UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SOUTHERN STAR, INC.

Respondent.

and Case 16-ca-168143

RICHARD L. WILLIS, an Individual

Charging Party.

RESPONDENT SOUTHERN STAR, INC.'S INITIAL BRIEF TO THE BOARD

On October 20, 2016, the Board issued an Order Approving Stipulation, Granting Motion and Transferring Proceeding to the Board pursuant to a joint motion filed by Respondent Southern Star, Inc. ("Southern Star" or "Respondent"), Charging Party Richard Willis ("Willis" or "Charging Party"), and Counsel for the Acting General Counsel to waive a hearing and transfer the proceedings to the Board for a decision based on the stipulated record. Pursuant to that Order, Southern Star hereby submits this brief in support of its position that the Complaint is without merit, as the provisions challenged by the General Counsel are not overly broad and do not violate Section 8(A)(1) of the National Labor Relations Act.

I. PROCEDURAL HISTORY

Charging Party initially filed a charge alleging violations of the Act on January 19. 2016, and amended his charge on April 22, 2016. (Stip. Exs. 1(a), (c).) This case is now before the National Labor Relations Board, pursuant to a Complaint and Notice of Hearing in Case 16-CA-168143 issued on May 26, 2016, by the Regional Director for

Region 16. (Stip. Ex. 1(e).) Specifically, the Complaint alleged that through its Arbitration Agreement, Southern Star "has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act." (Stip. Ex. 1(e).) Southern Star timely filed an Answer to the Complaint on June 7, 2016. (Stip. Ex. 1(g).) The parties entered into a Joint Motion and Stipulation of Facts on August 2, 2016, which was granted by the Board on October 20, 2016.

II. STATEMENT OF FACTS

A. The Charges

The original charge in this matter was filed on January 19, 2016, and served on January 22, 2016. (Stip. Exs. 1(a), (b).) The charge alleged that Southern Star violated Section 8(a)(1) of the Act when it required employees to sign an agreement that precluded them from filing joint, class, or collective claims to address their working conditions. *Id.* Willis amended his charge on April 22, 2016, to allege that Southern Star maintained an unlawful arbitration agreement that employees would reasonably believe bars/restricts their rights to file charges with the Board. (Stip. Ex. 1(c).)

B. Southern Star's Arbitration Agreements

Southern Star is the largest Regional Service Provider in the nation for DISH. Southern Star provides installation, upgrade, and service call work for DISH customers in Oklahoma, Arkansas, Texas, Louisiana, and New Mexico.[1] Southern Star hired Willis as

[1] Southern Star stipulated to the Board's jurisdiction and its status as an employer within the meaning of the Act. (Stip. ¶¶ 6-8.)

a Technician on June 2, 2014 in its Longview, Texas office. Upon his hiring, Willis knowingly and voluntarily entered into a binding Arbitration Agreement with Southern Star. (Stip. Ex. 3.)

The Arbitration Agreement executed by Willis states, in relevant part,

> THE PARTIES AGREE TO PURSUE THEIR RIGHTS AND REMEDIES EXCLUSIVELY THROUGH BINDING ARBITRATION, INDIVIDUALLY AND NOT AS A MEMBER OR REPRESENTATIVE OF A CLASS, AND WAIVE THEIR RIGHT TO A TRIAL BY JUDGE OR JURY, BUT THEY DO NOT WAIVE ANY OTHER RIGHTS OR REMEDIES AVAIABLE UNDER APPLICABLE LAW.

(Stip. Ex. 3.)

On or about June 24, 2016, Respondent implemented a revised Agreement for all current employees and future applicants (herein called "Revised Agreement") (Stip. Ex. 4.) The revised version of the Agreement includes the following language:

> **Exclusions:** Employee understands and agrees that nothing in this agreement to arbitrate limits or prevents Employee in any way from pursuing: . . . (2) administrative claims or charges with any governmental agency, such as the Equal Employment Opportunity Commission ("EEOC"), the U.S. Department of Labor ("DOL"), the National Labor Relations Board ("NLRB"), and/or state or local equivalents . . . . Likewise, nothing in this agreement to arbitrate limits or prevents Employee in any way from participating in proceedings before any governmental agency, such as the EEOC, DOL, NLRB, and/or state or local equivalents.
>
> * * * * * *
>
> ** I understand nothing about this agreement to arbitrate prevents me from filing a charge with or participating in proceedings before any governmental agency, such as the EEOC, DOL, NLRB, or state/local equivalent. **

Id. The Revised Agreement has been distributed, implemented, maintained, and enforced for all current and future employees as of June 24, 2016. It is undisputed that the

Arbitration Agreement included as Stip. Ex. 3 is no longer in effect for any individuals employed with Southern Star as of June 24, 2016.

III. STATEMENT OF ISSUES

According to the Joint Motion and Stipulation of Facts, the issues presented in this case are 1) whether Respondent violated Section (a)(1) of the Act by promulgating and maintaining the policy requiring employees to sign the Arbitration Agreement included as Stip. Ex. 3; and 2) whether Respondent's Revised Agreement included as Stip. Ex. 4, which superseded the Arbitration Agreement, cured any violation of Section 8(a)(1) caused by the Arbitration Agreement.

IV. ARGUMENT

A. Southern Star's Arbitration Agreement (including the class/collective action waiver) does not restrict activities protected by Section 7 and is not unlawful.

Southern Star's Arbitration Agreement (including the class and collective action waiver) does not restrict activities protected by Section 7 and is not unlawful. The United States Court of Appeals for the Fifth Circuit has at least eight times considered and each time rejected the argument that class or collective action waivers in employment agreements are unenforceable as violating the NLRA. *See Employers Res. v. NLRB*, No. 16-60034, 2016 WL 6471215 (5th Cir. Nov. 1, 2016); *Dismuke v. McClinton*, No. 16-50674, 2016 WL 6122763 (5th Cir. Oct. 19, 2016); *Citi Trends v. NLRB*, No. 15-60913, 2016 WL 4245458 (5th Cir. Aug. 10, 2016); *24 Hour Fitness USA, Inc. v. NLRB*, No. 16-60005, 2016 WL 3668038 (5th Cir. June 27, 2016); *PJ Cheese, Inc. v. NLRB*, No. 15-60610, 2016 WL 3457261 (5th Cir. June 16, 2016); *Chesapeake Energy Corp. v. NLRB*,

633 F. App'x 613 (5th Cir. 2016); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015); *D.R. Horton v. NLRB*, 737 F.3d 344 (5th Cir. 2013). Specifically, in *Murphy Oil*, the Fifth Circuit held, "an employer does not engage in unfair labor practices by maintaining and enforcing an arbitration agreement prohibiting employee class or collective actions and requiring employment-related claims to be resolved through individual arbitration." 808 F.3d at 1016.

The arguments and reasoning behind the Fifth Circuit's repeated confirmation of its decisions on this issue have been briefed and argued many times before this Board. As a result, in providing support for its position that its Arbitration Agreement (including the class and collective action waiver) does not restrict activities protected by Section 7 and is not unlawful, Southern Star will remain brief and will generally follow the framework provided by the Fifth Circuit in its *D.R. Horton* decision.

First, the validity and terms of the Arbitration Agreement at issue here must be determined under the Federal Arbitration Act ("FAA"), not the NLRA. *See American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013); *CompuCredit Corp. v Greenwood*, 132 S. Ct. 665, 669 (2012); *Marmet Health Care Ctr. v. Brown*, 132 S. Ct. 1201 (2012); *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011). In *American Express*, the Supreme Court of the United States stated that, in accordance with the text of the FAA, "courts must rigorously enforce arbitration agreements according to their terms, including terms that specify *with whom* [the parties] choose to arbitrate their disputes." *American Express*, 133 S. Ct. at 2309 (internal quotations and citations omitted) (emphasis in original). The Court specifically held that a class action waiver

must be enforced according to its terms in the absence of a "contrary congressional command" in the federal statute at issue. *Id.* at 2309. Notably, the Court reasoned, "the individual suit that was considered adequate to assure 'effective vindication' of a federal right before the adoption of class-action procedures did not suddenly become 'ineffective vindication' upon their adoption." *Id.* at 2311. Further, the Court held that there is not a substantive right to the opportunity to petition for class certification under Fed. R. Civ. P. 23. *Id.* at 2310 ("One might respond, perhaps, that federal law secures a nonwaivable *opportunity* to vindicate federal policies by satisfying the procedural strictures of Rule 23 or invoking some other informal class mechanism in arbitration. But we have already rejected that proposition in *AT&T Mobility*.") (emphasis in original).

Based on similar precedent and this line of reasoning, in *D.R. Horton*, the Fifth Circuit properly considered the enforceability of class/collective action waivers in arbitration agreements under the NLRA in light of two well-developed principles: (1) in reviewing these types of arbitration agreements, "[t]he Federal Arbitration Act ("FAA") has equal importance" to the NLRA, *D.R. Horton*, 737 F.3d at 357; and (2) the right to participate in a class or collective action is not a substantive right, but rather, is a "procedural device," *id.* (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997) and *Deposit Gaur. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980)). With this framework in mind, the Fifth Circuit began its evaluation

> with the requirement under the FAA that arbitration agreements must be enforced according to their terms. Two exceptions to this rule are at issue here: (1) an arbitration agreement may be invalidated on any ground that would invalidate a contract under the FAA's "saving clause"; and (2)

> application of the FAA may be precluded by another statute's contrary congressional command.

D.R. Horton, 737 F.3d 358 (internal citations omitted).

The court first held that the "saving clause is not a basis for invalidating the waiver of class procedures in the arbitration agreement." *Id.* at 360. Specifically, the court explained, "requiring the availability of class actions 'interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.' Requiring a class mechanism is an actual impediment to arbitration and violates the FAA." *Id.* (quoting *Concepcion,* 131 S. Ct. at 1748). Given its finding that the saving clause did not stand as a barrier to the enforcement of the class/collective action waiver at issue, the court continued its analysis by considering whether the NLRA contains a congressional command to override the FAA.

The court explicitly held that it does not:

> Neither the NLRA's statutory text nor its legislative history contains a congressional command against the application of the FAA. Therefore, the [Arbitration Agreement] should be enforced according to its terms unless a contrary congressional command can be inferred from an inherent conflict between the FAA and the NLRA's purpose. . . . [W]e do not find such a conflict.

Id. at 361. Ultimately, based on this reasoned analysis of the various statutes and issues affecting the enforceability of class/collective waivers in employment arbitration agreements, the Fifth Circuit held that arbitration agreements containing class waivers are enforceable. *Id.* at 362. The Fifth Circuit summarized and confirmed its *D.R. Horton* decision in *Murphy Oil v. NLRB*:

> We held: (1) the NLRA does not contain a "congressional command overriding" the Federal Arbitration Act ("FAA"); and (2) "use of class action procedures . . . is not a substantive right" under Section 7 of the NLRA. This holding means an employer does not engage in unfair labor practices by maintaining and enforcing an arbitration agreement prohibiting employee class or collective actions and requiring employment-related claims to be resolved through individual arbitration.

808 F.3d at 1016 (internal citations omitted).[2]

Based on the foregoing reasoning and controlling Fifth Circuit precedent, it is clear that Southern Star did not – and does not – violate the Act in any way by promulgating and maintaining a policy requiring employees to sign an Arbitration Agreement that includes a class/collective action waiver. In other words, Southern Star has not committed any unfair labor practice by requiring employees to relinquish their right to pursue class or collective claims in all forms by signing the Arbitration Agreements at issue here. Accordingly, the Complaint is without merit.

Finally, the Complaint is contrary to controlling Fifth Circuit authorities. Southern Star has repeatedly notified the General Counsel of its intention to appeal any adverse ruling in this case to the Fifth Circuit. Under the *D.R. Horton* and *Murphy Oil* line of Fifth Circuit decisions, the General Counsel has no legal basis for asserting that Southern Star's class and collective action waiver violates the Act in any way. Further, any decision by the Board to disregard the Fifth Circuit's controlling precedent on this

[2] The Fifth Circuit also noted, "Several of our sister circuits have either indicated or expressly stated that they would agree with our holding in *D.R. Horton* if faced with the same question: whether an employer's maintenance and enforcement of a class or collective action waiver in an arbitration agreement violates the NLRA." *Murphy Oil*, 808 F.3d 1018 n.3 (citing cases from the 2nd, 8th, 9th, and 11th Circuits).

issue will be grounds for the Court to issue a writ and/or hold the Board in contempt for its nonacquiescence. *See Murphy Oil*, 808 F.3d at 1018.

B. Nothing in Southern Star's Arbitration Agreement could be reasonably construed to prohibit the exercise of any substantive right under the Act.

Next, Southern Star's Arbitration Agreement does not violate the Act by prohibiting employees from engaging in protected concerted activity or filing charges with the Board, and nothing in the Arbitration Agreement between Charging Party and Respondent could be reasonably construed to prohibit the exercise of any such substantive right under the Act. In fact, the agreement specifically states, in large capital letters, "THEY DO NOT WAIVE ANY OTHER RIGHTS OR REMEDIES AVAILABLE UNDER APPLICABLE LAW." (Stip. Ex. 3.) Furthermore, the fact that Charging Party – on two separate occasions – did file an unfair labor practice charge with the NLRB is objective evidence that the Agreement was not construed by employees to prohibit their right to file such charges. Any other interpretation of such clear language would be unreasonable.

In addition, as of June 24, 2016, Respondent implemented a revised Agreement for all current employees and future applicants (herein called "Revised Agreement"). (Stip. Ex. 4). The revised version of the Agreement expressly informs employees they are permitted to file charges with the Board. In fact, employees signing the Agreement acknowledged, "[N]othing about this agreement to arbitrate prevents me from filing a charge with or participating in proceedings before any governmental agency, such as the EEOC, DOL, NLRB, or state/local equivalent." (Stip. Ex. 4.) The Revised Agreement

has been distributed, implemented, maintained, and enforced for all current and future employees as of June 24, 2016. The Arbitration Agreement included as Stip. Ex. 3 is no longer in effect for any individuals employed with Southern Star as of June 24, 2016. Based on the clear language in the Revised Agreement, "it would be unreasonable for an employee to construe the [Revised Agreement] as prohibiting the filing of Board charges when the agreement says the opposite." *Murphy Oil*, 808 F.3d at 1020.

Even if Southern Star's pre-June 24, 2016 Arbitration Agreement could have somehow reasonably been construed to prohibit the exercise of any right under the Act (which it could not have), Southern Star's implementation of a revised Agreement with explicit language affirming such rights cured any perceived or potential violation of the Act. To assert that an employee would in any way perceive the statement, "nothing about this agreement to arbitrate prevents me from filing a charge with or participating in proceedings before any governmental agency, such as the EEOC, DOL, NLRB, or state/local equivalent" to prevent them from filing a charge with the Board is outlandish and simply an insult to the intelligence of Southern Star's employees. Accordingly, it is clear that Southern Star's Arbitration Agreement does not violate the Act by prohibiting employees from engaging in protected concerted activity or filing charges with the Board

C. The Board's Claims Regarding The Arbitration Agreement Are Time-Barred.

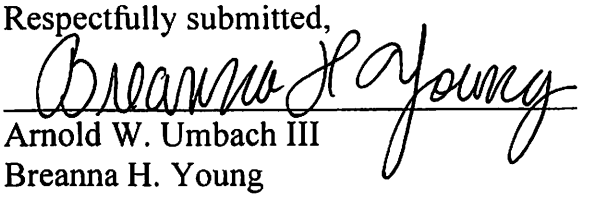
Finally, the Complaint is barred, in whole or in part, by the six-month limitations period set forth in Section 10(b) of the Act. Section 10(b) of the Act requires that "no complaint shall issue based upon any unfair labor practice occurring more than six

months prior to the filing of the charge with the Board." 29 U.S.C. § 160(b). Here, Willis entered into the Arbitration Agreement with Southern Star on June 2, 2014. In doing so, Willis created a voluntary and binding contract in which he agreed to arbitrate any employment-related disputes that might arise during his employment. However, Willis did not file his charge related to the lawfulness of the Agreement until January 19, 2016 – approximately one year and seven months after his execution of the agreement. As a result, his charge is time-barred.

V. CONCLUSION

Southern Star, like countless businesses across the country, asks its employees to sign an arbitration agreement upon hiring. Southern Star does so in an effort to control costs and minimize the risks inherent in doing business. It does not do so to restrict or prohibit the exercise of any statutory rights of its employees and to find otherwise is unreasonable. Indeed, neither of Southern Star's Arbitration Agreements (including the class/collective action waivers) restricts activities protected by Section 7 and neither is unlawful. Likewise, nothing in the Arbitration Agreement between Southern Star and Charging Party and nothing in the Revised Agreement could be reasonably construed to probit the exercise of any substantive right under the NLRA. Because the provisions challenged by the General Counsel are not overly broad and do not violate Section 8(a)(1) of the NLRA, the Complaint is with merit and due to be dismissed. Finally, the Complaint is barred, in whole or in part, by the six-month statute of limitations period set forth in Section 10(b) of the Act.

Respectfully submitted,



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AFFIDAVIT OF SERVICE OF SOUTHERN STAR'S INITIAL BRIEF TO THE BOARD

I, the undersigned, being duly sworn say that on **December 1, 2016**, I electronically filed the above-entitled document via the Agency's website at www.nlrb.gov, and served said document by **electronic mail**, upon the following persons, addressed to them at the following email addresses:

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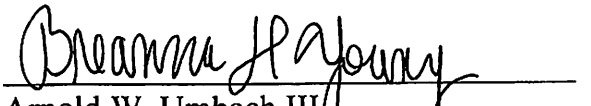

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