

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31**

DARDEN RESTAURANTS, INC.;
GMRI, INC.;
YARD HOUSE USA, INC.;
YARD HOUSE NORTHRIDGE, LLC
Respondents

and

Case 31-CA-158487

FILIBERTO MARTINEZ, an Individual
Charging Party

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

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I. STATEMENT OF THE CASE

On August 20, 2015¹, Filiberto Martinez, an individual, filed an unfair labor practice charge in this case alleging that Darden Restaurants, Inc. (herein “Respondent Darden” or “Darden”), GMRI, Inc. (“Respondent GMRI” or “GMRI”), Yard House USA Inc. (“Respondent Yard House USA” or “Yard House USA”), and Yard House Northridge, LLC (“Respondent Yard House Northridge” or “Yard House Northridge”) (collectively called Respondents); required all employees, as a condition of employment, to agree to a mandatory arbitration provision that does not permit class or representative actions, and filed a court motion to enforce the arbitration agreement and bar on class actions, in violation of Section 8(a)(1) of the Act.

After investigating the charge, the Acting Regional Director issued a Complaint and Notice of Hearing on February 26, 2016. In substance, the Complaint alleged that three of the four Respondents – Respondents GMRI, Yard House USA and Yard House Northridge (but not Respondent Darden) – violated Section 8(a)(1) of the Act by maintaining a mandatory arbitration policy, called the Dispute Resolution Process (“DRP”), that prohibits employees from pursuing claims in a class or representative capacity, and by requiring employees, as a condition of employment, to sign the DRP. The Complaint also alleged that all four Respondents jointly enforced the DRP by asserting it in class action brought against Respondents by the Charging Party. (Jt. Exh. 3².)

Respondent GMRI, in its answer, admitted that the DRP contained an arbitration provision and that it filed the Motion to Compel Binding Arbitration, but denied that

¹ All dates are 2015 unless otherwise noted.

² References to the stipulated facts in the parties’ June 29, 2016 *Joint Motion and Submission of Stipulated Facts and Exhibits to the Administrative Law Judge*, herein the Joint Motion, are designated as “Jt. Stip.” References to the stipulated exhibits in the Joint Motion are designated as “Jt. Exh.” References to page numbers in the Joint Motion are designated as “Jt. Motion p. --”. References to Administrative Law Judge Joel P. Biblowitz’ August 18, 2016 Decision are designated “ALJD p. --”.

maintenance of the DRP and filing the Motion to Compel Binding Arbitration violated the Act. The other Respondents asserted that they were not proper parties to the case.³

On June 29, 2016, the parties submitted a *Joint Motion and Submission of Stipulated Facts and Exhibits to the Administrative Law Judge*. Associate Chief Administrative Law Judge Gerald M. Etchingham granted the Joint Motion, approved the stipulated facts and exhibits, and reassigned the case to Administrative Law Judge Joel P. Biblowitz (“the ALJ”) that day. On August 18, 2016, Judge Biblowitz issued his Decision finding, among other things, that Respondent GMRI violated Section 8(a)(1) of the Act by maintaining the DRP and requiring that employees sign the DRP as a condition of employment. Judge Biblowitz also found that all four respondents violated the Act by jointly enforcing the DRP through a motion to compel arbitration.

On September 15, 2016, Respondents filed Exceptions, a Brief in Support of Exceptions, and a Request for Oral Argument.

Pursuant to Section 102.46(d) of the Board’s Rules and Regulations, Counsel for the General Counsel submits the instant answering brief to Respondents’ Exceptions. Counsel for the General Counsel submits that Respondents’ Exceptions are without basis in the record, are contrary to law, and should be dismissed in their entirety.

II. FACT SUMMARY⁴

Charging Party Filiberto Martinez was employed at the Yard House restaurant in Northridge, California, from November 8, 2012 until May 28, 2013. (Jt. Stip. 13.) Respondents’

³ Jt. Exh. E, F, G, H.

⁴ For a complete Statement of Facts, Counsel for the General Counsel respectfully refers the Board to General Counsel’s Brief to the Administrative Law Judge of August 10, 2016.

employees are not represented by any labor organization. (Jt. Stip. 8.) All four Respondents are engaged in interstate commerce within the meaning of the Act. (Jt. Stip. 4, 5, 6 and 7.)

On February 23, 2013, Respondent rolled out its Dispute Resolution Process (“DRP”, Jt. Exh. M), and the Charging Party signed an acknowledgement that day. (Jt. Exhibit N [Jt. Motion p. 93].) The acknowledgement stated:

This agreement contains the requirements, obligations, procedures and benefits of the Dispute Resolution Process (DRP). **I acknowledge that I have received and/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 or jury in court.** I agree as a condition of my employment, to submit any eligible disputes I may have to the DRP and to abide by the provisions outlined in the DRP. I understand this includes, for example, claims under state and federal laws relating to harassment or discrimination, as well as other employment-related claims as defined by the DRP. Finally, I understand that the Company is equally bound by all of the provisions of the DRP.⁵ (Jt. Exh. N [Jt. Motion p. 88].) (*Emphasis in original.*)

At material times, Respondent GMRI has required employees, including the Charging Party, to submit employment related disputes and compensation related disputes to arbitration. The terms of the employees’ agreement are in in the DRP. (Jt. Stip. 9.) Employees, including the Charging Party, must abide by the DRP as a condition of employment. (Jt. Stip. 11.) The DRP is a condition of employment of all employees who are employed by any of the Respondents. (Jt. Stip. 14.)

The DRP states that examples of legal claims covered by the DRP include, but are not limited to claims that arise out of the Civil Rights Act of 1964, the Americans With Disabilities Act, the Fair Labor Standards Act, the Age Discrimination in Employment Act, and the Family Medical Leave Act. (Joint Exhibit M, page 2.)

⁵ The Charging Party’s acknowledgement was in Spanish. The language quoted above is the English translation of the Spanish-language acknowledgement signed by the Charging Party.

The DRP also provides:

Class, Collective, and Representative Actions

There will be no right or authority for any dispute to be brought, heard or arbitrated by any person as a class action, collective action or on behalf of any other person or entity under the DRP. The arbitrator has no jurisdiction to certify any group of current or former employees, or applicants for employment, as a class or collective action in any arbitration proceeding. (Jt. Exh. M, page 3 [Jt. Motion p. 80].)

On March 2, the Charging Party filed a class action lawsuit alleging that all four Respondents violated the California Labor Code, Industrial Welfare Commission Wage Orders, and the California Business and Professional Code.⁶ (Jt. Exh. O.) The lawsuit alleged that the four Respondents violated these laws by failing to provide required meal periods, failing to provide required rest periods, failing to pay overtime wages, failing to timely pay wages during employment, failing to pay all wages due to discharged and quitting employees, failing to maintain required records, failing to furnish accurate, itemized wage statements, failing to indemnify employees for necessary expenditures incurred in the discharge of duties, and unfair and unlawful business practices. (Jt. Exh. O, p. 3 [Jt. Motion p. 94].)

The Charging Party's lawsuit was filed individually and on behalf of himself and all others similarly situated. The lawsuit identified all current and former non-exempt employees of Defendants (Respondents) working at Yard House locations in the State of California at any time within the period beginning four (4) years prior to the filing of the lawsuit, and ending at the time the lawsuit settled or proceeded to final judgment. (Jt. Exh. O, p. 5 [Jt. Motion p. 97].)

In a May 6 *Joint Initial Status Conference Class Action Response Statement*⁷ (Jt. Exh. P 5 [Jt. Motion p. 128]), Respondents asserted that the Charging Party was “not a proper representative

⁶ *Filiberto Martinez, et al. v. Darden Restaurants, Inc., et al.*, Case No. BC-574043 (Superior Court of the State of California, County of Los Angeles).

⁷ Counsel for the General Counsel notes that Joint Motion Stipulated Fact 16 contains a typographical error: it incorrectly states that the *Joint Initial Status Conference Class Action Response Statement* was submitted on May 6,

based on his agreement to submit claims through the Company's Dispute Resolution Procedures” and that the claims were subject to the DRP, including mandatory arbitration of his individual claims. Respondents estimated that Charging Party’s definition of the class included over 8,000 current and former employees. (Jt. Exh. P, p. 3 [Jt. Motion p. 130].)

Respondent’s *Statement* did not discuss employees’ right to engage in concerted activities, including class actions and collective action, under Section 7 of the Act, as an issue. None of the parties’ subsequent pleadings in the private litigation raised this issue.

On May 7th, the four Respondents jointly filed a *Notice of Removal of Action Pursuant to 28 U.S.C. Sections 1332, 1441, and 1446* in United States District Court for the Central District of California. (Jt. Exh. Q [Jt. Motion p. 135].) Respondents estimated that the number of potential class members to be 7,390 current and former employees.⁸ (Jt. Exh. Q [Jt. Motion p. 140].)

On May 8th, the four Respondents jointly filed *Defendants’ Motion to Compel Binding Arbitration; Memorandum of Points and Authorities* with the District Court. (Jt. Exh. R [Jt. Motion p. 211].) Respondents argued in the Motion that the Federal Arbitration Act, 9 U.S.C. § 1, *et seq* (“FAA”) required that Charging Party’s lawsuit be submitted to arbitration. On June 4th, the Charging Party submitted an *Opposition* to Respondent’s Motion to Compel, arguing that arbitration was inappropriate because the DRP was a procedurally and substantively unconscionable contract of adhesion. (Jt. Exh. S [Jt. Motion p. 382].) On June 5th, the four Respondents jointly submitted a *Reply* to the District Court. (Jt. Exh. T [Jt. Motion p. 397].)

On August 13th, U.S. District Court Judge George H. Wu issued an *Order* granting the four Respondents’ Motion to Compel Binding Arbitration. (Jt. Exh. U [Jt. Motion p. 437].) In

2016 rather than May 6, 2015. The date on the document itself is 2015, not 2016. (Jt. Exh. P, p.6 [Jt. Motion p. 133].)

⁸ 2,655 current employees and 4,735 former employees..

rejecting the Charging Party's arguments, Judge Wu found that his role under the FAA was "limited to determining (1) whether a valid agreement to arbitrate exists and, if it does, (2) whether the agreement encompasses the dispute at issue." (Jt. Exh. U [Jt. Motion p. 439].) Judge Wu concluded that the FAA was applicable and ordered the parties to arbitration, staying the matter pending arbitration. (Jt. Exh. U [Jt. Motion p. 442].) The Judge ordered the parties to submit a joint status report in early 2016. The Judge's *Order* did not discuss employees' rights to engage in concerted activities under Section 7 of the Act.⁹

On August 20, one week after Judge Wu issued his decision, the Charging Party filed the instant charge on August 20. After investigation, the Acting Regional Director issued the Complaint on February 26, 2016.

III. THE ALJ'S DECISION

The ALJ found that Respondent GMRI violated Section 8(a)(1) of the Act by requiring its employees to agree to the DRP as a condition of employment. ALJD p. 8. He found that all four Respondents violated Section 8(a)(1) by moving to enforce the DRP, as the Respondents' actions sought to restrict the Charging Party's right to engage in protected, concerted activity¹⁰. He rejected Respondents' assertions that the charge was time barred by Section 10(b) of the Act, citing *Employers Resource*, 363 NLRB No. 59, n. 2 (2015). He found that the lawsuit had an

⁹ On February 18, 2016, Charging Party and Respondents filed a *Joint Status Conference Statement Regarding Arbitration* to the District Court. (Jt. Exh. X [Jt. Motion p. 445].) The *Status Conference Statement* states that the Charging Party challenged the validity of the DRP's class action waiver, that the parties briefed the issue, and that the arbitrator ruled on February 1, 2016 that the waiver was valid. (Jt. Exh. X [Jt. Motion p. 446].) The *Status Conference Statement* did not mention employees' Section 7 right to engage in concerted activities, including class actions and collective action.

¹⁰ The ALJ cited *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), petition for rehearing en banc denied (5th Cir. No. 12-60031, 2014); *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), (October 28, 2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015); and *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27 (2015), enf. granted in part and denied in part, Cellular Sales of Missouri, LLC v. NLRB, 2016 WL 3093363 (8th Cir. June 2, 2016); *Lutheran-Heritage Village- Livonia*, 343 NLRB 646 (2004), and *Jacob Lewis v. Epic Systems Corporation* 823 F.3d 1147 (7th Cir. 2016), *petition for cert filed Sept. 2, 2016*.

unlawful purpose and violated the Act, citing *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 747 (1983). (ALJD p. 9.)

The ALJ ordered Respondent GMRI to cease and desist from maintaining the DRP provision that requires employees as a condition of employment to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial. He ordered Respondent GMRI to rescind or revise the DRP, to make clear to employees that the arbitration provision does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums. He ordered Respondent GMRI to notify the Charging Party and other current and former employees who executed the agreement that it had been rescinded or revised.

The ALJ also ordered all four Respondents to, among other things, cease and desist from taking legal action to restrict employees' joint, collective or class actions, to notify the Court that it has done so, and to inform the Court that it no longer opposes the Charging Party's class action on the basis of the agreement. The ALJ ordered the Respondents to reimburse the Charging Party for reasonable attorney fees and litigation expenses opposing Respondents' Motion to compel individual arbitration. (ALJD p. 9-10.)

Counsel for the General Counsel respectfully requests that the Board adopt all of the ALJ's conclusions and recommended Order.

IV. SUMMARY OF RESPONDENT'S EXCEPTIONS

In their Exceptions and Brief, Respondents make several arguments.

(1) Respondents argue that the ALJ did not adequately explain why he rejected Respondent's assertion that the Charging Party did not state a legally cognizable claim because

the charge was time-barred by Section 10(b) of the Act and the Charging Party was not an employee.

(2) Respondents argue that the ALJ failed to discuss Respondent's assertion that the Charging Party and General Counsel were estopped from pursuing the unfair labor practice charge.

(3) Respondents argue that the ALJ erroneously rejected Respondents' argument that prosecution of the unfair labor practice interferes with its right to petition the federal courts.

(4) Respondents argue that the ALJ erred by following Board precedent in *D.R. Horton, Inc.*¹¹ and *Murphy Oil USA, Inc.*¹² and their progeny.

(5) Respondents argue that the ALJ erred by finding that the Charging Party's class action lawsuit was protected, concerted activity.

(6) Respondents argue that the recommended remedies requiring the Employer to cease and desist from enforcing the DRP were punitive and inappropriate. Respondents assert that the charge should be dismissed or remanded to the ALJ for further legal conclusions.

As discussed further below, all of Respondent's exceptions should be rejected. There is ample Board precedent that establishes that the charge was timely filed, that the Charging Party is an employee within the meaning of the Act, that maintenance and enforcement of the DRP's ban on class action lawsuits violated employees' Section 7 rights, and that the ALJ's recommended remedy is appropriate. Nor is there any evidence that Respondents' detrimentally relied on any Charging Party or General Counsel action.

¹¹ *Supra*, 357 NLRB 2277 (2012).

¹² *Supra*, 361 NLRB No. 72.

V. ARGUMENT

A. The Charge Should Not Be Dismissed or Remanded to the Administrative Law Judge.

The charge need not be remanded to the ALJ. Even assuming that the ALJ did not fully address all legal issues raised by Respondent, the Board can issue a decision based upon the record in this case.

When an ALJ has failed to address complaint allegations in a decision, the Board has addressed the unresolved allegations where the record is sufficient and credibility resolutions do not need to be made to decide the issue. For instance, the ALJ in *Stevens Creek Chrysler Jeep Dodge*¹³ failed to address some of the 8(a)(1) allegations in the complaint. Based upon the record and the ALJ's factual determinations, the Board was able to conclude that the employer had interrogated employees and had created the impression of surveillance. *Id.*, 353 NLRB at 1295-1296.

Similarly, where the record was sufficient to enable the Board to examine a respondent's claim that it had terminated an employee based on its medical-leave policy and its manager's undisputed testimony concerning that policy, the Board did so, and concluded without remanding that the respondent had failed to meet its burden to establish a point. *Kentucky River Medical Center*.¹⁴

The Board also declined to remand in a case decided in light of the Board's then-recent *FES*¹⁵ restatement of the necessary elements for the General Counsel to establish a discriminatory refusal-to-hire after the ALJ issued his decision. Though the ALJ had not

¹³ *Stevens Creek Chrysler Jeep Dodge*, 353 NLRB 1294 (2009) (2-Member Board); adopted as modified, 357 NLRB 633 (2011); *Enfd.*, *Mathew Enterprise, Inc. v. NLRB*, 498 Fed.Appx. 45, 2012 WL 6599551 (DC Cir. 2012), 771 F.3d 812 (DC Cir. 2014) (*recess appointment issue*)

¹⁴ *Kentucky River Medical Center*, 354 NLRB 329 (2009), slip op. p. 3-4 (2-Member Board); adopted 355 NLRB 594 (2010); *Enfd. NLRB v. Jackson Hospital Corporation*, 669 F.3d 784 (6th Cir. 2012).

¹⁵ *FES*, 331 NLRB 9 (2000).

addressed the *FES* elements in his decision, the Board was able to examine the record and determine from the record that the General Counsel had established the necessary elements of a violation. Thus, no remand was necessary.¹⁶

Circumstances that would require remanding this matter to the ALJ do not exist in the instant case. In the decisions when the Board has remanded, it has done so when it could not make a determination based upon the record. Thus, for instance, the Board has remanded when an ALJ failed to set out the basis for making credibility resolutions¹⁷; when a witness recanted sworn testimony¹⁸; when the Board overruled precedent and applied its new holding retroactively¹⁹; when the ALJ failed to hold an evidentiary hearing on whether a settlement agreement was repugnant to the Act²⁰; and where a Board found that an employer discriminatorily enforced a rule banning distribution of literature but where the complaint had not alleged that the rule was discriminatory.²¹ None of these are in issue in the instant case.

Decisions cited by Respondent are distinguishable. Respondent notes²² that the Board in the *Stevens Creek Chrysler Jeep Dodge*²³ case remanded certain issues to the ALJ, but those issues were remanded because the ALJ had failed to resolve credibility issues on which the issues turned. *Id.* at 1296-1297. As noted above, the Board in that case did resolve other issues that could be decided based on the record. *Sears, Roebuck & Co v N.L.R.B.*²⁴ was a circuit court decision (rather than a Board decision) holding in which the Circuit found that an ALJ failed to

¹⁶ *Interstate Builders*, 334 NLRB 835 (2001); *Enfd. NLRB v. Interstate Buildings, Inc.*, 351 F.3d 1020 (10th Cir. 2003).

¹⁷ *Lee Builders, Inc.*, 341 NLRB 726 (2004).

¹⁸ *Southdown Care Center*, 308 NLRB 225 (1992)

¹⁹ *Rio All-Suites Hotel & Casino*, 362 NLRB No. 190 (Aug. 27, 2015).

²⁰ *BCI Coca-Cola Bottling Co.*, 359 NLRB No. 110 (April 30, 2013) (recess-appointed Board); *reconsidered* 361 NLRB No. 75 (Oct. 29, 2014).

²¹ *Enloe Medical Center*, 346 NLRB 854 (2006).

²² R. Exceptions Brief p. 7.

²³ *Supra*, 353 NLRB 1294 (2009).

²⁴ *Sears, Roebuck & Co v. N.L.R.B.*, 349 F.3d 493 (7th Cir. 2003).

explain why the ALJ credited one witness' testimony concerning the date of a meeting when several other witnesses and documentary evidence contradicted the sole credited witness. *Id.* at 514. In contrast to those cases, there is a stipulated record in the instant case and no credibility issues to resolve.

For the above reasons, there is no need in the instant case to remand any matters to the ALJ as the record is sufficient for the Board to make a decision. The parties in the instant case agreed to a stipulated record, so there are no credibility issues that need to be resolved by an ALJ. The parties stipulated all exhibits into the record; thus, there is a full and complete record in this case, and Respondents do not claim otherwise. The relevant and material pleadings from the Charging Party's lawsuit, Respondents' motions and responses thereto, are in the record. All parties, including Respondents, were free to cite in their briefs from any of the nearly 500 pages of exhibits. The stipulated record enables all parties, including Respondents, to make their legal arguments to the Board. The Board can and should decide that Respondents' arguments are without merit based on the record in this case.

B. The Judge Correctly Found That the Charge Was Not Barred by Section 10(b) of the Act and that Charging Party Martinez is an Employee.²⁵

1. The Charge Was Not Time Barred By Section 10(b) of the Act.

The ALJ's conclusion that the charge was filed within the Section 10(b) period was correct and amply supported by Board and Court precedent. Counsel for the General Counsel respectfully submits that the Board should affirm the ALJ's conclusion. As more fully explained below, it is well-established that Section 10(b) does not preclude the pursuit of a complaint

²⁵ Respondents argument that the ALJ lacked statutory authority to issue his decision because it amounted to an Advisory or Declaratory opinion should be rejected as it is without merit. Respondents' argument rests on their premise that the charge was not timely filed and that Charging Party is not an employee. As discussed below, the record and Board precedent amply demonstrate that the charge was timely and that the Charging Party is an employee within the meaning of Section 2(3) of the Act. The ALJ's decision was therefore not theoretical or advisory but rather was a correct finding that Respondents did engage in unfair labor practices.

allegation based on the maintenance and/or enforcement of an unlawful rule or policy within the Section 10(b) period, even if the rule or policy was promulgated more than six months before the filing and service of the charge.

The parties stipulated that Respondent GMRI has at material times required employees, including the Charging Party, to submit employment related and compensation related disputes to the DRP, which on its face precludes employee class or collective actions. The parties have also stipulated that employees, including the Charging Party, must agree to abide by the terms of the DRP as a term and condition of employment, and that the DRP is a condition of employment of all employees.

Further, the parties stipulated that all four Respondents filed the *Motion to Compel Binding Arbitration* on May 8, that the charge was filed on August 20 and served on August 21; thus the charge was served fewer than four months after the *Motion to Compel Binding Arbitration* was filed.

a. Enforcement By All Four Respondents Within The 10(b) Period Violated The Act.

It is well-established that Section 10(b) does not preclude the pursuit of a complaint allegation based on the maintenance or enforcement of an unlawful rule or policy within the Section 10(b) period, even if the rule or policy was promulgated more than six months before the filing and service of the charge. *See, e.g., Control Services*, 305 NLRB 435, 435 fn. 2, 442 (1991), *enfd. mem.* 961 F.2d 1568 (3d Cir. 1992); *The Guard Publishing Co.*, 351 NLRB 1110, 1110 fn. 2 (2007), *remanded on other grounds, Guard Publishing Co. v. NLRB*, 571 F.3d 53, 56 (D.C. Cir. 2009), *on remand* 357 NLRB 187 (2011); *Employers Resource*, 363 NLRB No. 59

(December 17, 2015), n. 2.²⁶ The ALJ correctly decided that the four Respondents' enforcement of the DRP within the 10(b) period violated the Act. Counsel for the General Counsel respectfully submits that the Board should affirm the ALJ's conclusion.

b. Respondent GMRI's Maintenance of the DRP Within the 10(b) Period Violated the Act.

The Board has specifically rejected arguments that complaints alleging policies barring class actions are time barred by Section 10(b) because the initial unfair labor practice charge was filed and served more than 6 months after an employee signed and became subject to such arbitration policies. *Adriana's Insurance Services*, supra, 364 NLRB slip op. at 2, fn. 3; *Securitas*, supra, 363 NLRB slip op. at 2. Indeed, even if the rules were not enforced during the 10(b) period – and, of course, Respondents in the instant case did enforce the DRP within the 10(b) period – the mere existence of the rule is unlawful since the existence of such rules tends to interfere with employee rights. *Carney Hospital*, 350 NLRB 627 (2007) at 640; *TeleTech Holdings*, 333 NLRB 402, 403 (2001); *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enf. 203 F.3d 52 (DC Cir. 1999). Under these circumstances, the maintenance of an unlawful workplace rule such as the Respondents' DRP, is a continuing violation that is not time barred by Sec. 10(b). *Adriana's Insurance Services*, supra, 364 NLRB slip op. at 2, fn. 3; *Securitas*, supra, 363 NLRB slip op. at 2²⁷.

²⁶ See also *Adriana's Insurance Services*, supra, 364 NLRB slip op. at 2, fn. 3; *Teamsters Local 293 (R.L. Lipton Distributing)*, 311 NLRB 538, 539 (1993) (provision requiring extra payment of 45 cents per hour to shop stewards); *Great Lakes Carbon Corp.*, 152 NLRB 988, 989-900 (1965) (provision providing for superseniority for strikers); *Whiting Milk Corp.*, 145 NLRB 1035, 1037-1038 (1964), enf. denied on other grounds, 342 F.2d 8 (DC 1 1965), (unlawful seniority provision in contract executed outside 10(b) period but enforced within the 10(b) period); *Prestige Bedding Co.*, 212 NLRB 690, 698 (1974) (discriminatory provision in contract providing benefits only for union members that was executed outside the 10(b) period, unlawful on its face and does not bar unfair labor practice based on continued enforcement of contractual provision within 10(b) period)

²⁷ Both decisions cite *PJ Cheese, Inc.*, 362 NLRB No. 177, slip op. at 1 (August 20, 2015), Respondent Motion for Summary Disposition granted, *PJ Cheese, Inc. v. NLRB*, 2016 WL 3457261 (5th Cir. June 16, 2016); *Neiman Marcus Group*, 362 NLRB No. 157, slip op. at 2 & fn. 6 (August 4, 2015); and *Cellular Sales of Missouri, LLC*, 362

Decisions cited by Respondents are not on point²⁸. *Bowen Products Corporation*, 113 NLRB 731 (1955), involved a discrete action that was “a fully consummated act” that that immediately created an adverse substantive condition of employment more than six months before the charge was filed. *Id.*, at 732. The Board distinguished those circumstances with other decisions where an unlawful policy was continuously applied within the 10(b) period. *Id.*, at 733. Respondent also cites *American Automatic Fire Protection*, 302 NLRB 1014 (1991), in support of its argument. That decision holds that a continuing violation theory is not applicable when notice of a “clear and total” contract repudiation took place more than six months before the charge was filed; as was the case with *Bowen*, the unfair labor practice in *American Automatic Fire Protection* was fully completed when the union learned of the repudiation. Respondent in the instant case, in contrast, has continued to maintain and enforce the unlawful DRP until and after the charge was filed, and its maintenance of that policy was not fully completed when the employees signed the DRP.

2. The ALJ Correctly Found That the Charging Party is an Employee Within the Meaning of the Act.

The ALJ correctly determined that Charging Party Filiberto Martinez was an employee; Respondent’s argument that he was not an employee because he voluntarily quit his employment outside the 10(b) period should be rejected. Counsel for the General Counsel respectfully submits that the Board should affirm the ALJ’s conclusion.

The Board has long held that that an "employee" is a "member[] of the working class generally," including a “former employee[] of a particular employer.” *Little Rock Crate & Basket*

NLRB No. 27, slip op. at 2 & fn. 7 (March 16, 2015), enf. granted in part and denied in part, *Cellular Sales of Missouri, LLC v. NLRB*, 2016 WL 3093363 (8th Cir. June 2, 2016).

²⁸ R. Exceptions Brief pp. 4-5.

Co., 227 NLRB 1406, 1406 (1977); *Briggs Manufacturing Company*, 75 NLRB 569 (1947), distinguishing between Section 8[(a)](5) of the Act, which requires an Employer to bargain with the representative of “*his*” employees, and Section 2(3) of the Act, which defines “employee” to include “*any employee, and shall not be limited to the employees of a particular employer...*” [Emphasis added.]

Indeed, the Board has rejected such arguments in other decisions involving policies waiving class actions. The Board rejected that argument in *Employers Resource*, 363 NLRB No. 59 (Dec. 17, 2015), n. 2, noting that it had long held that the broad definition of “employee” contained in Sec. 2(3) of the Act covers former employees. The Board also noted that Section 102.9 of the Board’s Rules and Regulations provides that a charge may be filed by “any person,” without regard to whether that person is a 2(3) employee. Further, the DRP specifically states that the arbitrator has no jurisdiction to certify any group of current or “*former employees*” as a class or collective action. (Jt. Exh. M; Jt. Motion p. 76.) (Emphasis added.) This clause is another further basis for rejecting Respondents’ argument and for finding the Charging Party to be an employee. *PJ Cheese, Inc.*, 362 NLRB No. 177 (Aug. 20, 2015), slip op. 3, n. 9.

Respondent’s attempt to distinguish *Briggs Mfg.* by arguing that the employee in *Briggs*, unlike Charging Party Martinez, had lost his employee status because of unlawful discrimination, fails. That was not in fact the Board’s finding in *Briggs*. Rather, the employee in *Briggs* had been terminated and later applied to be hired to a different position; the employer refused to hire the employee unless he agreed to withdraw a charge alleging the initial discharge to violate the Act. Though the General Counsel had alleged that the employee’s earlier termination was discriminatory, the Board found that the evidence did *not* establish that allegation. Thus, the

employee's termination was *not* discriminatory, but was for cause; the Board nonetheless found that he was an employee when he later applied for another position. *Id.*, at 572.

Similarly, Respondent's argument that *Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div.*, 404 U.S. 157 (1971) compels the Board to find that the Charging Party was not an employee is also unpersuasive. The Supreme Court in *Pittsburgh Plate Glass* held that retirees who did not share a substantial community of interest with active employees were not " 'employees' within the meaning of the collective-bargaining obligations of the Act" and could not be employees included in the bargaining unit. *Id.*, at 172. The Court specifically distinguished the employee status of retirees from the status of applicants for employment, hiring hall registrants, and "persons who have quit"; the Court found that, unlike in those other situations, retirees are individuals who have ceased work without expectation of further employment. *Id.*, at 169. There is no suggestion in the instant case that the Charging Party is a retiree; rather, he is a former employee whose status as an employee was untouched by the Court's decision.

Accordingly, it is clear that the Charging Party is an employee within the meaning of the Act when he pursued his class action lawsuit.

C. The Charging Party and General Counsel Are Not Estopped From Pursuing Respondents' Unfair Labor Practices.

Respondents' arguments that the General Counsel or the Charging Party are estopped from proceeding should be rejected, as it has failed to establish elements necessary to find estoppel.

“The doctrine of collateral estoppel dictates that once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.” *N.L.R.B. v. Kentucky May Coal Co., Inc.*, 89 F.3d 1235, 1239 (6th Cir.1996), quoting *N.A.A.C.P., Detroit Branch v. Detroit Police Officers Ass’n*, 821 F.2d 328, 330 (6th Cir.1987) (internal quotation marks and citations omitted). Four requirements must be met for preclusion to apply:

(1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding;

(2) determination of the issue must have been necessary to the outcome of the prior proceeding;

(3) the prior proceeding must have resulted in a final judgment on the merits; and

(4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

As a general rule, the Federal Government is not barred from subsequently litigating an issue involving enforcement of Federal law which the private plaintiff has litigated unsuccessfully, unless the Federal Government was a party in the prior litigation. *United States v. Mendoza*, 464 U.S. 154, 162 (1984).

“The Board ‘as a public agency asserting public rights should not be collaterally estopped by the resolution of private claims asserted by private parties.’” *Hospitality Care Center*, 314 NLRB 893 (1994), fn. 1, citing *Field Bridge Associates*, 306 NLRB 322 (1992), enfd. sub nom. *Local 32B-32J Service Employees Intern. Union, AFL-CIO v. NLRB*, 982 F.2d 845 (2d Cir.

1993), cert. denied 509 U.S. 904 (1993). “[I]f the Government was not a party to the prior private litigation, it is not barred from litigating an issue involving enforcement of Federal law which the private plaintiff has litigated unsuccessfully.” *Field Bridge Associates*, supra, 306 NLRB at 322, citing *Allbritton Communications*, 271 NLRB 201, 202 fn.4 (1984), enfd. 766 F.2d 812 (3d Cir. 1985), cert denied 474 U.S. 1081 (1986); see also, e.g., *Precision Industries*, 320 NLRB 661, 663 (1996), enfd. 118 F.3d 585 (8th Cir.1997), cert. denied 523 U.S. 1020 (1998). “Congress has entrusted to the Board exclusively the prosecution of the proceeding by its own complaint, the conduct of the hearing, the adjudication and the granting of appropriate relief,” and the Board is “the public agency . . . chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce.” *Field Bridge Associates*, supra, 306 NLRB at 322, quoting *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 265 (1940).

In the instant case, the Board was not a party to any of the private court actions at issue. Therefore, under established Board law, it is clear that the Board is not precluded from proceeding against the unlawful Employers’ motions at issue here.

Further, even if the Board were a party to the private court actions, the necessary elements of collateral estoppel are not present in the instant case. Thus, not only is the Board not precluded from proceeding because it is a Federal Government agency, but the Board and the Charging Party are not precluded from proceeding given the absence of the necessary elements.

First, the issue at stake in the instant case is not identical to any issue decided in the parties’ litigation of the Plaintiffs’ (Charging Party’s) legal claims and the Defendants’ (Respondents’) motions. The instant case deals with whether Respondents’ DRP unlawfully

interferes with employees' Section 7 rights to engage in concerted activities under the NLRA and whether Respondents' action to enforce the DRP violated the Act. In contrast, the private parties in the lawsuit have argued whether the DRP compels individual arbitration under the FAA, whether federal diversity existed, whether the FAA or California law applied to the lawsuit, the parties agreed to the DRP, and whether the DRP was procedurally or substantively unconscionable. But the parties in the lawsuit have *not* touched on whether the DRP unlawfully restrains employees' Section 7 rights to engage in protected, concerted activities. Similarly, Judge Wu's Order in the parties' private litigation addressed only whether the parties were compelled to arbitrate under the FAA. Indeed, discussion of the Section 7 right of employees to engage in concerted activities under the National Labor Relations Act was notably absent from any of the parties' pleadings and from Judge Wu's Order. Clearly, the Section 7 issue was not litigated in the lawsuit.

Nor has the second element of collateral estoppel been met, as determination of the Section 7 issue was not necessary to the outcome of the parties' underlying litigation. Judge Wu made his decision without any consideration of employees' Section 7 right to engage in concerted activities; thus, determination of whether employees' Section 7 rights were unlawfully restrained were superfluous to the litigation and Judge Wu's decision.

While there is no evidence of any appeal of Judge Wu's order, it is clear that the Charging Party did not have a full opportunity to litigate the Section 7 issue in the parties' underlying litigation. The National Labor Relations Board, not private litigation, is the exclusive forum to litigate Section 7 rights, and the employees' Section 7 rights never came up in the parties' private litigation. *Field Bridge Associates, supra*.

Thus, three elements necessary to a finding of collateral estoppel are missing, and Respondents' argument must fail. *N.L.R.B. v. Kentucky May Coal Co., Inc.*, supra, 89 F.3d at 1239.²⁹

Similarly, Respondents' argument that General Counsel and Charging Party are estopped because the Charging Party did not request reconsideration of or appeal Judge Wu's Order and the Board did not seek to intervene in the private litigation should be rejected.

Contrary to Respondents' apparent claim that the Charging Party somehow lulled Respondents into mistakenly believing that the Charging Party was dropping his challenge to the DRP, the Charging Party promptly filed the instant charge one week after Judge Wu issued his Order, and that charge was filed with the Agency that has exclusive jurisdiction to determine whether the DRP restrains employees' Section 7 rights. Thus, Respondents were on clear and

²⁹ Two circuit court decisions that have applied collateral estoppel principles to Board proceedings and denied enforcement of Board orders in unfair labor practice cases that turned on the existence of a contract are distinguishable. *Donna-Lee Sportswear*, 836 F.2d 31 (1st Cir. 1987); *NLRB v. Heyman*, 541 F.2d 796 (9th Cir. 1976). In *Donna-Lee Sportswear*, the First Circuit held that the Board was precluded from finding an effective contract because a court had already ruled that no binding contract was in existence. 836 F.2d at 35. The court emphasized that: (1) it was not unusual for a court to determine whether there was a valid contract; and (2) the private interests of the disputants predominated in that case, rather than any public rights at issue. *Id.* at 36-38. In *NLRB v. Heyman*, the Ninth Circuit denied enforcement of a Board order finding that the employer had unlawfully repudiated a collective-bargaining agreement and refused to bargain with the union. Instead, the court held that the Board was bound by a previous federal district court decision in a Section 301 lawsuit that rescinded the collective-bargaining agreement due to the union's lack of majority status, holding that "[a]n implicit collateral attack, launched through the filing of charges premised on the contract, may not be entertained by the Board under the guise of different policy considerations." 541 F.2d at 799. The Board has noted that, in both of those cases, the issue in the unfair labor practice case – whether or not there was a contract – was the same issue as the one that had been decided in the court proceeding. See, e.g., *Precision Industries*, supra, 320 NLRB at 663 n.13.

In contrast to the issues in *Donna-Lee Sportswear* and *Heyman*, the issue in the instant case does not concern a private dispute about the mere existence of a contract in which the particular interests of the disputants predominate, and as to which the courts may be at least as capable of determining as the Board. Rather, this case deals with whether Respondent's enforcement of the DRP violates employees' Section 7 rights – an issue regarding a public right that is within the exclusive authority and expertise of the Board. Further, the impact of the Board's resolution of this matter is not limited to the same two parties who are litigating the identical issue in a different forum. Rather, the Board's case impacts whether up to 8,000 employees can be made whole for alleged violations of California wage and hour laws, if established. Thus, even under the rationale of *Donna-Lee Sportswear*, the Board is not precluded from finding that Respondent violated Section 8(a)(1) of the Act by moving to compel individual arbitration, even after a state or federal court has granted such a motion.

prompt notice that the Charging Party was continuing to challenge the DRP's prohibition on class actions and would now do so before the Board.

Further, Respondents failed to cite any authority for their apparent contention that the Board was required to intervene in a matter that had not arisen at the Board until after Judge Wu's Order had issued. Under the 9th Circuit's Rules³⁰, an appeal of Judge Wu's Order would normally need to be filed on September 12, 2016, very early in the investigation and months before any determination that the allegations had merit. Respondents would apparently urge that the Board intervene in collateral matters before it has had a chance to investigate a brand new charge and determine that the charge was meritorious.³¹

Heckler v. Community Health Services of Crawford County, 467 U.S. 51, 60 (1984), cited by Respondents³², does not support Respondents' argument. The Court in *Community Health Services* described estoppel as:

...an equitable doctrine invoked to avoid injustice in particular cases. While a hallmark of the doctrine is its flexible application, certain principles are tolerably clear:

“If one person makes a definite misrepresentation of fact to another person having reason to believe that the other will rely upon it and the other in reasonable reliance upon it does an act ... the first person is not entitled

[] to regain property or its value that the other acquired by the act, if the other in reliance upon the misrepresentation and before discovery of the truth has so changed his position that it would be unjust to deprive him of that which he thus acquired.” *Restatement (Second) of Torts § 894(1) (1979)*.

Thus, the party claiming the estoppel must have relied on its adversary's conduct “in such a manner as to change his position for the worse.” and that reliance must have been reasonable in that the party claiming the estoppel did not know nor should it have known that its adversary's conduct was misleading. See *Wilber National Bank v. United States*, 294 U.S. 120, 124–125, 55 S.Ct. 362, 364, 79 L.Ed. 798 (1935).

³⁰ Federal Rules of Appellate Procedure, 28 U.S.C.A. Rule 4(a)(1)(A).

³¹ The matter was under investigation and a Regional determination on whether the charge was meritorious was not implemented until Complaint issued on February 26, 2016.

³² Resp. Exceptions Brief p. 8.

Id., 467 U.S. at 59.

Under these principles, Respondents has failed to show that estoppel is appropriate in the instant case. First, there is no contention, let alone evidence, that either the Charging Party or the General Counsel made a definite misrepresentation of fact to Respondents. Nor is there any evidence that the Charging Party or General Counsel believed that Respondents would act in reliance of a misrepresentation. Since Charging Party filed the instant charge within days of Judge Wu's Order, Respondents cannot seriously contend that Charging Party misled Respondents into believing that Charging Party was dropping its contention that it was entitled to file a class action. Nor is there any evidence that the General Counsel informed Respondents at any time that General Counsel would not proceed with the allegations. Finally, Respondents do not point to any action that they would have taken, but did not take, or vice versa, because Charging Party did not appeal Judge Wu's decision to the Circuit or because the Board did not seek to intervene in the parties' private litigation.

Accordingly, the Board should reject Respondents' argument.

D. The Complaint Does Not Interfere With Respondents' Right to Petition.

Respondents' assertion that the First Amendment precludes the Board from finding that the Respondent violated the Act by litigating its motion in court should be rejected as lacking merit.

The Supreme Court has held that the Board may find the filing and prosecution of an ongoing or completed lawsuit to be an unfair labor practice only if the lawsuit is both objectively baseless and subjectively motivated by an unlawful purpose – *i.e.*, if it lacks a reasonable basis in fact or law and was prosecuted with a retaliatory motive. *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983) (ongoing actions); *BE & K Construction*, 536 U.S. 516 (2002) (completed

actions). In *Bill Johnson's*, however, the Court carved out an exception for two situations in which a lawsuit enjoys no such First Amendment protection: as pertinent here, where “a suit . . . has an objective that is illegal under federal law.” *Id.*, 461 U.S. at 737 fn. 5. Thus, the Board may restrain litigation efforts that have an illegal objective, even if – like the Respondents’ successful motion before the court – those efforts are “otherwise meritorious.” See *Teamsters Local 776 v. NLRB*, 973 F.2d 230, 236 (3d Cir. 1992). A lawsuit has a *Bill Johnson's* footnote 5 illegal objective “if it is aimed at achieving a result incompatible with the objectives of the Act.” *Manno Electric*, 321 NLRB 278, 297-299 (1996) enfd. per curiam mem. 127 F.3d 34 (5th Cir. 1997), at 297.

An illegal objective will be found when “the underlying acts constitute unfair labor practices and the lawsuit is simply an attempt to enforce the underlying [unlawful] act.” *Regional Construction Corp.*, 333 NLRB 313, 319 (2001). As examples of suits with unlawful objectives in footnote 5 of *Bill Johnson's*, the Supreme Court has cited legal actions taken to enforce illegal union fines.³³ In those cases, the unions violated Section 8(b)(1)(A) by fining employee/members, and the lawsuits were merely the mechanism to enforce and collect the unlawful fines.

An illegal objective will also 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 instead also seeks to use the arbitrator or the court itself to directly interfere with the Section 7 activity. Thus, for example, in *Manno Electric*, the Board

³³ *Granite State Joint Board, Textile Workers Union*, 187 NLRB 636, 637 (1970), enforcement denied, 446 F.2d 369 (CA1 1971), rev'd, 409 U.S. 213 (1972); *Booster Lodge No. 405, Machinists & Aerospace Workers*, 185 NLRB 380, 383 (1970), enforced in relevant part, 459 F.2d 1143 (1972), aff'd, 412 U.S. 84 (1973).

found that an employer cause of action attacking employee statements made to the Board was not only preempted, but also had an illegal objective. *Manno Electric*, supra, 321 NLRB at 297.

Both of these rationales apply to Respondents' May 8 Motion. First, Respondents' Motion sought to enforce a DRP that is itself unlawful. Thus, as in union fine cases, maintenance of the DRP itself is an unfair labor practice and the Motion was simply an attempt to enforce the underlying unlawful act. Secondly, Respondents' Motion also had an illegal objective because it was directly aimed at preventing employees' protected conduct. Indeed, the objective of Respondents' motion was to prohibit employees from engaging in Section 7 activity, *i.e.*, bringing collective or class actions in any forum. Thus, Respondents' efforts to enforce the DRP by filing the motion violates Section 8(a)(1). *Bill Johnson's*, supra, footnote 5.

Thus, Respondents acted with an illegal objective when they moved to compel arbitration of the Charging Party's claims and to dismiss the class action to enforce an underlying act — the DRP provision — that is itself an unfair labor practice. This motion had the illegal objective of “seeking to enforce an unlawful contract provision.” *Murphy Oil USA*, supra, 361 NLRB slip op. at 21; *Convergys Corp.*, 363 NLRB No. 51 (Nov. 30, 2015), slip op. at 2.

E. The ALJ Did Not Err In Finding That *D.R. Horton* and *Murphy Oil USA* Are Controlling Authority

Respondents' assertions that the ALJ should not have found a violation because the Board wrongly decided *D.R. Horton* and *Murphy Oil USA*³⁴ should be rejected. The Board has considered and reconsidered whether class action bars restrain the exercise of Section 7 rights and has concluded in numerous decisions that such bars violate the Act. Indeed, while the Fifth

³⁴ Resp. Exceptions Brief pp. 11-22.

Circuit declined to enforce *D.R. Horton* and *Murphy Oil USA*, the Seventh Circuit and Ninth Circuits have found that class action bars unlawfully restrain employees' Section 7 rights. *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. May 26, 2016); *Morris v. Ernst & Young, LLP*, --- F.3d ---, 2016 WL 4433080 (9th Cir. Aug. 22, 2016).

It is a judge's duty to apply established Board precedent which the Supreme Court has not reversed. *Waco, Inc.*, 273 NLRB 746 (1984), n. 14, citing *Iowa Beef Packers*, 144 NLRB 615, 616 (1963). It is for the Board, not the judge, to determine whether that precedent should be varied. *California Saw and Knife Works*, 320 NLRB 224, 290 (1996). Respondents' facility is located in the 9th Circuit, which found (four days after the ALJ issued his Order) that bars on class actions violate Section 7. Even if the 9th Circuit hadn't so found, however, the ALJ should have applied Board precedent. The ALJ did that.

Thus, the ALJ correctly applied Board precedent in finding Respondents' DRP and action to enforce it violate the Act. *Id.* Counsel for the General Counsel respectfully submits that the Board should affirm the ALJ's conclusion.

F. The ALJ Correctly Found That Respondents' Actions Restrained Charging Party's Right to Engage in Protected, Concerted Activities.

1. The Judge Correctly Found That the Rule Would Reasonably Be Viewed As Restraining Section 7 Activities Under the *Lutheran Heritage Village* Test.

The ALJ correctly found that Respondent GMRI violated Section 8(a)(1) of the Act by maintaining the DRP provision that forfeits employees' rights to pursue a dispute to be brought, heard, or arbitrated as a class action, collective action or on behalf of any other person, thus requiring employees to forfeit their right to act collectively. Counsel for the General Counsel respectfully submits that the Board should affirm the ALJ's conclusion.

Respondents' policy clearly prohibits concerted activity and should be found to be unlawful because it explicitly restricts a Section 7 activity; further, even if Respondents' policy didn't explicitly restrict Section 7 activity, employees would reasonably construe the DRP to prohibit Section 7 activity.

When an employer maintains a challenged rule, the Board will first examine whether the rule *explicitly* restricts activities protected by Section 7. If it does, the Board will find the rule unlawful. If it does not, a violation will be found 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 union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. *Lutheran Heritage Village – Livonia*, 343 NLRB 646 (2004), 646-647. The *Lutheran Heritage Village* analysis is the appropriate analysis of rules restricting class and collective actions. *D.R. Horton*, supra, 357 NLRB at 2280; *Murphy Oil USA*, supra, 361 NLRB slip op. at 19.

Respondents' DRP in this case explicitly restricts activities protected by Section 7 and is unlawful under the *Lutheran Heritage Village* analysis. The DRP Acknowledgement states that the DRP *requires* that disputes be submitted to mediation or arbitration rather than to a judge or jury in court, and the DRP states that there "will be no right or authority" to bring a class action under the DRP. *D.R. Horton*, supra, 357 NLRB at 2280. Even if the DRP did not explicitly restrict Section 7 activities, employees would reasonably construe the phrase "no right or authority" to prohibit class actions in employment litigation. *Murphy Oil USA*, supra, 361 NLRB slip op. at 19.³⁵

³⁵ Indeed, the Board recently held that a provision that was nearly identical to the language in the DRP violated the Act. *Securitas Security Services USA, Inc.*, 363 NLRB No. 182 (May 11, 2016). The *Securitas* provision stated that "there will be no right or authority for any dispute to be brought, heard or arbitrated as a class, collective or representative action." *Securitas*, supra, 363 NLRB slip op. at 2. The Board, applying *D.R. Horton* and *Murphy Oil*,

Respondents' assertion that the rule has not been applied to restrict the exercise of Section 7 activities should be rejected: by invoking the DRP in the Motion to Compel Arbitration that ultimately precluded Charging Party's pursuit of the class action status in the instant case, Respondents have indeed applied the rule to restrict the Section 7 right to concertedly litigate employment disputes. *Adriana's Insurance Services*, 364 NLRB No. 17 (May 31, 2016), slip op. at 13.

Respondents' assertion that the DRP is lawful because it could not reasonably be interpreted as prohibiting the filing of unfair labor practice charges is similarly without merit. The Board rejected just such a claim in *SolarCity Corporation*, 363 NLRB No. 83 (December 15, 2015). The Board concluded in *SolarCity* that access to administrative agencies is not the equivalent of access to a judicial forum where employees themselves may seek to litigate. It noted that a wide range of employment law claims, such as common-law claims, were not within the purview of any administrative agency. Further, even if an administrative authority has the ability to pursue employees' claims, it typically has the discretion to decline to do so, whether for lack of resources, a different view of the legal merits, or another reason, or to do so only on the agency's terms. The Board noted, for example, that in Fiscal Year 2012, the Wage and Hour Division of the U.S. Department of Labor – a federal equivalent to the California statute cited by the Charging Party in his lawsuit – received about 20,000 FLSA complaints, but the Department's Solicitor filed only about 200 lawsuits to enforce the FLSA.³⁶ Finally, even if a claim falls within the authority of an administrative agency and the agency does choose to pursue the claim, a typical administrative agency is not a judicial forum that adjudicates claims, and the

found that *Securitas*' maintenance of the language to violate Section 8(a)(1) of the Act. Id. The DRP in the instant case is nearly identical to a mandatory arbitration agreement found unlawful in *Securitas*.

³⁶ *SolarCity*, supra, 363 NLRB slip op. at 3, fn. 10.

agency, rather than the employee, controls the litigation. *SolarCity*, supra, 363 NLRB slip op. at 2-4.

2. Filing the Class Action Lawsuit Was Protected, Concerted Activity.

Respondents' assertion that the Charging Party was not engaging in concerted activity³⁷ because there were no other plaintiffs is without merit, as the Board has found that an individual's class action lawsuit, though filed without others, is protected, concerted activity.

"Clearly, an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7." *D.R. Horton*, supra, 357 NLRB at 2279. "By definition, such an action is predicated on a statute that grants rights to the employee's coworkers, and it seeks to make the employee the representative of his colleagues for the purpose of asserting their claims, in addition to his own. Plainly, the filing of the action contemplates—and may well lead to—active or effective group participation by employees in the suit, whether by opting in, by not opting out, or by otherwise permitting the individual employee to serve as a representative of his coworkers. It is this potential 'to initiate or to induce or to prepare for group action,' in the phrase of *Meyers II* [*Meyers Industries*, 281 NLRB 882, 887 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988)]—collectively seeking legal redress—that satisfies the concert requirement of Section 7." *Murphy Oil USA*, supra, 361 NLRB slip op. at 13.

The Board explicitly found that an individual employee's class action lawsuit is protected, concerted activity in *Beyoglu*, 362 NLRB No. 152 (July 29, 2015) which was the first case in which the Board was squarely presented with that issue. The Board in *Beyoglu* applied

³⁷ Resp. Exceptions Brief pp. 23-24.

the principles articulated in *Meyers II*, *D.R. Horton* and *Murphy Oil USA*, and concluded that, “we hold that the filing of an employment-related class or collective action by an individual employee is an attempt to initiate, to induce, or to prepare for group action and is therefore conduct protected by Section 7.” *Beyoglu*, supra, 362 NLRB slip op. at 2. See also *RPM Pizza, LLC*, 363 NLRB No. 82 (December 22, 2015), at fn. 4.

In light of this authority, Respondents’ arguments should be rejected.

G. The ALJ’s Recommended Remedies Were Appropriate.

The ALJ’s Recommended Order was consistent with Board precedent in violations of this nature. Respondents’ assertions that the remedies were inappropriate³⁸ should be rejected. Counsel for the General Counsel respectfully submits that the Board should affirm the ALJ’s Recommended Order.

The ALJ’s order that Respondent GMRI rescind or revise the portion of the DRP waiving class and collective actions, make clear that the agreement does not constitute or require a waiver of employees’ right to maintain employment-related class or collective actions, and post and/or mail a Notice, is consistent with *Murphy Oil USA*. *Murphy Oil USA*, supra, 361 NLRB slip op. at 21-22.

The ALJ’s order that Respondent GMRI provide a copy of any revised agreements to employees is consistent with *Murphy Oil USA* (supra, 361 NLRB slip op. at 21), *Securitas* (supra, 363 NLRB slip op. at 5), and *Adriana’s Insurance Services* (supra, 364 NLRB slip op. at 2). Further, consistent with the Board’s Order in *D. R. Horton* and its progeny that employers post a Notice at all locations where its unlawful class action policy was in effect, the ALJ appropriately ordered that Respondent post the Notice wherever the unlawful DRP provision was in effect. *D.R. Horton*, supra, 357 NLRB at 2289; *Murphy Oil USA*, supra, 361 NLRB slip op. at

³⁸ Resp. Exceptions Brief p. 24.

22; *Securitas*, supra, 363 NLRB slip op. at 5; and *Adriana's Insurance Services*, supra, 364 NLRB slip op. at 3. The ALJ's order that all Respondents cease and desist from maintaining and enforcing the DRP at any location where it had barred class or collective actions was also consistent with the Board orders in *Murphy Oil USA*, *Adriana's Insurance Services*, *D. R. Horton* and *Securitas*. Id.

The Judge's order that all four Respondents reimburse any Charging Party expenses that are directly related to opposing the Motion to Compel or opposing any other legal action taken by Respondents to reinforce the DRP to preclude collective legal action was consistent with Board Orders in *Murphy Oil USA*, *Adriana's Insurance Services*, and *Securitas*. Id.³⁹

Finally, the ALJ's order that all four Respondents notify the Court that it has rescinded or revised the DRP upon which it based its motion to compel arbitration of the Charging Party's claims, and to inform the court that it no longer opposes his lawsuit on the basis of the DRP, is also consistent with Board orders in other cases where a respondent sought court enforcement of a class action waiver. *Murphy Oil USA*, supra, 361 NLRB slip op. at 22; *Adriana's Insurance Services*, supra, 364 NLRB slip op. at 3; *Securitas*, supra, 363 NLRB slip op. at 5.⁴⁰

³⁹ The Board explained in *Murphy Oil USA* that an order that Respondent reimburse plaintiffs for all reasonable expenses and legal fees, with interest incurred in opposing the Respondent's unlawful motion to dismiss their collective FLSA action and compel individual arbitration, is consistent with the Board's usual practice in cases involving unlawful litigation. Id. Interest is to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). See *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 835 fn. 10 (1991), enf.d., 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993). (“[I]n make-whole orders for suits maintained in violation of the Act, it is appropriate and necessary to award interest on litigation expenses.”)

⁴⁰ Counsel for the General Counsel notes that, when a respondent with multiple facilities enforces a policy that unlawfully restricts class actions in one location while maintaining the policy in other locations, the Board orders two notices. The first notice, which is posted in the location where the unlawful policy is enforced, among other things, informs employees that the respondent will not maintain or enforce the unlawful policy, that it will rescind the policy, will notify current and former employees and applicants of the rescission or revision will reimburse the plaintiffs for attorney fees, and will notify the court that it has rescinded the policy and no longer opposes the plaintiffs' claim on the basis of those agreements. The second notice, which is posted in the other locations where a respondent maintains an unlawful policy, notifies employees that the respondent will not maintain and/or enforce the policy, will rescind or revise the offensive language, and will notify current and former employees and applicants of the rescission or revision. *Murphy Oil USA*, supra, 361 NLRB slip op. at 58 (Appendix A) and 59 (Appendix B); *Bristol Farms*, 364 NLRB No. 34 (July 6, 2016), at 2, 5 (Appendix A) and 6 (Appendix B).

Respondents' argument that these remedies would require Respondent to cease using arbitration agreements and would impose penalties for enforcing an agreement that was upheld by a federal district judge should be rejected, as the remedies do no such thing. Under the ALJ's Order, Respondents cannot maintain or enforce unlawful provisions that waive employee rights to engage in class or collective actions, but the ALJ's Order does *not* require Respondents to cease using arbitration agreements. Rather, the ALJ's Order provides that Respondent *rescind or revise* the offending provisions. (Emphasis added.)

Nor does the ALJ's Order impose penalties. Rather, the Order provides for standard remedial relief that fits the unfair labor practices in this case.

For these reasons, the ALJ's Order was appropriate for the violation, and Respondent's exceptions are without merit.

VI. CONCLUSION

It is respectfully urged that the Board affirm the Administrative Law Judge's findings and conclusions and adopt the recommended Order.⁴¹

Dated at New York, New York this 14th day of October, 2016.



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⁴¹ Respondents requested oral argument. Respondents' Exceptions stated that oral argument would aid the Board's understanding and the unique public interest considerations in this case, and that it would further explain its reasons in its brief. However, the brief does not appear to provide any additional explanation of Respondent's request. (Resp. Exceptions p. 4; Resp. Exceptions Brief p. 25.) Counsel for the General Counsel submits that Respondent's request for oral argument is premature, as the Board cannot determine whether oral argument is necessary until the record and briefs have been fully assessed. *Wal-Mart Stores, Inc.*, 2015 WL 1169343 (N.L.R.B.) Further, Counsel for the General Counsel submits that the record, exception and briefs will be sufficient to present the issues and positions of the parties. See, *Hobby Lobby Stores, Inc.*, 363 NLRB No. 195 (2016), slip op. n. 1; *The Dalton School*, 364 NLRB No. 18 (2016), slip op. n. 1.

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31**

DARDEN RESTAURANTS, INC.;
GMRI, INC.;
YARD HOUSE USA, INC.;
YARD HOUSE NORTHRIDGE, LLC
Respondents

and

Case 31-CA-158487

FILIBERTO MARTINEZ, an Individual
Charging Party

CERTIFICATE OF SERVICE

I hereby certify that copies of Counsel for the General Counsel's Answering Brief to Respondents' Exceptions to the Administrative Law Judge's Decision have been served by electronic transmission on October 14, 2016 on the following:

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