. The overwhelming majority of courts considering the Board's position have likewise rejected it. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 34 (Member Miscimarra, dissenting in part); *id.*, slip op. at 36 fn. 5 (Member Johnson, dissenting) (collecting cases); see also *Patterson v. Raymours Furniture Co., Inc.*, No. 14-CV-5882 (VEC), 2015 WL 1433219 (S.D.N.Y. Mar. 27, 2015); *Nanavati v. Adecco USA, Inc.*, No. 14-cv-04145-BLF, 2015 WL 1738152 (N.D. Cal. Apr. 13, 2015), motion to certify for interlocutory appeal denied 2015 WL 4035072 (N.D. Cal. June 30, 2015); *Brown v. Citicorp Credit Services, Inc.*, No. 1:12-cv-00062-BLW, 2015 WL 1401604 (D. Idaho Mar. 25, 2015) (granting reconsideration of prior determination that class waiver in arbitration agreement violated NLRA).

⁶ Even if a conflict existed between the NLRA and an arbitration agreement's class waiver provisions, the FAA requires that the arbitration agreement be enforced according to its terms. *Murphy Oil*, above, slip op. at 34 (Member Miscimarra, dissenting in part); *id.*, slip op. at 49–58 (Member Johnson, dissenting).

sions have enforced similar agreements in such circumstances.⁷ As the Fifth Circuit recently observed after rejecting (for the second time) the Board’s position regarding the legality of class waiver agreements: “[I]t is a bit bold for [the Board] to hold that an employer who followed the reasoning of our *D.R. Horton* decision had no basis in fact or law or an ‘illegal objective’ in doing so. The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders.”⁸ I also believe that any Board finding of a violation based on filing with a court a meritorious motion to compel arbitration would improperly risk infringing on the Respondent’s rights under the First Amendment’s Petition Clause. See *Bill Johnson’s Restaurants v. NLRB*, 461 U.S. 731 (1983); *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002); see also my partial dissent in *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 33–35.

Dated, Washington, D.C. December 1, 2015

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

⁷ See, e.g., *Murphy Oil, Inc., USA v. NLRB*, above; *Johnmohammadi v. Bloomingdale’s*, 755 F.3d 1072 (9th Cir. 2014); *D. R. Horton, Inc. v. NLRB*, above; *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013).

⁸ *Murphy Oil USA, Inc. v. NLRB*, above, at *6.

WE WILL NOT maintain our Employment Arbitration Policy (EAP), which requires employees, as a condition of their employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial, and requires all disputes relating to wages, hours, or other working conditions to be submitted to individual binding arbitration.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind or revise the EAP in all of its forms to make it clear to employees that the policy does not constitute a waiver of their right in all forums to maintain class or collective actions about wages, hours, and other working conditions.

WE WILL notify all former and current employees who were required to sign or otherwise agree to the EAP in any form at our facilities at any time since December 26, 2012, that the EAP has been rescinded or revised and, if revised, WE WILL provide them with a copy of the revised agreement.

CITIGROUP TECHNOLOGY, INC. AND
CITIGROUP CITICORP BANKING
CORPORATION (PARENT), A SUBSIDIARY
OF CITIGROUP, INC.

Thomas W. Brudney, Esq., for the General Counsel.
Edward M. Cherof, Esq., Jonathan J. Spitz, Esq., Stephanie Adler-Paindiris, Esq. (Jackson Lewis, LLP), of Orlando, Florida, & *Andrew Frisch, Esq. (Morgan & Morgan)*, for the Respondent.

DECISION

STATEMENT OF THE CASE

DONNA N. DAWSON, Administrative Law Judge. This case involves issues related to *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), and *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. granted in part and denied in part 737 F.3d 344 (5th Cir. 2013). On June 12, 2014, Andrea Smith (“Charging Party” or “Smith”) filed an initial charge, and on August 27, 2014, she filed a first amended charge. A complaint issued on August 29, 2014, and an amended complaint issued on September 10, 2014 (“the complaint”). The complaint alleges that Citigroup Technology, Inc. and Citicorp Banking Corporation (parent), a subsidiary of Citigroup, Inc. (“Respondent”) violated Section 8 (a)(1) of the National Labor Relations Act (the “NLRA” or the “Act”) by maintaining and enforcing a mandatory employment arbitration policy precluding its employees from pursuing any group, class, or collective actions, arbitration or otherwise, concerning wages, hours, and other terms and conditions of employment. Although Respondent admits in its amended answer that it maintained and enforced its arbitration policy, it denies that any of its actions violated the Act and sets forth several affirmative defenses.

On October 8, 2014, the parties jointly requested that the case be decided without a hearing based on a stipulated record, with attachments. The motion was granted on October 9, 2014, and the parties subsequently filed their briefs.

Having considered the entire stipulated record and the briefs, for the reasons set forth below, I make the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, Respondent, a Delaware corporation with an office and place of business in Tampa, Florida (Respondent's Tampa facility), has been engaged in the business of providing global financial services. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Since about December 26, 2012, Respondent has "maintained and enforced" as part of its U.S. Employee Handbook, "Appendix A: The Employment Arbitration Policy" revised ("EAP") which is applicable to all of its employees in the United States, including those employed at its Tampa facility. This arbitration policy includes the following relevant provision:

The Policy makes arbitration the required and exclusive forum for the resolution of all disputes arising out of or in any way related to employment based on legally protected rights (i.e., statutory, regulatory, contractual, or common-law rights) that may arise between an employee or former employee and Citi or its current and former parents, subsidiaries, and affiliates and its and their current and former officers, directors, employees, and agents (and that aren't resolved by the internal Dispute Resolution Procedure) including, without limitation, claims, demands, or actions under Title VII of the Civil Rights Act of 1964, the Civil Rights Acts of 1866 and 1991, the Age Discrimination in Employment Act of 1967, the Older Workers Benefit Protection Act of 1990, the Rehabilitation Act of 1973, the Americans with Disabilities Act of 1990, the Family and Medical Leave Act of 1993, the Fair Labor Standards Act of 1938, the Equal Pay Act of 1963, the Employee Retirement Income Security Act of 1974, the Worker Adjustment and Retraining Notification Act, the Sarbanes-Oxley Act of 2002, and the amendments thereto, and any other federal, state, or local statute, regulation, or common-law doctrine regarding employment, employment discrimination, the terms and conditions of employment, termination of employment, compensation, breach of contract, defamation, retaliation, whistle-blowing, or any claims arising under the Citigroup Separation Pay Plan.

Except as otherwise required by applicable law, this Policy applies only to claims brought on an individual basis. Consequently[,] neither Citi nor any employee may submit a class action, collective action, or other representation action for resolution under this Policy.

(Jt. Exh. 4).

Since about December 26, 2012, and at all material times thereafter, Respondent has required its newly hired employees

to agree to and accept its EAP as a condition of employment. Based on this agreement, Respondent has precluded these employees from filing any "group, class, collective, or other representative action claims in arbitration," or otherwise, in connection with disputes identified in the EAP concerning wages, hours, and other terms and condition of employment. Of note, Respondent's EAP also states that it does not "exclude the National Labor Relations Board from jurisdiction over disputes covered by the [Act]" (Id.).

In January 2013, Respondent hired Darlene Echevarria (Echevarria) as an antimoney laundering operations analyst in its Tampa facility. Echevarria worked in this position from January 7 until August 23, 2013.

Similarly, Respondent hired Charging Party Smith. By letter dated January 31, 2013, Respondent offered Smith the position of antimoney laundering operations analyst in its Tampa facility. The job offer letter includes an arbitration provision which reads in relevant part:

Arbitration:

Any controversy or dispute relating to your employment with or separation from Citi will be resolved in accordance with Citi's Employment Arbitration Policy as set forth in the Principles of Employment which you will be required to sign as a condition of your Citi employment, the terms of which are incorporated herein. A copy of the Principles of Employment is attached.

I acknowledge that I have received and read or have had the opportunity to read this arbitration agreement. I understand that this arbitration agreement requires that disputes that involve the matters subject to the agreement be submitted to mediation or arbitration pursuant to the arbitration agreement rather than to a judge and jury in court.

(Jt. Exh. 2, p. 4.) The referenced "Principles of Employment," state in relevant part:

[Y]ou agree to follow our dispute resolution/arbitration procedure for resolving all disputes (other than disputes which by statute are not arbitrable) arising out of or relating to your employment with and separation from Citi.* This applies while you are employed by us as well as after your employment ends. While we hope that disputes with our employees will never arise, we want them resolved promptly if they do arise. These procedures do not preclude us from taking disciplinary actions (including terminations) at any time, but if you dispute those actions, we both agree that the disagreement will be resolved through these procedures. Our procedures are divided into two parts:

1. An internal dispute resolution procedure that allows you to seek review of any action taken regarding your employment or termination of your employment which you think is unfair.
2. In the unusual situation when this procedure does not fully resolve a dispute, and such dispute is based upon a legally protected right (i.e., statutory, contractual, or common law), we both agree to submit the dispute, within the time provided by the applicable statute(s) of limitations, to binding arbitra-

tion as follows:

....

- Before the American Arbitration Association ("AAA") where you don't meet the criteria above for FINRA [Financial Industry Regulatory Authority, Inc.] arbitration, FINRA declines the use of its facilities, or you are a Dual Employee and your dispute does not involve CGMI [Citigroup Global Markets Inc.] or activities related to your securities license(s).

Arbitrations shall be conducted in accordance with the respective arbitration rules of the FINRA or AAA, as applicable, then in effect and as supplemented by Citi's Arbitration Policy then in effect ("Arbitration Policy"). A detailed description of the Arbitration Policy is included in the Employee Handbook, and is available for review prior to your acceptance of employment if you choose to review it. Again, it is your responsibility to read and understand the dispute resolution/arbitration procedure.

(Jt. Exh. 2, pp. 7–8.)

On February 5, 2013, Smith accepted and signed the January 31, 2013 job offer as a condition of her employment. She also electronically signed the receipt for Respondent's U.S. 2013 Employee Handbook and EAP. (Jt. Exhs. 2–3.) Smith worked for Respondent as an antimoney laundering operations analyst from about February 19, 2013, until March 28, 2014, when she voluntarily resigned.

On March 28, 2014, Echevarria, on her own behalf, and also on the behalf of other similarly situated employees of Respondent, including Smith and Danielle Lucas (Lucas), Yadira Calderon (Calderon), and Kelleigh S. Weeks (Weeks), through counsel, filed a demand for arbitration with the American Arbitration Association (the AAA), titled "Nationwide Class Action Arbitration Submission," (class arbitration action), along with a "Notice of Filing Notice of Consent to Join," and notices of "Consent to Join" collective action.¹ They sought designation of the action as a collective action and alleged that Respondent violated the Fair Labor Standards Act (FLSA), 29 U.S.C. Sec. 201 et. seq., by failing to pay overtime premium pay. (Jt. Exh. 5).

On April 14, 2014, the AAA case filing coordinator, Kristen Cottone (Cottone) sent a letter to the representatives of the parties to the class arbitration action, requesting a copy of the complete arbitration agreement so that the AAA could determine whether to proceed with the class action. The letter stated that, "[t]he Association requests that either Claimant or Respondent provide a contract clause providing for administration by the [AAA]." Cottone also requested any additional documents that "discuss arbitration procedures to be followed, such as an employee handbook," as well as court order or joint stipulation, if any, compelling the dispute to arbitration. (Jt. Exh. 6.)

On April 15, 2014, counsel for Respondent sent a letter to the AAA, along with a copy of the EAP, and requested that the AAA reject Echevarria's demand for designation of the claim

¹ Darlene Echevarria, on her own behalf and others similarly situated v. Citigroup, Inc., a Foreign Corporation and Citibank, N.A., Case No. 01–14–0000–0324.

as a nationwide collective arbitration action, and instead, only accept her individual claim. (Jt. Exh. 7.) On April 28, 2014, Cottone, on behalf of the AAA, notified the parties that the AAA had received a copy of the EAP, and that, "[i]n accordance with the AAA's policy on class arbitrations, we cannot administer this matter as a class action since the agreement between the parties prohibits class claims." She further advised the parties that they "may proceed with this matter on an individual basis." (Jt. Exh. 8.) Thus, as admitted by Respondent, it successfully enforced its EAP.

III. DECISION AND ANALYSIS

A. Respondent's Maintenance and Enforcement of Its EAP Violates Section 8(a)(1) of the Act

The complaint asserts violations of Section 8(a)(1) of the Act. Under Section 8(a)(1), it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ."

In *D.R. Horton*, 357 NLRB No. 184, slip op. at 1, the Board found that an employer violates Section 8(a)(1) of the Act by imposing, as a condition of employment, a mandatory arbitration agreement that precludes employees from "filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial." Citing to *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948–949 (1942), *Salt River Valley Water Users Assn.*, 99 NLRB 849, 853–854 (1952), enfd. 206 F.2d 325 (9th Cir. 1953), and many other cases, the Board noted that such concerted legal action addressing wages, hours, and working conditions has consistently fallen within Section 7's protections. Most recently, in *Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. at 1–2, the Board adopted and reaffirmed the rationale and decision in *D.R. Horton*. The Murphy Oil Board found that the respondent violated Section 8(a)(1) of the Act by requiring its employees to agree to mandatory arbitration agreements requiring them to resolve all employment-related disputes through individual arbitration, and by taking steps to enforce the unlawful agreements in Federal district court when the charging party and three other employees filed a collective action under the FLSA. *Id.*

The complaint here specifically alleges that Respondent violated the Act by maintaining and enforcing the EAP as a condition of its employees' employment, including that of the Charging Party (Smith), by precluding them from filing any group, class, collective, or other representative action claims, through arbitration or the judicial system, of disputes identified in the EAP concerning wages, hours, and other terms and conditions of employment.

First, it is undisputed that Respondent's EAP has been maintained as a condition of the newly hired employees' employment from December 26, 2012, and continuing to the present, as evidenced by the stipulated record. This includes, of course, Smith's employment. Further, Smith electronically signed the

EAP on February 5, 2013, when she accepted Respondent's employment offer and acknowledged receipt of the principles of employment and the U.S. 2013 Employee Handbook receipt form. (Jt. Exh. 4.) Therefore, I find the EAP was a mandatory rule imposed by Respondent as a condition of employment. As such, the EAP is evaluated in the same manner as any other workplace rule. See *D.R. Horton*, 357 NLRB No. 184, slip op. at 5.

To determine if such a rule, including a mandatory arbitration policy, violates Section 8(a)(1) of the Act, the Board applies the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). See *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enf. 255 Fed.Appx. 527 (D.C. Cir. 2007); *D.R. Horton*, supra, 357 NLRB No. 184. Under *Lutheran Heritage*, the first inquiry is whether the rule explicitly restricts activities protected by Section 7. If it does, the rule is unlawful. If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to [Section 7] activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage*, supra at 647. In the instant case, I find that the EAP explicitly restricts activities protected by Section 7, in that it states:

Except as otherwise required by applicable law, this Policy applies only to claims brought on an individual basis. Consequently neither Citi nor any employee may submit a class action, collective action, or other representation action for resolution under this Policy.

Further, Respondent admitted, in its answer, to paragraph 4(c) of the complaint that by maintenance of its EAP, it "has precluded employees from filing any group, class, collective, or other representative action claims in arbitration with respect to disputes identified in the [EAP] which concern wages, hours and other terms and conditions of employment." In addition, Respondent admitted, to paragraph 5(b) of the complaint, that since on or about April 15, 2014, it made efforts to enforce its EAP when it requested that the AAA reject the nation-wide class action submission filed by Echevarria, on her own behalf, and on behalf of other of Respondent's similarly situated employees, including Smith. (Jt. Exh. 5.) Accordingly, I find that Respondent's maintenance of its EAP and efforts to enforce it violate the Act because the EAP expressly precludes any class or collective actions. In doing so, I find that Respondent restricted the exercise of employees' Section 7 rights in violation of Section 8(a)(1) of the Act. This finding is fully supported by the Board's decisions in *D.R. Horton* and *Murphy Oil*.

B. D.R. Horton and Murphy Oil Are Controlling

Respondent insists that this matter is not one to be "decided in a vacuum of [NLRB] precedent," but "a proceeding that brings into question the jurisdiction of the Board to act in a matter Congress has chosen to regulate through . . . the [FAA] . . ." and not the NLRA or Board law. In support of this argument, Respondent presents a litany of recent United States Supreme Court decisions which "have established the broad preemptive sweep of the FAA," by mandating "that arbitration

agreements must be enforced according to their terms." Respondent contends that these decisions "reject the application of other state and federal statutes" in order to deem arbitration agreements invalid in the absence of an express 'congressional command' to override the FAA. See (R. Br. citing and discussing, e.g., *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013); *CompuCredit*, 132 S.Ct. 665, 669 (2012); and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627 (1985)). In the same vein, Respondent argues that the NLRA has not vested the Board with authority to dictate or guarantee how other courts or agencies would or should adjudicate non-NLRA legal claims, whether they be class, collective, joinder of individual claims, or otherwise, citing Board Member Miscimarra's dissent in *Murphy Oil*. Respondent also asserts that the Board's holding in *D.R. Horton* is incorrect based on its rejection by the U.S. Court of Appeals for the Fifth Circuit in its opinion on appeal of *D.R. Horton* (737 F.3d 344 (Dec. 3, 2013)), and based on other federal court opinions. In sum, Respondent urges that I ignore the Board's decisions in *D.R. Horton* and *Murphy Oil*, and instead, follow its interpretation of Supreme Court precedent, Federal court opinions, and Board member dissent.

However, I decline to deviate from Board precedent. The Board majority, in both *D.R. Horton* and *Murphy Oil*, considered all arguments, and most court decisions, raised and relied on by Respondent, to support a different conclusion, by which I am bound unless and until it is reversed by the Supreme Court. See *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004); *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984) ("it is a judge's duty to apply established Board precedent which the Supreme Court has not reversed," and "for the Board, not the judge, to determine whether precedent should be varied.") (citation omitted).²

In *American Express Co.*, supra, the Supreme Court dismissed claims by multiple merchants that their agreements to arbitrate individual claims as the sole method of resolving disputes was invalid, and concluded that when federal statutory claims are involved, such as federal antitrust laws, the FAA's directive can only be "overridden by a contrary congressional command."³ However, the Board in *D.R. Horton* distinguished *American Express*, finding that it did not involve the substantive Section 7 right of employees to engage in collective action, including collective legal action, for mutual aid and protection concerning wages, hours, and work conditions.

Although the Supreme Court has upheld the enforcement of individual mutual arbitration agreements in these and other cases, the Board recognizes that the Court has never addressed or resolved the issue of exclusive individual arbitration over class and/or collective actions under the Act. The Board understands that the FAA establishes a liberal policy favoring arbitration agreements. *D.R. Horton*, 357 NLRB No. 184, slip op. at

² Respondent's argument, in its brief, that the Board's non-acquiescence position is untenable because of Federal Circuit Court opinions rejecting *D.R. Horton* is without merit. See (R. Br. fn. 4).

³ The merchants in *American Express* challenged the rates that *American Express* charged them, and argued that it would only be cost effective to proceed collectively. The Court found that the Federal antitrust laws at issue failed to guarantee "an affordable procedural path to the vindication of every claim." *American Express*, supra at 2039.

8. However, as noted in *D.R. Horton*, the Supreme Court has “repeatedly emphasized” that the FAA protects agreements to arbitrate federal statutory claims “so long as ‘a party does not forgo the substantive rights afforded by the statute.’” *Id.* at 9–10, citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (quoting *Mitsubishi Motors Corp.*, *supra* at 628.⁴

Respondent further contends that the Supreme Court in *American Express* makes clear that it is improper to find a congressional command where none exists, and therefore, since none exists in the language or legislative history of the NLRA, there should be no such finding here. However, as stated, the Board decisions in *D.R. Horton* and *Murphy Oil* establish that such a command exists in that Section 7 substantively guarantees employees the right to engage in collective action, including collective legal action, for mutual aid and protection concerning wages, hours, and working conditions. For the same reasons, the Supreme Court’s decision in *CompuCredit*, *supra*, and other cases cited by Respondent are distinguishable.⁵ Further, these general consumer litigation and commercial cases do not address the central questions of how and to what extent the FAA may be used to interfere with, by way of private agreements, the fundamental substantive right of workers to engage in concerted activity established and protected by the NLRA—the gravamen of the violation here and in *D.R. Horton*.

Respondent also points to *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011),⁶ *Marmet Health Care Center v. Brown*, 133 S.Ct. 1201 (2012) (requirement that courts enforce the parties’ bargain to arbitrate), and other Supreme Court cases to support its argument that the validity of their EAP and class action waiver contained therein must be based only on the FAA. Similarly, the Supreme Court in these cases did not address the issue of mandatory arbitration agreements in the context of individual employment agreements and the well-established substantive right of employees under the NLRA to engage in concerted legal action against their employer. The *Murphy Oil* Board has reaffirmed, and thoroughly and convincingly explained its rationale as to why *D.R. Horton* was correctly decided, despite the FAA’s liberal arbitration policy. Thus, Respondent’s argument that the FAA must always override the NLRA in these mandatory arbitration agreement cases fails.

The Board in *Murphy Oil* noted the Supreme Court’s recent confirmation “that the Federal policy favoring arbitration, however, liberal, has its limits. It does not permit a ‘prospective waiver of a party’s right to pursue statutory remedies.’” *Murphy Oil*, 361 NLRB No. 72, slip op. at 8, citing *Italian Colors*,

⁴ The Board distinguished *Gilmer*, in that it “addresses neither Section 7 nor the validity of a class action waiver,” and involved an individual claim and an arbitration agreement without any language specifically waiving class or collective actions. *D.R. Horton*, 357 NLRB No. 184, slip op. at 10, fn. 22.

⁵ The Supreme Court in *CompuCredit* invalidated an arbitration agreement waiving the ability of consumers to sue a credit card marketer and the card’s issuing bank in court for alleged violations of the Credit Repair Organization Act (CROA).

⁶ In *AT&T Mobility LLC v. Concepcion*, the Supreme Court found the FAA preempted California state law making class-action waivers in consumer adhesion contracts unconscionable.

supra, 133 S.Ct. at 2310 (quoting *Mitsubishi Motors Corp.*, *supra*, at 637) (emphasis in original). In doing so, the Board established that an arbitration agreement that prevents employees from exercising their substantive Section 7 right to pursue legal claims concertedly to address work conditions in any forum “amounts to a prospective waiver of a right guaranteed by the NLRA,” and is unlawful. *Id.* at 9.

The Board in *Murphy Oil* also found that even applying the framework applied by the Fifth Circuit Court of Appeals, *D.R. Horton* is good law. The Board established that both exceptions to the FAA’s requirement that arbitration agreements must be enforced according to their terms, apply to cases such as *D.R. Horton*. First, the *Murphy Oil* Board found the arbitration agreement in its case “invalid under Section 2 of the FAA, the statute’s savings clause, which provides for the revocation ‘upon such grounds as exist at law or in equity for the revocation of any contract.’” *Murphy Oil*, 361 NLRB No. 72, slip op. at 9, citing 9 U.S.C. § 2. The Board found that such grounds existed in its case, and relied on earlier Supreme Court decisions to establish that, “any individual employment contract that purports to extinguish rights guaranteed by Section 7 of the National Labor Relations Act is unlawful.” *Id.* at 9, citing *National Licorice, Co. v. NLRB*, 309 U.S. 350, 361 (1940) and *J.I. Case, Co. v. NLRB*, 321 U.S. 332, 337 (1944).

Second, the Board agreed with the *D.R. Horton* Board’s opinion regarding the second exception of the FAA’s mandate, that Section 7 of the Act does constitute a “contrary congressional command” overriding the FAA. It saw “no compelling basis for the court’s conclusion that to override the FAA, Section 7 was required to explicitly provide for a private cause of action for employees, a right to file a collective legal action, and the procedures to be employed.” Further, the Board emphasized the substantive right to engage in collective legal activity “plainly authorized by the broad language of Section 7, as it has been authoritatively construed by the Supreme Court in [*Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978)] as part of the protected ‘resort to administrative and judicial forums.’” *Murphy Oil*, 361 NLRB No. 72, slip op. at 9. All other cases cited by Respondent in support of its positions favoring the FAA over the NLRA and discrediting Board precedent are not specifically addressed here as they are so thoroughly explained in *D.R. Horton* and *Murphy Oil*.

C. Respondent’s Remaining Arguments Are Unsupported

Respondent’s assertion that unrepresented employees are on an equal playing field with unions that, on behalf of its members, can voluntarily agree to waive a judicial forum in favor of arbitration is without merit. The Act clearly recognizes the inequality of bargaining power between employees without benefit of a collective-bargaining agreement or union representation and employers who are corporately or otherwise organized. See 29 U.S.C. § 151. Therefore, a mandatory arbitration agreement, such as Respondent’s EAP, which embodies a waiver restricting employees’ substantive rights under the Act, “is the antithesis of an arbitration agreement providing for union representation in arbitration that was reached through the statutory process of collective bargaining . . .” *Murphy Oil*, 361 NLRB No. 72, slip op. at 10. Although the *D.R. Horton*

and Murphy Oil Boards recognize the importance of such balancing of power under the Act, neither claims the inequality in bargaining power between individual employees and employers is the only reason to invalidate mandatory arbitration agreements.

Respondent argues that its EAP is distinguishable from the agreement that the Board found unlawful in *D.R. Horton* because it specifically states that it does not “exclude the National Labor Relations Board from jurisdiction over disputes covered by the [Act] . . .” Similarly, Respondent claims that its EAP would not preclude the U.S. Department of Labor, or similar state agency, from seeking class-wide or collective action on behalf of the Charging Party. See (R. br., fn. 2). However, there is nothing in Respondent’s EAP which allows for employees, past or present, to pursue in any way, even as parties in an FLSA or DOL action, class, joint, or collective claims in arbitration or court. Moreover, Respondent’s EAP “makes arbitration the required and exclusive forum for the resolution of all disputes arising out of or in any way related to employment based on legally protected rights.” (Jt. Exh. 1.) It does not leave open any judicial forum, as required by the Board in *D.R. Horton*, nor does it allow for collective or class arbitration. See *D.R. Horton*, 357 NLRB No. 184, slip op. at 12. Of note, the Murphy Oil Board rejected a similar argument where a revised arbitration agreement stated that employees would not waive their Section 7 right to file a class or collective action in court, but maintained its original language under which employees “explicitly waive their right” to file or be a party or class member in a class or collective action in arbitration or other forum. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 19.

Respondent also asserts that the Board has no authority to order it to take action regarding litigation initiated by the Charging Party in another forum, and which involves another federal statute, the FLSA. The Board, in *D.R. Horton* and *Murphy Oil*, explained how the Board and court decisions recognized this authority in cases, such as this one, where mandatory arbitration agreements “restrict the exercise of the substantive right to act concertedly for mutual aid or protection that is central to the [NLRA].” *Murphy Oil*, 361 NLRB No. 72, slip op. at 5, citing *D.R. Horton*, 357 NLRB No. 184, slip op. at 2–3 & fn. 4. The Murphy Oil Board recognized that while the underlying claims before it involved the FLSA, the NLRA “is the source of the relevant, substantive right to pursue those claims concertedly.” *Id.* at 5. Further, the Board and courts have held that the filing of FLSA cases, and seeking support of others in pursuit of those cases, constitutes the kind of concerted activity protected by the Act. See, *Murphy Oil*, *Id.*, citing *Spandso Oil & Royalty Co.*, 42 NLRB 942, 949–950 (1942); *Salt River Valley Water Users’ Assn. v. NLRB*, 206 F.2d 325 (9th Cir. 1953).

Next, Respondent contends that even if the EAP was mandatory, it did not violate the Act because the use of class action procedures is not a substantive right. Similarly, Respondent denies that Smith, Echevarria, and other similarly situated employees, engaged in concerted activities with other employees for the purpose of mutual aid and protection by filing a nationwide collective action arbitration submission before the AAA on about March 28, 2014. This contention fails on both counts. First, the Board has made clear that the Act does not create or ensure a

right to “class certification or the equivalent,” but a right “to pursue joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint.” *Murphy Oil*, 361 NLRB No. 72, slip op. at 2, citing *D.R. Horton*, 357 NLRB No. 184, slip op. at 10 & fn. 14.

Second, Smith and other employees joined the nationwide class action submission filed by Echevarria, as is evidenced by the “Notice of filing Notice of Consent to Join” and “Notices of Consent to Join Collective Action” signed by Echevarria, Smith, Lucas, Calderon, and Weeks. (Jt. Exh. 5.) There is simply no evidence in this case that Smith, Echevarria, and the other designated, similarly situated employees were acting on their own behalf. Thus, I reject Respondent’s argument that concerted activity in this case is merely presumed, and not based on actual evidence as required by the Board. See *Meyers Industries, Inc. & Prill*, 268 NLRB 493 (“Meyers I”) and *Meyers Industries, Inc. & Prill*, 281 NLRB 882 (1986) (“Meyers II”).

Respondent also contends, in the same context, that since Smith was no longer an employee at the time she filed the underlying charge, she could not have been engaged in protected concerted activity when she submitted a demand for class-wide arbitration, or have joined a putative class action for the purpose of mutual aid or protection. Respondent relies on *Statutory Engineers, Local 39*, 346 NLRB 336, 347 fn. 9, in which the Board affirmed an administrative law judge’s decision finding that Sec. 2(3) of the Act does not include in its definition of employees former employees who are filing personal lawsuits against their former employer and who have lost their jobs for reasons other than a labor dispute or because of an unfair labor practice. Accepting this argument would mean that Smith would not have standing to have filed the underlying charge, which she clearly does. Unlike this case, in *Statutory Engineers*, supra, the affected employee was found to have been terminated for good cause, and had filed a personal lawsuit. Here, Smith did not file a personal lawsuit. Moreover, the Act does not place such a limitation on who may file a charge. See Sec. 10 of the Act and *NLRB v. Indiana & Michigan Electric Co.*, 318 U.S. 9, 17 (1943). It is well established that the term “employee” under the Act includes former employees of the employer. See Section 2(3) of the Act; *Redwood Empire, Inc.*, 296 NLRB 369, 391 (1989); *Waco, Inc.*, 273 NLRB 746, 747 fn. 8 (1984).

Next, Respondent asserts this claim should be barred due to the “Voluntariness Carve-Out” in footnote 28 of *D.R. Horton*. In other words, Respondent argues that because Smith, unlike the charging party in *D.R. Horton*, signed and agreed to the terms of the EAP when she applied for employment, she was fully informed, and voluntarily agreed to individually arbitrate any employment disputes with Respondent. However, as Respondent acknowledged, the charging party in *Murphy Oil*, like Smith, did in fact sign the arbitration agreement when she applied for employment. Although the Murphy Oil Board did not specifically address the matter of voluntariness, it clearly establishes that it matters not when an employee signs a mandatory arbitration agreement forfeiting his or her Section 7 substantive rights.

Next, Respondent argues that this claim is untimely under Section 10(b) of the Act because Respondent’s alleged actions

causing Smith to be bound by its EAP occurred more than six months before she filed her charge on June 8, 2014. Respondent contends that the 6-month statute of limitations commenced in February 13, 2013, when Smith began employment with Respondent, and agreed to its EAP. However, this argument is without merit under controlling case law holding that a continuing violation exists as long as the rule is still being enforced at the time the charge is filed. See e.g., *Carney Hospital*, 350 NLRB 627, 640 (2007). Further, Respondent did not attempt to enforce its EAP until April 14, 2014, when it sent a letter to the AAA requesting that the class-action arbitration submission be rejected. See *Alamo Cement Co.*, 277 NLRB 1031, 1036–1037 (1985) (not time barred where enforcement allegation could not have been litigated sooner).

Finally, in its answer, Respondent relied on the Supreme Court decisions *Bill Johnson's v. NLRB*, 461 U.S. 731, 741 (1983), and *BE&K Construction*, 536 U.S. 516 (2002), to argue that its request for the AAA to preclude class arbitration pursuant to its EAP is constitutionally protected by the First Amendment, and should therefore be stayed pending the final outcome of Smith's FLSA claim. This argument is admittedly based on Respondent's belief that its EAP and enforcement thereof are lawful. As Respondent acknowledges, the Murphy Oil Board rejected this argument and reliance on Bill Johnson's and BE&K because it found the underlying arbitration agreements and enforcement of those agreements unlawful. Further, the First Amendment does not protect the right to file lawsuits or motions that have an illegal objective under the Act. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 20–21; *Allied Trades Council (Duane Reade)*, 342 NLRB 1010, 1013 fn. 4 (2004), citing *Bill Johnson's*, supra at 738. I reject these First Amendment arguments, as well as Respondent's claim that its efforts did not constitute enforcement of its EAP. I find that Respondent's efforts to enforce its unlawful EAP, by petitioning the AAA to reject the nation-wide class action claim pursuant to the EAP, clearly had an illegal basis pursuant to the Board decisions in *D.R. Horton* and *Murphy Oil*.

Based on the foregoing, I find that Respondent's maintenance of its EAP and enforcement efforts through the AAA violate Section 8(a)(1) of the Act as alleged in complaint.

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(6) and (7) of the Act.
2. Respondent violated Section 8(a)(1) of the Act by maintaining the EAP, and by enforcing that policy by moving to compel individual arbitration of the Charging Party's class-action submission before the AAA.
3. Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As I have concluded that the EAP is unlawful, the rec-

ommended order requires that Respondent revise or rescind it and advise its employees in writing that said rule has been so revised or rescinded. Because Respondent utilized the EAP on a corporate-wide basis, Respondent shall post a notice at all locations where the EAP, or any portion of it requiring all and/or enumerated employment-related disputes to be submitted to individual arbitration, was in effect. See, e.g., *U-Haul Co. of California*, supra, fn. 2 (2006); *D.R. Horton*, supra, slip op. at 17. Respondent is also ordered to distribute appropriate remedial notices to its employees electronically, such as by email, posting on an intranet or internet site, and/or other appropriate electronic means, if it customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB No. 9 (2010).

I recommend Respondent be required to reimburse Charging Party Andrea Smith and other grievants for any litigation and related expenses, with interest, to date and in the future, directly related to Respondent's filing its request/petition for the AAA to reject their demand for a nationwide collective or class arbitration in *Darlene Echevarria et al. v. Citigroup, Inc., et al.* (Case No. 01–14–0000–0324). Determining the applicable rate of interest on the reimbursement will be as outlined in *New Horizon*, 283 NLRB 1173 (1987) (adopting the Internal Revenue Service rate for underpayment of Federal taxes). Interest on all amounts due to Ms. Smith shall be computed on a daily bases as prescribed in *Kentucky River Medical Center*, 356 NLRB 8 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.⁷

ORDER

Respondent, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Maintaining an EAP that precludes employees from filing and/or maintaining class or collective actions in any arbitral or judicial forum.
 - (b) Enforcing (or attempting to enforce) the EAP to prohibit class or collective actions;
 - (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - (a) Rescind or revise the EAP, in all forms and places, to make it clear to employees that the policy does not require them, as a condition of their employment, to waive their right to maintain employment-related class or collective actions in all forums, whether arbitral or judicial.
 - (b) Notify the employees of the rescinded or revised EAP, to include providing them with a copy of any revised policies, acknowledgement forms or other related documents, or specific notification that the EAP has been rescinded.

⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Reimburse Smith and all grievants for all reasonable expenses and legal fees, if any, incurred in opposing Respondent's request/petition to compel individual arbitration before the AAA, with interest, in *Darlene Echevarria et al. v. Citigroup, Inc., et al.* (Case No. 01-14-0000-0324).

(d) Ensure that the Charging Party Andrea Smith, and all similarly situated employees, have a forum to litigate or arbitrate their class complaint by either moving the AAA, jointly with the Charging Party upon request, to vacate its decision to not administer the matter as a class action, or permitting her/their claims, upon request, to be arbitrated on a class-wide basis.

(e) Within 14 days after service by the Region, post at its facility in Tampa, Florida, and in all facilities where it has maintained and/or enforced the EAP, copies of the attached notice marked "Appendix."⁸ Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 26, 2012.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 23, 2014

APPENDIX
NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

⁸ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce an employment arbitration policy (EAP) or agreement that requires employees, as a condition of their employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial, and/or requires disputes relating to wages, hours, or other working conditions be submitted to individual binding arbitration.

WE WILL NOT enforce a mandatory arbitration program by asserting it in class-action arbitration or litigation regarding wages that the Charging Party Andrea Smith brought against us.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

WE WILL rescind or revise the EAP to arbitrate in all of its forms to make it clear to employees that the policy does not constitute a waiver of their right in all forums to maintain class or collective actions about wages, hours, and other working conditions.

WE WILL notify all former and current employees who were required to sign or otherwise agree to the EAP in any form at our facilities at any time since December 26, 2012, of the rescinded or revised mandatory arbitration program set forth in our EAP, to include providing them with a copy of any revised agreements, acknowledgement forms, or other related documents, or specific notification that the EAP has been rescinded.

WE WILL reimburse Charging Party Andrea Smith and other grievants for any litigation expenses directly related to opposing Respondent's (*Citigroup Technology, Inc. and Citigroup Citicorp Banking Corporation* (parent), a subsidiary of *Citigroup, Inc.*) request/petition to compel individual arbitration before the AAA, in *Darlene Echevarria et al. v. Citigroup, Inc., et al.* (Case No. 01-14-0000-0324).

WE WILL ensure that the Charging Party Andrea Smith, and all similarly situated employees, have a forum to litigate or arbitrate their class complaint by either moving the AAA, jointly with the Charging Party upon request to vacate its decision to not administer the matter as a class action, or permitting her/their claims, upon request, to be arbitrated on a class-wide basis.

CITIGROUP TECHNOLOGY, INC. AND
CITIGROUP CITICORP BANKING
CORPORATION (PARENT), A SUBSIDIARY OF
CITIGROUP, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/12-CA-130742 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

