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

ARISE VIRTUAL SOLUTIONS, INC.

and **Case 12-CA-144223**

MATTHEW RICE, an Individual

GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS AND BRIEF IN SUPPORT OF ITS EXCEPTIONS TO DECISION OF ADMINISTRATIVE LAW JUDGE

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Pursuant to Section 102.46 of the Board's Rules and Regulations, Counsel for the General Counsel (herein called the General Counsel) files the following Answering Brief to Respondent Arise Virtual Solution Inc.'s Exceptions to the Decision of the Administrative Law Judge and to Respondent's Brief in Support of its Exceptions.[1]

I. Statement of the Case

The hearing in this case was held before the Honorable Charles J. Muhl, Administrative Law Judge (herein called the "ALJ") on May 2 and 3, 2016. On August 12, 2016, the ALJ issued his Decision finding that customer service professionals (CSPs), including Matthew Rice, are statutory employees of Respondent, and that Respondent violated the Act as alleged in the Complaint issued by the Regional Director on April 27, 2015. (ALJD 1, 19:6-10, 20:19-20).[2] The ALJ correctly analyzed traditional common law factors and the Board's decision in *FedEx Home Delivery,* 361 NLRB No. 55 (2014) to reach his conclusion that CSPs are not independent contractors, as asserted by Respondent. (ALJD 1, 2:1-4). The ALJ also concluded that Respondent violated Section 8(a)(1) of the Act by maintaining a class action waiver provision in its 'Acknowledgment and Waiver Agreement" (the Waiver Agreement); requiring employees to sign the Waiver Agreement as a condition of employment; and enforcing the Waiver Agreement by requiring Matthew Rice to withdraw his opt-in consent to join a class action complaint in the matter of *Heather Steele et al. v. Arise Virtual Solutions, Inc.,* Case No. 13-62823-WJZ in U.S. District Court for the Southern District of Florida, alleging violations of the Fair Labor Standards Act (FLSA). (ALJD 1, 20:33-37).

[1] General Counsel is simultaneously filing limited cross-exceptions to certain findings made by the ALJ and a brief in support of cross-exceptions.

[2] The ALJ's Decision will be identified by "ALJD", page, and line. Respondent's brief in support will be identified by "RB" and the page number. Transcript pages will be identified by the page, line, and name of witness where necessary for clarification. "GCX" refers to General Counsel's exhibits, and "RX" refers to Respondent's exhibits.

Respondent's principal arguments raised in its exceptions and brief that CSPs are not statutory employees of Respondent; that the ALJ erred by concluding that all CSPs are similarly situated to Matthew Rice; that Respondent did not violate Section 8(a)(1) by forcing CSPs to enter into the Waiver Agreement as a condition of employment; and that Respondent should not be responsible for reimbursing Matthew Rice for reasonable attorney's fees and litigation expenses should be rejected. (RB 1, 7).

With respect to Respondent's argument that the ALJ erred by concluding that all CSPs are employees of Respondent, the central issue at the hearing was whether all CSPs, not just Matthew Rice, are statutory employees of Respondent. General Counsel presented overwhelming evidence that Respondent maintains the same policies and procedures for all CSPs employed by Respondent in the United States. Respondent had ample opportunity to present witnesses at the hearing, cross-examine witnesses and introduce documentary evidence. Yet, Respondent did not present any evidence to rebut General Counsel's overwhelming evidence that all CSPs are employees of Respondent within the meaning of Section 2(3) of the Act, and are not independent contractors. Accordingly, Respondent's exceptions should be denied in their entirety.

II. The ALJ Correctly Concluded that Respondent is a Virtual Call Center Technology Company that Provides Call Center Services to its Clients.

The ALJ correctly found that Respondent operates a virtual call center technology company and that "Respondent's regular business is to provide call center services to its clients." (ALJD 3:5, 17:39-40). The ALJ astutely recognized that "Respondent's business structure as to CSPs is an elaborate construct designed to portray the relationship between the two as that of an independent contractor." (ALJD 19:6-7). Robert Padron, who testified during the hearing, is Respondent's senior vice president and general manager. (Tr. 16:9-17, 250:1-5, Padron).

Respondent's clients are large companies, including Barnes & Noble and Disney, that provide customer service to their own customers. (ALD 3:6-7; Tr. 17:7-11, 23-24, 19:14-20, 250:7-10, Padron). While Respondent describes itself as strictly a technology company, the ALJ concluded that Respondent "contracts with corporate clients to provide customer service using representatives who operate from remote locations through the Company's internet site." (ALJD 2:36-38; Tr. 19:14-23, Tr.27:13-18, 31:5-7, 250:1-4; 253:13-25, Padron).

The ALJ carefully described Respondent's business model, and the manner in which Matthew Rice became a CSP. (ALJD 3-4). Respondent enters into contracts with independent businesses (IBs), and the owners of the IBs are called independent business operators (IBOs). (Tr. 20:22-25, 21:1-8, Padron). In order to do business with Respondent, IBs must agree on Respondent's website with Respondent's assertion that they are independent contractors. (Tr. 22:20-24, 264:4-8, Padron). Respondent currently has approximately 8,800 IBs. (ALJD 3:11; Tr. 23:2-3, Padron). In this particular case, Respondent entered into a Master Services Agreement (MSA) with Certified Client Solutions, LLC (CCS), the IB, and CCS provided customer service to Respondent's clients. (Tr. 24:19-21, 26:19-24, Padron; GCX 2). Patricia Rice, who also testified during the hearing, is the IBO for CCS. (Tr.24:16-18, Padron). The MSA presented to CCS is a form contract that is drafted by Respondent and presented to all IBOs who desire to perform services for Respondent's clients. (Tr. 24:22-25, Padron). In order to perform CSP work, individuals must incorporate a business to become an IBO or have an IBO designate the individual as a CSP. (Tr. 28:24-25, 29:1-2, Padron). About 60 percent of all IBs designate themselves to perform CSP work. (Tr. 29:3-8, Padron).

The vast majority of CSPs perform work in their homes. (Tr. 31:15-17, Padron). In this case, when Matthew Rice began doing customer service work at home, he lived with IBO

Patricia Rice, his mother. (Tr. 157:9-25, 158:1-5, M. Rice.). Matthew Rice performed CSP work for Respondent from about 2009 to 2014 and worked on Respondent's Kmart.com, Sears.com, Barnes & Noble and Disney accounts. (Tr. 157:3-5, 158:6-9, 162:10-13, 182:1-4, M. Rice; GCX 3-4; RX 5(d)).

The MSA drafted by Respondent and signed by CCS states, "Arise is a virtual contact center that provides customer care solutions to its corporate clients…using customer service representatives…(GCX 2, page 1). Although Respondent currently uses the term "customer support professional" (CSP) to convey the idea that CSPs are not Respondent's employees, until February 2, 2012, Respondent referred to CSPs as "Arise Certified Professionals." (ACPs). (Tr. 29:16-24, Padron; GCX 2-4, 9). On February 2, 2012, Respondent announced on its website that it was changing its terminology, allegedly to clarify any "misconception" concerning the status of individuals as employees rather than independent contractors. (ALJD 3, fn. 1; GCX 9).

III. Argument - Respondent's Exceptions Should be Denied in their Entirety.

A. The ALJ correctly found that Certified Client Solutions, LLC (CCS) is not a necessary party to this case. Respondent's Exception 1 should be denied.

On June 15, 2015, Respondent filed a Motion to Dismiss for Failure to Join a Required Party, and on October 29, 2015, the Board denied the motion. (ALJD 11:9-16). However, Respondent did not make a similar motion to dismiss before the ALJ. Rather, Respondent made the same argument in its brief to the ALJ, and the ALJ rejected Respondent's argument that CCS is a necessary party to this action. (Id.). Respondent incorrectly relies on the Federal Rules of Civil Procedure and case law pertinent to those rules. (RB 7-8). Rather, as the ALJ found, traditional rules regarding the joinder of parties in private litigation are not applied to unfair labor practice proceedings regarding the enforcement of public rights. *Expert Electric, Inc.*, 347 NLRB 18, 19 (2006). Moreover, the ALJ further concluded that even if the Federal Rules of

Civil Procedure were applied to this case, CCS would not have to be joined as a party. As the ALJ found, using Respondent's nomenclature, the evidence shows that Respondent can unilaterally amend a Master Services Agreement (MSA) or Statement of Work (SOW) and require Independent Businesses (IBs) to have Customer Service Professionals (CSPs) execute documents. Accordingly, "Respondent can accord complete relief in this case, if necessary, by exercising those unilateral rights." (ALJD 11:30-40). Although Respondent argues that CCS has the option of terminating its relationship with Respondent (i.e., terminating its MSA), rather than agreeing to rescind the unlawful Waiver Agreement, it is highly unlikely that CCS or any other Independent Business Operator (IBO) would terminate its relationship with Respondent if Respondent directed it to rescind the Waiver Agreement. The IBO must sign all documents that Respondent drafts and presents to the IBO in order to continue performing work for Respondent. Moreover, even if Respondent did have to bring an action against CCS or other IBs to comply with the ALJ's Recommended Order, it would be necessary in order to vindicate the public Section 7 rights of Respondent's employees, the CSPs. Accordingly, Respondent's Exception 1 should be denied.

B. Standard for independent contractor status

The ALJ correctly analyzed the common law factors regarding independent contractor status as well as the independent business factor discussed in detail by the Board in *FedEx Home Delivery*, 361 NLRB No. 55, slip op. at 1 (2014). (ALJD 1, 2:1-5). In *FedEx*, the Board re-affirmed that in order to evaluate independent contractor status, common law principles are applied and "all of the incidents of the relationship must be assessed and weighed with no one factor being decisive," citing *NLRB v. United Insurance Co. of America,* 390 U.S. 254, 256 (1968). The common law factors to be considered include:

> (a) the extent of control which, by the agreement, the master may exercise over the details of the work; (b) whether or not the one employed is engaging in a distinct occupation or business; (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision; (d) the skill required in the particular occupation; (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work; (f) the length of time for which the person is employed; (g) the method of payment, whether by the time or by the job; (h) whether or not the work is part of the regular business of the employer; (i) whether or not the parties believe they are creating the relationship of master and servant; and (j) whether the principal is or is not in the business.

FedEx, slip op. at 2. In addition to these factors, the Board has also considered whether the asserted contractor has a "significant entrepreneurial opportunity for gain or loss," quoting *Roadway Package System*, 326 NLRB 842, 851 (1998) (*Roadway III*); *FedEx*, slip op. at 3. In analyzing the entrepreneurial ability factor, the Board considers "whether purported contractors have the ability to work for other companies, can hire their own employees and have a proprietary interest in their work." Id. The Board further stated that it "should give weight to actual, but not merely theoretical, entrepreneurial opportunity, and it should necessarily evaluate the constraints imposed by a company on the individual's ability to pursue this opportunity." Id., slip op. at 1. In *Porter Drywall, Inc.*, 362 NLRB No. 6, slip op. at 1 (2015), the Board stated that "in assessing all of the relevant common law factors, the applicable inquiry is whether the putative independent contractor is rendering services as part of an independent business." See also *FedEx*, slip op. at 1. The party asserting independent contractor status bears the burden of proof on that issue, and the ALJ properly concluded that Respondent failed to meet this burden. Id., slip op at 2. (ALJD 18:37-40).

C. The ALJ correctly found that Respondent controls CSPs' work, and Respondent's Exceptions 2, 3, 4 and 15 should be denied.

The ALJ correctly found that the evidence presented by the General Counsel regarding all CSPs, including Matthew Rice, demonstrates that CSPs are statutory employees. As found by the ALJ, Respondent "trains, tests, and approves individuals to become CSPs and to provide service to a particular client," and this factor weighs in favor of employee status, citing *Slay Transportation Company, Inc.*, 331 NLRB 1292, 1293-1294 (2000). (ALJD 13:5-13). The requirements set forth in Respondent's rigorous CSP 101 course and certification course leaves little room for CSPs to use independent judgment in handling customer service calls and emails. Instructors give CSPs very specific requirements for every aspect of how CSPs perform their work, including providing a script as to how to deal with customer service situations. Id. As Rice's testimony shows, CSPs followed these instructions and did not dare deviate from them for fear that their employment would be terminated. As was the case with the employer's control over the work of the drivers in *FedEx*, Respondent leaves little to no discretion for CSPs as to how to perform their work. Id.**;** see also *FedEx*, slip op. at 13; *Lancaster Symphony Orchestra*, 357 NLRB 1761, 1764 (2011), enf. 822 F.3d 563 (D.C. Cir. 2016) (control over manner and means of musicians' performances weighs in favor of employee status).

Respondent's argument that differences between Matthew Rice's situation and the situations of other CSPs precludes a finding that CSPs are statutory employees should be summarily rejected because Respondent failed to present any such evidence to rebut the evidence that was properly relied upon by the ALJ to conclude that CSPs are employees and are not independent contractors. As such, Respondent's Exception 2 contending that the ALJ erred by relying on CSP certification materials, and Respondent's Exception 3 contending that the ALJ erred by extrapolating his findings regarding Matthew Rice to all CSPs should be denied. With

respect to Respondent's Exception 2 regarding training, Respondent requires CSPs nationwide to complete extensive training and certification in order to become a CSP. (ALJD 13:5-13). Respondent failed to present any evidence to show that the process CSPs undertake to complete the certification courses, or the requirements imposed by Respondent by virtue of the certification courses, vary in any significant way. (RB 9-10). Padron testified that all prospective CSPs must take Respondent's detailed CSP 101 course on Respondent's web portal. (Tr. 41:19-24, 42:1-8, 296:2-23, Padron; GCX 72). If a CSP passes the CSP 101 course and chooses one of Respondent's clients to perform customer service work, he or she must take a particular certification course for that client. (Tr. 60:18-25, 61:17-19, 64:24-25, 65:1-14, Padron). Respondent's web pages from the Disney and Barnes & Noble accounts corroborate Matthew Rice's testimony regarding the nature of the training. (Tr. 163:19-21, Padron; GCX 48-49, 66-68). Since Padron testified that Respondent requires CSPs to take the certification courses, it is immaterial that Matthew Rice did not see all of the certification materials. The differences in the certification courses required by particular clients are not significant to the analysis of the employee status of CSPs because Respondent failed to rebut General Counsel's evidence that Respondent provides training to all CSPs regarding the policies and procedures they must follow.

Contrary to Respondent's Exception 3, the main issue before the ALJ was whether or not Respondent's CSPs as a group, not just Matthew Rice, are statutory employees, and the ALJ and Board have plenary authority to decide the issue. Respondent failed to present any specific evidence of factual differences among CSPs with respect to any of the factors analyzed by the ALJ in order to reach his conclusion that CSPs are statutory employees. (RB 10-13). Although Respondent argues that differences between how CCS and other IBs run their business is

significant, Respondent did not present any evidence that such differences exist. (RB 11). It is significant the Respondent prepares form MSAs and SOWs delineating its requirements of IBs and presents these documents to all IBOs for their signature, and Respondent did not present any evidence that the basic requirements under SOWs delineating metrics and work requirements differ in any significant way. (Tr. 24:22-25, Padron).

Moreover, the ALJ correctly rejected Respondent's arguments with respect to CCS's relationship to Matthew Rice, and Respondent's argument that CSPs must be independent contractors if IBs such as CCS are independent contractors. (ALJD 13, fn. 6). Contrary to Respondent's Exception 4, it is immaterial whether or not CCS was established seven years prior to entering into an MSA with Respondent. Similarly, any differences in the relationships between the IBs and the CSPs nationwide are wholly irrelevant because, as found by the ALJ, it is Respondent, not the IBs, that limits CSPs' opportunity for profit or loss, controls CSPs' service hours, and provides CSPs with all of the skills necessary to perform their work, all of which demonstrates that CSPs do not run a distinct occupation or business. (ALJD 18). Respondent maintains detailed records through its web portal, and Robert Padron testified at length during the hearing. Respondent no doubt could have presented evidence that CSPs other than Matthew Rice are independent contractors if such evidence existed. Respondent's failure to present such evidence dooms its argument that Matthew Rice's situation is not typical of that of all of Respondent's CSPs. In summary, Respondent's argument that the ALJ did not analyze why his findings should apply to all CSPs should be summarily rejected. The ALJ carefully analyzed and considered all of the evidence regarding CSPs presented by the General Counsel and Respondent.

With respect to Respondent's Exception 15, the ALJ did not err by failing to consider "other factors" such as the fact that the MSA and SOWs contain self-serving statements that Respondent does not exert control over Matthew Rice and that CCS controls the manner in which Matthew Rice provided service. (RB 31). This provision is belied by the fact that Respondent controls the method for providing customer service through the metrics that it imposes and enforces. While it is true that CSPs select their own projects, Respondent exerts the same type of control over CSPs regardless of which project the CSP chooses. Although a CSP can work at any physical location, the vast majority of CSPs work out their homes, and the virtual nature of Respondent's business does not require Respondent to exert control over where the work is performed. (RB 31).

For the above reasons, Respondent's Exceptions 2, 3, 4 and 15 should be denied.

D. The ALJ correctly found that Respondent controls CSPs' work hours, and Respondent's Exceptions 5, 13 and 14 should be denied.

Contrary to the arguments made by Respondent, the ALJ correctly found that Respondent imposes "a number of restrictions" on CSPs' ability to select their work hours and that "Respondent's retention of significant control over CSPs work hours favors employee status," citing *Lancaster Symphony Orchestra*, 357 NLRB at 1763-1764 (2011). (ALJD 13:19-36). CSPs select 30 minute intervals of work, and Respondent's system tracks a CSP's work hours. (Tr. 91:24-25, 92:1-16; GCX 47, 64). Matthew Rice worked approximately 20 or 30 hours per week for Respondent. (Tr. 166:25, 167:1-2, M. Rice). If Matthew Rice did not work the minimum number of hours set by Respondent, Respondent could have terminated the Statement of Work (SOW) which was required for Rice to provide customer service for Respondent's client. (ALJD 13:27-33; Tr. 167:13-20, M. Rice.). CSPs are allowed to release hours within a 48 hour period prior to their service interval. (ALJD 13:16-17; Tr. 259:10-22,

Padron). As an alternative, if a CSP cannot work a 30 minute interval of work selected, the CSP can go on Respondent's portal and swap that interval with another CSP who is interested in taking that 30 minute interval. (ALJD 13:16-17; Tr. 170:15-25, 171:1-2, 204:2-16, 215:1-9, M. Rice; Tr. 259:9-22, Padron).

Although CSPs select their hours through Starmatic, as Matthew Rice testified, after Respondent releases the "pre-select" hours to certain CSPs, Respondent releases the remaining hours to the rest of the CSPs at the same time, generally once per week. (ALJD 13:21-25; Tr. 168:6-19, 170:1-4, M. Rice). As a result, as the ALJ found, Matthew Rice testified that he was able to select a schedule that was "scattered" from about 8:00 or 9:00 a.m. to 10:00 or 11:00 p.m., working a few hours in the morning, afternoon, and evening. (ALJD 6:32-34, 13:19-25; Tr. 18-21, 168:6-19, M. Rice). Although Respondent contends in Exception 5 that roughly 60 percent of the time Matthew Rice performed work between 1:30 p.m. and 6:00 p.m., this is consistent with the ALJ's finding that Matthew Rice's work hours were scattered due to Respondent's release of available work hours. Thus, even if Rice performed 60 percent of his work between 1:30 p.m. and 6:00 p.m., the other 40 percent of his work was performed during other times of the day. Respondent also argues that the client establishes the hours available to CSPs. However, Respondent controls Starmatic, decides when to release potential work hours to CSPs and makes the hours available through its website. (RB 30, Tr. 254:2-24, Padron). See *Sisters Camelot*, 363 NLRB No. 13 slip op. at 2 (the fact that canvassers were required to report to work and that the employer administered discipline to canvassers who were late to work was indicative of employee status); *Lancaster*, 357 NLRB slip op. at 1764 (musicians who were required to attend all rehearsals and performances as scheduled once the musician selected a program were found to be employees); *Roadway III*, 326 NLRB at 852 (the fact that drivers were

required under contract to show up each day weighed in favor of employee status). *Velu v. Velocity Express, Inc.*, 666 F. Supp. 2d 300, 308 (E.D.N.Y 2009), cited by Respondent, is not a Board case and is factually distinguishable. In *Velu*, the court noted that the individual in question found by the court to be an independent contractor communicated directly with clients to set up his schedule. Accordingly, Respondent's Exception 5, 13 and 14 should be denied.

E. The ALJ correctly found that CSP work is done under the direction of Respondent, and Respondent's Exceptions 6, 17, and 18 should be denied.

The ALJ properly concluded that whether the work is usually done under the direction of Respondent or by a specialist without supervision factor weighs in favor of employee status. Therefore, Respondent's Exceptions 6, 17, and 18 should be denied. (ALJD15:6-10). Contrary to Respondent's Exception 6, the ALJ correctly found that Respondent's performance compliance leads "monitor CSP performance and insure that they are adhering to the performance standards in the SOWs." (ALJD 7:36-37; RB 32-36). As described by the ALJ, CSPs are required to meet detailed performance requirements called metrics. (ALJD 7: 8-32; GCX 3-4). CSPs are monitored by Quality Assurance Performance Facilitators (QAPFs) and Chat Performance Facilitators (Chat PFs). (ALJD 7:39-42; Tr. 171:10-24, 172:1-3, 173:7-16, M. Rice). Among other things, QAPFs monitor compliance with metrics, and Chat PFs oversee live customer service calls through a virtual chat room. (ALJD 7:39-42; Tr. 171:8-25; GCX 76). Respondent also employs about 20 to 25 client results managers who are responsible for making sure that performance metrics are being met. (ALJD 7:34-37; Tr. 72:6-25, 73:1-2, 74:7-13, Padron). In this particular case, Bradford Kerley was the client results manager assigned to monitor the Barnes & Noble account. Similarly, Respondent employs about 20 to 25 performance compliance leads who are also involved in reviewing compliance with metrics. (ALJD 7:34-37; Tr. 73:3-25, 74:7-13, Padron). Sheri Phillips was the performance compliance

lead working on the Barnes & Noble account. (Id.). Client results managers, performance compliance leads, QAPFs and Chat PFs are part of Respondent's client results team and quality assurance structure. (GCX 44, pg. 34, 38).

Chat PFs handle CSPs' questions regarding how to handle a customer's call, and if a customer asks a CSP to speak to a supervisor, a CSP transfers that call to the Chat PFs. (ALJD 7:39-42; Tr. 71:6-16, Padron; 171:10-25, 196:9-16, M. Rice). Chat PFs not only answer questions from CSPs during customer service calls, but they can also listen to recorded calls and provide feedback to QAPFs to notify them if a CSP needs additional supervision. (ALJD 8:1-2; GCX 44, pg. 38). Matthew Rice testified that he never used the term Chat PF and always referred to Chat PFs as his supervisors. (Tr. 196:17-24, M. Rice). While Respondent argues that it is only "leveraging" PFs to for assistance, the ALJ rightfully found that the active oversight and monitoring by PFs shows this factor weighs in favor of employee status, citing *Sisters Camelot, slip op. at 3; FedEx*, 361 NLRB No. 55, slip op. at 13. (RB 34-35; ALJD 15:1-10).

Respondent ensures that CSPs meet metrics set forth in the SOW by assigning each metric a grade and giving an average "Star" rating to each metric, from one to three, with three stars being the highest performance for the category. (ALJD 8:9-21; Tr. 75:15-25; 76:1-13; 78:9-16, Padron; GCX 3-4). IBs and CSPs must meet performance expectations and are regularly informed of the status of their performance. (Tr. 75:8-14, 83:3-6, Padron; GCX 63, 69). Under the Barnes & Noble SOW for phone work, Respondent monitored the following metrics: commitment adherence, intervals serviced, quality scores (QA), average handle time (AHT) and customer satisfaction (OSAT). (Tr. 258:8-13, Padron; GCX 3). Commitment adherence measures the percentage of 30 minute service intervals actually completed by a CSP, and the ALJ properly concluded that Respondent alone determines and enforces the commitment

adherence requirement. (ALJD 14:24-31; Tr. 74:18-23, Padron; 167:3-9, M. Rice). In order to assess the metric called quality scores, Respondent's Quality Assurance Performance Facilitators (QAPFs) listen to CSPs' live or recorded phone calls or review emails to assess whether or not the CSP is adhering to the metrics. (Tr. 76:14-25, 77:1-16, Padron; 173:7-16, M. Rice; GCX 71, page 3). As Matthew Rice testified, QAPFs are "meticulous" with regard to how CSPs perform their customer service work. (Tr. 173:15-16, M. Rice). For the Barnes & Noble account, QAPFs would review the call for quality such as how friendly a CSP was to the customer. (Tr. 77:17-25, Padron). Average handle time, which is the actual time spent on a call, is also recorded and reviewed by Respondent. (ALJD 14:24-31; Tr. 82:12-25, 83:1-2, Padron). The customer satisfaction metric (OSAT) is often measured through customer satisfaction surveys. For the Barnes & Noble account, Client Results Manager Kerley and Performance Compliance Lead Phillips ensured that the surveys met the performance requirements in the SOW. (ALJD 8:23-24; Tr. 83:18-25, 84:1-5, Padron; GCX 73). For the email SOW, Respondent measures an additional performance metric called first call resolution, which refers to whether or not the CSP is able to answer a customer's question during the first contact. (Tr. 86:14-25, 87:1-7, Padron).

Contrary to Respondent's Exception 18, the ALJ correctly found that if a CSP is not meeting performance metrics, Respondent may terminate the CSP's SOW and preclude the CSP from working under that SOW. The ALJ also correctly found that Respondent's termination of an SOW is a disciplinary measure taken against CSPs. (ALJD 14:42-47; Tr. 81:22-25, 82:1-9, 93:21-25, 266:9-12, Padron; 173:17-24, M. Rice; GCX 7(a)-7(d), GCX 8). In some cases, CSPs will not be allowed to work for a client if the CSP has been terminated from a SOW. (Tr. 279:17-25, 280:1-4, Padron). For example, in Matthew Rice's case, after the expiration period of the Barnes & Noble SOWs, Respondent decided not to offer new SOWs to CCS because of

Matthew Rice's failure to meet metrics. (Tr. 94:4-18, Padron). An email from Performance Compliance Lead Phillips to Patricia Rice notes that the SOWs for Matthew Rice were not offered because Respondent received overall poor feedback from the surveys; the QAPF communicated the overall poor quality to Matthew Rice and attempted to improve his performance; and Matthew Rice failed to improve. (ALJD 14:42-47;GCX 6). See *Lancaster*, 357 NLRB at 1764 (2011). Accordingly, Respondent's argument that its termination of SOWs is merely due to a breach of contract should be rejected. (RB 35).

As in *FedEx*, cited by the ALJ to support his findings, CSPs are supervised by Chat PFs, QAPFs and performance compliance leads. Respondent's QAPFs review phone calls and emails for adherence to performance standards, and CSPs are terminated for failure to meet those standards. *FedEx*, slip op. at 13 (fact that drivers can be suspended or terminated for failure to comply with rules and procedures weighed in favor of employee status); See also *Sisters Camelot*, 363 NLRB slip op. at 2 (canvassers subject to discipline for being late to work favored finding of employee status). The vast majority of Respondent's clients choose to have CSPs' calls and emails measured for quality. *FedEx*, slip op at 15; see also *Sisters Camelot*, 336 NLRB, slip op. at 4 (close monitoring of canvassers weighs in favor of employee status); *Slay Transportation*, 331 NLRB at 1293-1294 (requiring drivers to follow performance standards favors a finding of employee status). Although Respondent argues that it is the IB rather than Respondent who is responsible for the CSPs' performance, it is Respondent who monitors CSPs regarding every aspect of their work and terminates the employment of underperforming CSPs. *Lancaster*, 357 NLRB at 1763.

Based on the above, the ALJ correctly found that Respondent directs CSPs through "enforcement of performance metrics and tracking mechanisms," and Respondent's Exception

17 should be denied. (ALJD 14:24-40). The ALJ specifically rejected Respondent's argument that it controls only the ends to be achieved, noting that the client results team provides feedback that is subjective, specific and goes beyond reporting results. (ALJD 14:33-40). Respondent's reliance on *NV Resort Assn.*, 250 NLRB 626, 642 (1980) is misplaced. In that case, the Board held that lounge musicians who were told by the employer what type of music to play and how to improve their performances were statutory employees. *Porter Drywall*, 362 NLRB slip op. at 3, also cited by Respondent, is inapposite because the skilled crew and crew leaders found to be independent contractors in that case performed their work in the manner they saw fit, rather than being required to follow specific procedures.[3] Similarly, *Argix Direct*, 343 NLRB 1017 (2004) is distinguishable. In that case the Board found that owner operators were independent contractors, in part, because many of them hired their own drivers and had independent companies; they were not required to follow suggested delivery routes; they were not subject to discipline or discharge; and contract termination occurred only for missing key window times for deliveries.[4] In contrast, Respondent imposes strict guidelines for every aspect of CSPs' work, effectively disciplines CSPs, and constantly evaluates CSPs' performance with respect to a myriad of metrics, including metrics imposed strictly by Respondent rather than by its clients. Accordingly, the ALJ correctly concluded that CSPs work under the direction of Respondent, and Respondent's Exceptions 6, 17 and 18 should be denied.

[3] While Respondent also cites to *North American Van Lines*, 288 NLRB 38 (1988), enf. denied in relevant part, 869 F.2d 596, 599 (D.C. Cir. 1989), the Board is not bound by decisions of the district courts.

[4] *Dial-a-Mattress Operating Corp.*, 326 NLRB 884 (1988), also cited by Respondent, is distinguishable because the owner operators in question found to be independent contractors had few restrictions; had business identities distinguishable from the employer; hired supplemental employees; controlled their work schedules; and did not face disciplinary measures.

F. The ALJ correctly concluded that CCS's status is not relevant to whether CSPs are statutory employees, and Respondent's Exception 7, 8 and 12 should be denied.

The ALJ considered the fact that Respondent spent a "great deal of time" arguing that IBs have an independent contractor relationship with Respondent and rejected the argument that if IBs are independent contractors, CSPs must also be independent contractors, citing *Porter Drywall, Inc.*, 362 NLRB No. 6 (2015). (ALJD 13, fn. 6). Accordingly, Respondent's Exception 12 should be denied. In Respondent's Exception 7, Respondent argues that the ALJ erred by not considering the revenue that CCS generated from servicing clients. However, the ALJ properly concluded that regardless of CCS's status, the relevant issue is the relationship between CSPs such as Matthew Rice and Respondent. Moreover, Patricia Rice of CCS testified that she was not running a successful or big business. (Tr. 127:4-9; 135:11-13, 139:18-23, P. Rice; RX 11, 16-17). The ALJ correctly found that "CSPs lack the infrastructure and support to operate as a separate entity, absent their affiliation with" Respondent. Accordingly, Respondent's Exception 8 should be denied. (ALJD 14:10-11). As noted by the ALJ, CSPs' services are essential to Respondent's business because 85 percent of Respondent's revenue comes from the customer service that CSPs provide to Respondent's clients. (ALJD 14:12-13; Tr. 290:9-25, 291:1-12, Padron). There is no evidence that CCS or IBs provide the infrastructure necessary for CSPs to perform customer service work. Rather, Respondent provides its expensive web platform, and the vast majority of CSPs work from their homes. (Tr. 20:15-18, 31:15-17, Padron). Accordingly, Respondent's Exceptions 7, 8 and 12 should be denied.

G. The ALJ correctly concluded that CSPs are not rendering services as an independent business, and Respondent's Exceptions 9, 10, 11 and 26 should be denied.

The ALJ correctly concluded that CSPs are not rendering services as an independent business, and Respondent's Exceptions 9, 10,11 and 26 should be denied. (ALJD 18:4-33, RB

20-26). Respondent did not present any evidence that CSPs have any genuine financial risk or potential for entrepreneurial gain, and Respondent's Exception 9 should be denied. On the contrary, the ALJ properly found that CSPs' financial risk is limited to the minimal costs associated with the equipment they purchase to do CSP work, and that CSPs can increase their wages only by working more hours or simultaneously working as an IBO. As such, Respondent's Exception 10 should also be denied. (ALJD 16:27-30). The ALJ also correctly found that while CSPs could work for other companies, this ability was "somewhat unrealistic," and Respondent's Exception 26 should be rejected. (ALJD 18:11-16). Due to the constraints of the available work hours through Starmatic, Matthew Rice performed customer service work for only one of Respondent's clients at a time and did not work for any other employer. (Tr. 181:21-23, 182:5-19, 210:19-25, M. Rice). *FedEx*, slip op. at 15 (fact that other work opportunities are limited by the employer's work commitment weighs in favor of employee status). Moreover, as found by the ALJ, Respondent required CSPs to work a minimum number of hours. *Time Auto Transportation, Inc.*, 338 NLRB 626, 638-639 (2002), aff. 377 F.3d (6th Cir. 2004) (employer's requirement that drivers generate a certain amount of monthly income that limited ability to work for other companies weighs in favor of employee status). In addition, although the SOW between CCS and Respondent does not prohibit CSPs from performing work for other companies, CSPs do not have access to the necessary technology, managerial resources, or a customer base, which are all provided by Respondent. (GCX 3, page 3). As the ALJ noted, the Board has stated that "the ability to work for multiple employers does not make an individual an independent contractor." *Sisters Camelot*, slip op. at 3 (2015); *Lancaster*, 357 NLRB at 1764. (ALJD 14:15-17).

Similarly, the ALJ correctly found that CSPs do not control any important business decisions; do not hire employees; and that Respondent's agreements with IBs, that CSPs must execute, set all of the terms of CSPs' work. Thus, Respondent's Exception 11 should be denied. (ALJD 18:20-25; Tr. 182:19-22, M. Rice). See also *BKN, Inc.*, 333 NLRB 143, 145 (2001). Finally, under some circumstances, some of Respondent's clients do not allow CSPs to work on a customer service account if they were previously terminated by Respondent. (Tr. 183:17-24, 200:1-13, M. Rice; 279:17-25, 280:1-4, Padron). Although Respondent again attempts to interject CCS's entrepreneurial opportunities into this case, evidence that CCS or other IBOs have entrepreneurial opportunities is not relevant to CSPs' employment status with Respondent. In sum, CSPs must apply through Respondent's website; be vetted through Respondent's screening and training process; and once hired, are supervised by Respondent. Respondent controls the service revenue paid to IBOs, the available clients and the available work hours. Accordingly, as in *FedEx,* Respondent has "total command over its business strategy, customer base and recruitment, and the prices charged to customers." *FedEx,* slip op. at 15; See also *Sisters Camelot*, slip op. at 5 (Board found that canvassers who did not have control over important business decisions or a proprietary interest in their work and could not subcontract their work were not independent contractors); *Roadway III*, 326 NLRB at 852 (employer control over rate charged to customers weighed in favor of employee status). As a result, Matthew Rice put it best when he testified that he was making enough money working for Respondent to survive, but after all, he was living with his mother. (Tr. 182:16-18, M. Rice). Accordingly, the facts show that CSPs do not render services as independent businesses, and the ALJ correctly concluded that this factor weighs in favor of employee status.

In its brief, Respondent again attempts to use CCS as a red herring by arguing that CCS did operate an independent business. (RB 20-25). However, Respondent's various arguments relating to CCS's operations are not relevant to this analysis, and the ALJ rejected Respondent's argument that CCS is a necessary party to this case.[5] As noted above, the ALJ correctly found that Respondent sets the terms of CSP work by virtue of its agreements with IBs and the agreements it requires all IBs and CSPs to execute, and Respondent can unilaterally change those terms under the MSAs. (ALJD 18:23-26). Although Respondent also argues that Matthew Rice could have increased his financial gain by starting an IB, this is irrelevant because the employment status of IBs is not at issue in this case. (RB 25). Accordingly, Respondent's Exceptions 9, 10, 11 and 26 should be denied.

H. The ALJ correctly found that Respondent provides all the skills necessary for CSP work, and Respondent's Exception 19 should be denied.

The ALJ correctly found that Respondent provides all of the skills a CSP needs through its CSP 101 and client certification courses, and Respondent's Exception 19 should be denied. (ALJD 15:14-23). Respondent does not require that CSPs have any education or prior skills. (ALJD 15:14-15; Tr. 41:5-8; 13-15, Padron). In fact, Matthew Rice only had a GED and did not have work experience prior to performing customer service work for Respondent. (Id., Tr. 56: 18-19, 157:6-7, M. Rice). As noted by the ALJ, Respondent provides very detailed training through its CSP 101 and certification courses to give CSPs the skills necessary to perform their work. (Id.). *United Insurance*, 390 U.S.at 259; *Sisters Camelot*, slip op. at 3; *FedEx*, slip op. at 13; *Corporate Express*, 332 NLRB 1522 (2000); *Prime Time Shuttle*, 314 NLRB 838, 840-841 (1994); cf. *Porter Drywall*, slip op. at 4 (fact that crew leaders performed skilled work installing

[5] On October 29, 2015, the Board denied Respondent's Motion to Dismiss for Failure to Join a Required Party, finding that Respondent had failed to establish that there are no genuine issues of material fact regarding its assertion that joinder of CCS is necessary in this case.

drywall weighed in favor of independent contractor status). While Respondent argues that it has other programs available requiring special skills, Matthew Rice testified that the other jobs were for supervisors rather than for CSPs, or were for individuals who were bilingual, a skill unlikely to be provided by any employer in the customer service industry. (Tr. 162:107, M. Rice). Accordingly, Respondent's Exception 19 should be denied.

I. The ALJ correctly found that the length of time for which CSPs are employed is a neutral factor, and Respondent's Exception 20 should be denied.

The ALJ found that Respondent's SOWs under which CSPs provide customer service work are generally for a 90 day period. (ALJD 15:16-47). The evidence in this case shows that some CSPs work for Respondent for a short period of time but have the potential to establish a longer period of employment because Respondent routinely renews SOWs if CSPs meet the performance metrics. (ALJD 16:1-4; Tr. 81:1-3, 284:15-20, 286:3-7, Padron). Respondent's contention that SOWs are "contractually limited to a definite period of time" should be rejected given the Respondent's practice of renewing SOWs. (RB 37). For example, as noted above, CSP Matthew Rice worked for Respondent for about five years, from about 2009 to 2014. As such, the ALJ correctly found this factor is neutral, and Respondent's Exception 20 should be denied. See *Sisters Camelot*, 363 NLRB No. 13, slip op. at 4 (2015).

J. The ALJ correctly concluded that providing call center services to its clients is part of Respondent's regular business and that Respondent and CSPs are in the same business. Respondent's Exception 21, 23 and 25 should be denied.

The ALJ properly concluded, contrary to Respondent's Exception 23, that ... "at its core, the Respondent's regular business is providing call center services through its website using CSPs," and rejected Respondent's argument that it is solely a technology company, citing *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 4 (employee status found in part because canvassers generated 90 percent of the company's revenue). (ALJD 17:13-16). Contrary to

Respondent's Exception's 25, the ALJ also correctly concluded that Respondent is in the same business as CSPs, citing *Porter Drywall,* 362 NLRB No. 6, slip. op. at 5 (2015). (ALJD 17:39-42). The fees paid by Respondent's clients for customer service generates 85 percent of Respondent's revenue, and Respondent's Exception 21 should also be rejected. While Respondent argues that it can transition to other services, this is purely speculative, and there is no evidence that the high percentage of its revenues received from providing customer service through CSPs has decreased.[6] Thus, the ALJ properly found that these two factors weigh in favor of employee status, and Respondent's Exception 21, 23 and 25 should be denied.

K. Respondent's argument that the ALJ should have concluded that the factor of whether or not the parties believe they are creating an independent-contractor relationship supports independent contractor status should be rejected, and Respondent's Exception 24 should be denied.

The General Counsel is filing cross-exceptions regarding the ALJ's finding that the factor of whether or not the parties believe they are creating an independent contractor relationship is a neutral factor, arguing that this factor favors a finding of employee status. Respondent's Exception 24 arguing that this factor weighs in favor of independent contractor status should be denied. Although Respondent requires IBOs to sign MSAs agreeing that they are independent contractors, CSPs do not have an opportunity to bargain over the terms of this agreement which is drafted and presented to IBOs by Respondent. Although Respondent takes the position that CSPs are independent contractors or have no relationship with Respondent, Matthew Rice testified that he considered Respondent to be his employer and he did not consider CCS or his mother, Patricia Rice, to be his employer. (ALJD 17: 29-32; Tr. 182:23-25, M. Rice). Matthew Rice and other CSPs have asserted claims in federal court against Respondent under the FLSA, and arbitrators considering those claims have rejected Respondent's position

[6] Respondent's assertion in its brief in support of exceptions that it ventured into a new type of business after the hearing in this matter closed is not part of the record and should not be considered. (RB 27, fn. 21).

that CSPs are independent contractors. (Id.; GCX 78-79). Patricia Rice shepherded Matthew Rice during the time that Matthew Rice worked for Respondent, and testified that she was only a go-between, between Respondent and the CSPs. (Tr. 183:1-5, M. Rice; 155:4-8, P. Rice). Respondent supervised, trained, disciplined and terminated CSPs who worked under the SOWs with CCS. (Tr. 154:7-25, 155:1-3, P. Rice). While Patricia Rice operated her business and did some advertising, Patricia Rice testified that she was not running a successful or big business. (Tr. 127:4-9; 135:11-13, 139:18-23, P. Rice; RX 11, 16-17). Accordingly, the ALJ did not err by failing to find that this factor weighs in favor of independent contractor status, and Respondent's Exception 24 should be denied.

L. Respondent's argument that the ALJ should have concluded that the distinct occupation or business factor weighs in favor of independent contractor status should be rejected, and Respondent's Exceptions 16 and 22 should be denied.

The General Counsel is filing cross-exceptions regarding the ALJ's failure to conclude that the distinct occupation or business factor weighs in favor of employee status. The ALJ found that this factor was neutral. The ALJ correctly found that the sporadic nature of CSPs' work hours makes it difficult for CSPs to obtain outside employment. Thus, Respondent's Exception 16 should be rejected. (ALJD 14:14-15). Moreover, contrary to Respondent's Exception 22, the ALJ properly found that "the services provided by CSPs are essential to [Respondent]'s operations." While Respondent argues that CCS operated separately from Respondent, there is no evidence that CCS or IBs in general supply the infrastructure necessary for CSPs to perform their work. Rather, Respondent provides the necessary infrastructure for CSPs to perform their work. (RB 16). In addition, although Respondent contends that *Porter Drywall* stands for the proposition that the Board should consider evidence relating to CCS in order to determine the status of CSPs, in sharp contrast to *Porter Drywall*, there was no entity

such as CCS involved in the *Porter Drywall* case. The same is true of *Metropolitan Taxicab Board of Trade*, 342 NLRB 1300, 1208 (2004), where the Board considered whether taxi drivers were employees or independent contractors of fleet owners. *Metropolitan Taxicab* is distinguishable because the fleet owners did not impose any controls over the taxi drivers. Rather, once the taxi driver paid a rental fee to the fleet owner, the taxi driver kept all fares from customers, and, as found by the administrative law judge in *Metropolitan Taxicab*, the fleet owner had no financial incentive to impose controls over cab drivers. These facts are in sharp contrast to this case where Respondent derives 85 percent of its revenue from the services that CSPs provide to its clients. (Id.) Finally, even assuming arguendo that the relationship between IBs such as CCS to CSPs such as Matthew Rice must be considered, the evidence shows that unlike the dry wall installers in *Porter Drywall* or the taxi drivers in *Metropolitan Taxicab*, CSPs are statutory employees, in part, because they are not engaged in a distinct occupation or business. Accordingly, Respondent's Exceptions 16 and 22 should be denied.

M. The ALJ correctly found that CSPs are statutory employees, and Respondent's Exceptions 27 and 28 should be denied.

The ALJ correctly concluded that based on an analysis of traditional common law factors and the independent business factor, Respondent failed to meet its burden of proof that CSPs are independent contractors. (ALJD 18:37-40). In so doing, the ALJ stated as follows:

> The majority of the factors support a finding of employee status. These include that the Respondent exercises control over the details of CSPs' work; CSPs are not rendering services as an independent business; the Respondent is in the business of providing call center services and such services are part of its regular business; CSPs are not required to have any special skills, and the CSPs' work is being directed by the Respondent. (ALJD 18:40-44).[7]

[7] Although the ALJ found that the factors of whether CSPs are engaged in a distinct occupation or business and whether or not the parties believe they are creating an independent contractor relationship are neutral factors, as noted above, the General Counsel is filing cross-exceptions relative to those findings. (ALJD 14:19, 17:34). The General Counsel is also filing cross-exceptions regarding the ALJ's findings that the factors of whether the

As explained above, the relationship of CCS relative to Matthew Rice and other CSPs is not relevant, and a review of that evidence does not lead to the conclusion that CSPs are independent contractors. Accordingly, Respondent's Exceptions 27 and 28 should be denied.

N. The ALJ properly concluded that Respondent, not CCS, requires CSPs to sign the class action waiver, and Respondent's Exceptions 29 and 30 should be denied.

As the ALJ found, contrary to Respondent's Exception 29, in order to perform customer service work, IBs and CSPs are required to electronically sign the Waiver Agreement that is drafted by Respondent and accessed by IBs and CSPs through Respondent's portal. (ALJD 19:35-38; Tr. 101, 3-25, 102, 103:1-10, Padron; GCX 5). On October 19, 2012, Patricia Rice electronically signed the Waiver Agreement for CCS and on January 1, 2014, Matthew Rice signed the Waiver Agreement. (GCX 5). Although Respondent does not enter into the Waiver Agreement with the CSP, Padron testified that all CSPs who want to perform customer service work for Respondent's clients must sign the Waiver Agreement. (Tr. 101:10-17). The SOWs signed by Patricia Rice designating Matthew Rice for CSP work include Section 16.4 "Class Action Waiver" which requires that all parties waive any rights to file or join collective claims against Respondent. (GCX 3 and 4, pages 10-11). Notably, the SOWs refer to CCS as a vendor, and Section 16.1 of the SOWs states that for purposes of Article 16 only, vendor includes "vendor personnel." (Id.). Accordingly, under the provision, CCS is obligated to make sure that CSPs such as Matthew Rice enter into the Waiver Agreement. Although Respondent contends in Respondent's Exception 30 that the customer service work is performed for CCS and the client rather than for Respondent, the customer service work is clearly being

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employer or individual supplies instrumentalities, tools, and places of work and the method of payment weigh in favor of independent contractor status. (ALJD 15:15:42, 16:32).

performed for Respondent. Accordingly, Respondent's Exceptions 29 and 30 should be denied.

O. The ALJ correctly applied the Board's Decisions in *D.R. Horton* and *Murphy Oil,* and Respondent's Exceptions 32 and 33 should be denied.

The ALJ correctly applied the Board's decisions in *D.R. Horton* and *Murphy Oil* concluding that Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing the waiver. (ALJD 19:34-35). In *Murphy Oil USA, Inc.*,[8] the Board re-affirmed its prior decision in *D. R. Horton, Inc.*[9] holding that an employer violates Section 8(a)(1) of the Act "when it requires employees covered by the Act, as 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 in any forum, arbitral or judicial." The Board found 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." *D.R. Horton,* 357 NLRB at 2286. The Board has since re-affirmed these holdings in a number of cases. See *CVS RX Services, Inc.*, 363 NLRB No. 180, slip op. at 1 (2016); *Haynes Building Services, LLC,* 363 NLRB No. 125, slip op. at 1 (2016); *Multiband EC, Inc.*, 363 NLRB No. 100, slip op. at 1-2 (2016); *Employers Resource,* 363 NLRB No. 59, slip op. at 1 (2015); *Philmar Care, LLC d/b/a Fernando Post Acute Hospital,* 363 NLRB No. 157, slip op. at 1 (2015); *200 East 81st Restaurant Corp., d/b/a Beyoglu,* 362 NLRB No. 152, slip op. at 2 (2015), *Chesapeake Energy Corporation,* 362 NLRB No. 80, slip op. at 3 (2015), *Flyte Tyme Worldwide,* 362 NLRB No. 46, slip op. at 1 (2015), and *Cellular Sales of Missouri, LLC,* 362 NLRB No. 27, slip op at 1-2 (2015). Contrary to Respondent's Exception 32, the ALJ properly rejected Respondent's argument that the savings

[8] 361 NLRB No. 72, slip op. at 5 (2014), enf. denied in relevant part, 808 F.3d 1015 (5th Cir. 2015).

[9] 357 NLRB 2277 (2012), enf. denied in relevant part, 737 F.3d 344 (5th Cir. 2013).

provision in the Agreement allowing parties to file charges with the Board or challenge the enforceability of the waiver in state or federal court is sufficient to support a finding that the waiver is lawful. (ALJD 19:43-47). As the ALJ concluded, the Board has rejected this argument. *Multiband EC, Inc.*, 363 NLRB, slip op at 3, fn. 6 (2016); *SolarCity Corp.*, 363 NLRB No. 83, slip op. at 2-4 (2015). Id.

Contrary to Respondent's Exception 33, The ALJ also properly rejected Respondent's reliance on court of appeals precedent concluding that such waiver provisions are lawful because the ALJ is bound to follow established Board precedent which the U.S. Supreme Court has not reversed. (ALJD 20:4-17, RB 43-44). Accordingly, *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1335 (11th Cir. 2014), cert. denied, 134 S.Ct. 2886 (2014), cited by Respondent, is not controlling because the case was considered under the FLSA, and the Board is not bound by the decisions of the courts of appeals. Id. Moreover, as the ALJ noted, the courts of appeals are currently split regarding the *D.R. Horton* decision, citing *Lewis v. Epic Systems Corp.*, 823 F.3d 1127 (7th Cir. 2016); see also *Morris v. Ernst & Young, LLP*, __ F.3d __ , 2016 WL 4433080 (9th Cir. 2016).

While Respondent argues that the Board's decision "trenches upon" precedent supporting the enforcement of arbitration agreements, the Board has stated that "when circumstances arise that present a conflict between the underlying purposes of the Act and those of another federal statute, the Board has recognized that the issue must be resolved in a way that accommodates the policies underlying both statutes to the greatest extent possible." *D.R. Horton*, 357 NLRB at 2284. Class action waivers "interfere[s] with substantive statutory rights under the NLRA, and the intent of the FAA was to leave substantive rights undisturbed." Id. at 2286. The Board also concluded that its decision did not "conflict with the letter or interfere with the policies underlying the FAA and, even if it did, that the finding represents an

appropriate accommodation of the policies underlying the two statutes." Id. at 2284. The Board further noted that as repeatedly stated by the Supreme Court, under the FAA, "arbitration may substitute for a judicial forum only so long as the litigant can effectively vindicate his or her statutory rights through arbitration," citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991). Id. at 2285.

In *Murphy Oil*, the Board specifically rejected the Fifth Circuit's reliance on *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), a case holding that the FAA preempted a California state law finding class-action waivers in consumer contracts unconscionable. *Murphy Oil*, 362 NLRB No. 72, slip op. at 9. See also *D.R. Horton*,357 NLRB at 2288 (finding that *Concepcion* involved a conflict between state law and the FAA and did not address the class action waiver issue under the NLRA). Unlike the preemption issue in *Concepcion*, the Board noted that the *D. R. Horton* case presented an issue requiring the accommodation of the statutory schemes of the NLRA and the FAA. *Murphy Oil*, 361 NLRB No. 72, slip op. at 9-10. Similarly, in *Chesapeake*, the Board stated that the Court had not specifically addressed the issues raised by *D.R. Horton and Murphy's Oil* in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013). 362 NLRB No. 80, slip op. at 3. In contrast, as the Board found in *D.R. Horton and Murphy Oil*, Section 7 guarantees substantive rights to engage in collective legal action which are "not peripheral but central to the Act's purposes." *D.R. Horton*, 357 NLRB at 2279.

Finally, even if there was a conflict between the Act and the FAA that could not be reconciled, the NLRA amounts to a "'contrary congressional command' overriding the FAA." *Murphy Oil*, 361 NLRB No. 72, slip op. at 9, fn. 51. With respect to the federal court cases, the interpretation and enforcement of the substantive rights protected by the Act is, in the first instance, accorded to the Board rather than the federal district courts. It is well-settled that only the Board or the Supreme Court can overturn existing precedent in *D.R. Horton* and *Murphy Oil.*

Waco, Inc., 273 NLRB 746, 749, fn. 14 (1984); *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616-617 (1963), enf. granted in part, 331 F.2d 176 (1964).

Although the U.S. District Court for the Southern District of Florida upheld the class action waivers at issue herein, in *Steele et al. v. Arise Virtual Solutions, Inc.*, Case No. 13-cv-62823 and *Otis et al. v. Arise Virtual Solutions, Inc.*, Case No. 12-cv-62143-KMW, the Board is not bound by the district court's decisions. In *Cellular Sales,* the Board took administrative notice of a district court's decision granting the employer's motion to compel arbitration of the employee's claim under the FLSA, but found that the district court's decision did not affect its decision finding that class action waivers were unlawful. *Cellular Sales,* slip op. at 1, fn. 2. In *Enloe Medical Center v. NLRB,* the Court stated that the Board had every right not to acquiesce to the Court's policy on the contract issue under consideration, and the Board has the option of seeking certiorari in the event the federal court does not rule in its favor. *Enloe*, 433 F.3d 834, 838 (D.C. Cir. 2005). Since the Supreme Court has not reversed Board precedent that class action waivers requiring employees to forego the right to engage in concerted activity are unlawful, the ALJ's conclusion that Respondent's maintenance and enforcement of the Waiver Agreement in this case violates Section 8(a)(1) of the NLRA should be upheld, and Respondent's Exceptions 32 and 33 should be denied.

P. The ALJ correctly concluded that Matthew Rice engaged in protected concerted activity by filing an opt-in consent form to join a class action lawsuit and that Respondent unlawfully enforced the waiver. Respondent's Exception 31 should be denied.

As demonstrated above, the ALJ correctly found that CSPs such as Matthew Rice are employees of Respondent, and that Respondent's maintenance of the Waiver Agreement is unlawful under Section 8(a)(1) of the Act . The ALJ also correctly found that Matthew Rice engaged in protected concerted activity by filing an opt-in consent form to join a class action

lawsuit and that Respondent enforced the Waiver Agreement by requesting that Matthew Rice withdraw his consent to opt-in to the class action lawsuit, in violation of Section 8(a)(1) of the Act. (ALJD 19:38-41). On December 30, 3013, attorneys filed a class action complaint on behalf of CSPs challenging Respondent's minimum wage payment practices in the U.S. District Court for the Southern District of Florida. *Steele, et al. v. Arise Virtual Solutions, Inc.*, Case No. 13-cv-62823-WJZ. (GCX 41). On November 13, 2014, Matthew Rice signed an Opt-In Consent Form electing to join the class action complaint, and on November 13, 2014, the CSPs' attorneys filed this form with the court. (GCX 39). On November 18, 2014, Respondent, through its counsel Adam P. Kohsweeney, sent the CSPs' attorneys an email stating that Matthew Rice had signed the waiver, and asked if the attorneys would withdraw Matthew Rice's consent to join the *Steele* litigation. (GCX 28). On December 5, 2014, counsel for the CSPs filed a notice with the Court withdrawing from the class action complaint and stating that Matthew Rice would pursue his claim in arbitration. (GCX 40).

Thus, Respondent, not CCS, enforced the class action waiver against Rice. Although Respondent did not sign the Waiver Agreement, Respondent imposed the Waiver Agreement on its employees, including CSPs. Respondent was a direct participant in the promulgation, maintenance and distribution of the Waiver Agreement because Respondent drafted the Waiver Agreement, including the provision requiring CSPs to sign it,[10] disseminated the Waiver Agreement to CSPs, its employees, through its IBs, required that CSPs sign the Waiver Agreement as a condition of their employment, and has maintained the Waiver Agreement with respect to all CSPs. In addition, in the case of Matthew Rice and other CSPs involved in *Steele, et al. v. Arise Virtual Solutions, Inc.*, Respondent enforced the Waiver Agreement against CSPs.

[10] As noted, under Section 16 of the SOW, the contract treats vendor personnel such as CSPs as a party to the SOW for purposes of the class action waiver. (GCX 3-4, page 10).

Respondent's maintenance and enforcement of the Waiver Agreement violates Section 8(a)(1) of the NLRA.[11]

Contrary to Respondent's argument that Matthew Rice "consciously and lawfully waived his right" to join the class action, CSPs such as Matthew Rice cannot waive their Section 7 right to participate in the class-action lawsuit by virtue of Respondent's unlawful actions. (RB 46). Finally, contrary to Respondent's argument in its brief, nothing in the ALJ's decision forecloses Respondent's access to the courts or violates Respondent's due process rights. (RB 47). Accordingly, Respondent's Exceptions 31 should be denied.

Based on the foregoing, the ALJ's conclusions of law that Matthew Rice engaged in protected concerted activities by filing an opt-in consent form in the *Steele* class action complaint, that Respondent violated Section 8(a)(1) of the Act by maintaining the class action waiver and requiring its employees to sign it, and that Respondent violated Section 8(a)(1) of the Act by requesting that Matthew Rice withdraw his opt-in consent form, thereby enforcing the Waiver Agreement, should be upheld. (ALJD 20:24-40). Accordingly, Respondent's Exception 34 and 35 should be denied.

[11] Even assuming for the sake of argument, that CSPs were employees of IBs, rather than employees of Respondent, Respondent's maintenance and enforcement of the Waiver Agreement would still violate Section 8(a)(1) of the Act. Thus, in *Costa Mesa Cars, Inc.*, JD(SF) 13-16, 2016 WL 1019676, slip op at 3 (2016), the administrative law judge rejected the employer's argument that it was not responsible for participating in the distribution and maintenance of such waiver agreements because it did not have any statutory employees. Rather, the judge found that the employer may be "derivatively liable" for the conduct of a subsidiary or affiliated corporation. Id; see also *Esmark, Inc.*, 315 NLRB 763 (1994); *American Electric Power Co.*, 302 NLRB 1021, 1023 (1991). While IBs are not subsidiaries or direct affiliates of Respondent, the same principles apply here, because Respondent is promulgating, maintaining and enforcing the Waiver Agreement. In this regard, the Board has long held that an employer may violate the Act not only with respect to its own employees but also by actions affecting employees who do not stand in such an immediate employer/employee relationship. *New York New York Hotel & Casino*, 356 NLRB 907, 911 (2011), enf. 676 F.3d 193 (D.C. Cir. 2012); *International Shipping Assn.*, 297 NLRB 1059 (1990); *Dews Construction Corp.*, 231 NLRB 182, fn.4 (1977), enf. 578 F.2d 1374 (3rd Cir. 1978).

Q. The ALJ's Order is consistent with Board precedent, and Respondent's Exception 36 and 37 should be denied.

Contrary to Respondent's Exception 36, the ALJ's Order requiring Respondent to cease and desist from its unlawful conduct in maintaining and enforcing the class action waiver; to rescind or revise the Acknowledgement and Waiver Agreement; and to notify all current and former employees that Respondent has rescinded and revised the Agreement is an appropriate remedy for Respondent's unfair labor practices. (ALJD 20:44-47, 21-22). In addition, the ALJ also correctly ordered that Respondent is responsible for reimbursing Matthew Rice for all reasonable expenses and legal fees, with interest, incurred in opposing the Respondent's unlawful efforts to enforce the class action waiver by requesting that Rice withdraw his opt-in consent form in the *Heather Steele* FLSA class action. (ALJD 20:47; 21, 1-4). As the ALJ found, reimbursement of these expenses is consistent with the Board's decisions in *Murphy's Oil*, slip op. at 21 and *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 747 (1983).

As the Board found in *Murphy's Oil*, Respondent's efforts to enforce the class action waiver against Matthew Rice is an "attempt to enforce an agreement that interfered with employees' exercise of their Section 7 rights," and Respondent cannot lawfully impose the Waiver Agreement under the Act. 361 NLRB slip op at 28. Accordingly, since the Board has determined the type of class action waiver enforced by Respondent against Rice is unlawful, Respondent's argument that it had a reasonable basis for seeking to enforce the waiver should be rejected. (RB 47-48). Accordingly, Respondent's Exceptions 36 and 37 should be denied.

IV. Conclusion

Based on the foregoing, the ALJ's findings, conclusions and recommended Order should be affirmed in its entirety, and Respondent's Exceptions should be denied in their entirety.

Dated at Miami, Florida, this 20st day of October, 2016.

Respectfully submitted,

/s/Susy Kucera
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CERTIFICATE OF SERVICE

I hereby certify that the General Counsel's Answering Brief to Respondent's Exceptions and Brief in Support of its Exceptions to Decision of Administrative Law Judge was electronically filed with the Office of the Executive Secretary of the National Labor Relations Board and served by electronic mail this 20th day of October 2016 on the following persons:

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