UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TBC CORPORATION and **TBC RETAIL GROUP, INC.,** a wholly-owned subsidiary of TBC CORPORATION **and** **LUIS RODRIGUEZ**, an Individual	**CASE 12-CA-157478** **12-CA-170543**

RESPONDENTS' REPLY BRIEF TO COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENTS' EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND RESPONDENTS' ANSWERING BRIEF TO COUNSEL FOR THE GENERAL COUNSEL'S CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

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I. ARGUMENTS PERTAINING TO THE CLASS ACTION WAIVER IN THE ARBITRATION AGREEMENT.

A. The Board is Bound by the Supreme Court's Decision in *Rent-A-Center, West, Inc. v. Jackson*.

In his Answering Brief, Counsel for the General Counsel ("CGC") concedes that the National Labor Relations Board ("NLRB") and its Administrative Law Judges ("ALJ") are bound by the United States Supreme Court's decisions. However, CGC argues that *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010) is inapplicable here "[b]ecause [it] does not either implicitly or explicitly bar or limit the Board's authority to protect Section 7 activity." (Answering Brief at 7). CGC then conflates this issue with the Board's articulated standard for assessing whether arbitration agreements with class action waivers violate Section 8(a)(1) of the Act under the *Lutheran Heritage Village-Livonia* test.

CGC's narrow interpretation of the Board's obligation under *Rent-A-Center* is erroneous for a myriad of reasons:

First, the significance of *Rent-A-Center* as applied to this case is the Supreme Court's holding that a delegation clause is enforceable. Specifically, if the parties specify that an arbitrator, or a court, must resolve any dispute relating to the enforceability of an arbitration agreement, that clause is enforceable. The only exception recognized by the Supreme Court is where the plaintiff specifically challenges the validity of the delegation clause (which neither CGC nor the Charging Party has done here). ***The Supreme Court held that even it must defer to the delegation clause*** and, pursuant to the parties' contractual obligation, an arbitrator, not the Supreme Court, was required to consider whether the arbitration agreement was enforceable**.** *Id.* at 70–76.[1] Although the CGC asserts that *Rent-A-Center* does not "limit the Board's authority to

[1] CGC's contention in his Answering Brief that in *Rent-A-Center*, "the Court held that under the FAA, where an arbitration agreement includes language that the arbitrator will determine the enforceability of the agreement, if a

protect Section 7 activity," (Answering Brief at 7), *Rent-A-Center* unquestionably held that the Board cannot be the body that ***decides*** enforceability of an arbitration agreement, where the agreement itself delegates that authority to a different tribunal. In his Answering Brief, CGC therefore implies – without articulating a basis for the implication – that this obligation to defer to a delegation clause, which unquestionably applies to the United States Supreme Court, the United States Courts of Appeal, the United States District Courts, and all of the various states courts throughout the country, does not apply to the Board, an administrative agency. This position is pure poppycock.

Second, CGC implies that the Board's authority to protect Section 7 activity, is somehow a separate inquiry than that expressly stated in the Arbitration Agreement's delegation clause, i.e. that "[a]ny issue ***concerning the enforceability or validity of this waiver***, must be decided by a court. . . ." [JX-2 at 1, subsection 2] (emphasis added). That is simply not the case because there is no question that both inquiries are the same; to find that Respondents violated Section 8(a)(1) of the Act, the Board must first find that the agreement is unlawful under Section 7 (i.e., that it is unlawful, unenforceable, and invalid). *See Murphy Oil U.S.A., Inc.*, 361 NLRB No. 72 (2014) ("Having reaffirmed the *D.R. Horton* rationale, we apply it here to find that the [r]espondent has violated Section 8(a)(1) of the Act by requiring its employees to agree to resolve all employment-related claims through individual arbitration, and by taking steps to enforce the

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party challenges the enforceability of that particular agreement, then the district court considers the challenge, but if a party challenges the enforceability of the agreement as a whole, then such challenge is for the arbitrator to decide," (Answering Brief at 7) (citing 561 U.S. 63 (2010, slip op. at 3–12)) is imprecise — in *Rent-A-Center*, the Supreme Court stated that "unless [the plaintiff] challenged the ***delegation provision specifically***, we must treat it as valid under § 2 [of the Federal Arbitration Act ("FAA")], and must enforce it under §§ 3 and 4 [of the FAA], leaving any challenge to the validity of the Agreement as a whole for the arbitrator." 561 U.S. at 72. CGC did not contest the validity of the delegation clause either in his Post-Trial Brief to the Administrative Law Judge and does not do so in his Answering Brief. Thus, as Respondents' argued in their Brief in Support of Exceptions, there is no question under Supreme Court jurisprudence that the delegation clause in the parties' Arbitration Agreement should be enforced as written, and the Board must defer to a Court to determine whether the Arbitration Agreement, as a whole, is enforceable.

unlawful agreements in Federal district court . . ."); *D.R. Horton, Inc.*, 357 NLRB 2277, 2278–80 (2012) (finding that an arbitration agreement containing a class action waiver was ***unlawful*** because the agreement "clearly and expressly bars employees from exercising substantive rights that have long been held protected by Section 7 of the NLRA."); *see also* ALJD at 7:20–24 ("unless and until the Supreme Court holds otherwise, an administrative law judge is bound to follow the Board's controlling precedent finding class action waivers ***unlawful***."). This is the precise inquiry that the arbitration agreement delegates to a court to determine.[2]

Third, it is entirely irrelevant whether in *Rent-A-Center*, the Supreme Court considered "the interplay of the Federal Arbitration Act (FAA) and the NLRA, but instead, focused exclusively upon the interplay between the FAA and the authorities of the federal district courts." (Answering Brief at 6). CGC cites to no provision in the NLRA that purportedly effects the Supreme Court's interpretation of a delegation clause in an arbitration agreement and Respondents are not aware of any. Moreover, the fundamental premise in *Rent-A-Center* was that "[t]he FAA thereby places arbitration agreements on an equal footing with other contracts, and requires courts to enforce them according to their terms." *Id.* at 67. Thus, *Rent-A-Center* was ultimately a question of contract interpretation, regardless of whether the contract implicated the FAA or whether the delegation clause was contained in an arbitration agreement. There is no question that the Supreme Court, not the NLRB, is the ultimate authority on contract interpretation and it has definitely determined that:

> The delegation provision is an agreement to arbitrate threshold issues concerning the arbitration agreement. We have recognized that parties can agree to arbitrate 'gateway' questions of 'arbitrability' . . . An agreement to arbitrate a gateway issue is

[2] As Respondents explained in their Brief in Support of Exceptions, the Board is not a "court." *See* Respondent's Answering Brief at Sec. IV.A; *see also Shepard v. NLRB*, 459 U.S. 344, 351 (1983) ("The Board is not a court; it is not even a labor court; it is an administrative agency charged by Congress with the enforcement and administration of the federal labor laws.").

> simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement as it does on any other.

561 U.S. at 68–69. Thus, the significance of *Rent-A-Center* is that, regardless of whether the issues presented arise under the NLRA or other law, the parties have the right to contractually delegate issues of enforcement to a specified tribunal.

Fourth, CGC's assertion that "the proper test for determining whether class action waivers contained in arbitration agreements constitute a rule that violates Section 8(a)(1) of the Act is that set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004)" (Answering Brief at 7) has no bearing whatsoever on the applicability of *Rent-A-Center* in this case. CGC, Charging Party, and/or Plaintiffs can certainly argue to the Court that the *Lutheran Heritage Village-Livonia* test is the applicable standard and nothing in the delegation clause precludes them from doing so.

For these reasons and the reasons stated more fully in Respondents' Brief in Support of Exceptions, *Rent-A-Center* requires enforcement of the arbitration agreement's delegation clause, and it precludes adjudication by the Board of the issue of enforceability of the class and collective action waiver.

B. <u>There is No Substantive Right Under the NLRA for Employees to Participate in Collective Litigation.</u>

As an initial matter, CGC has not responded to Respondents' argument that the Board's own internal litigation procedures are contrary to its interpretation that the Act creates a substantive right for employees to pursue collective adjudication, and, therefore, he concedes that point.[3]

[3] Given the CGC's extensive experience litigating Board cases, if there was anyone who could contest Respondents' explanation of internal Board litigation procedures, it would be CGC.

Moreover, the additional cases that CGC cites in his Answering Brief for the proposition that Section 7 of the Act creates a substantive right for employees to pursue collection action are all recent Board cases that rely entirely on the Board's rationale in *D.R. Horton* and *Murphy Oil*. *See Bristol Farms*, 364 NLRB No. 34 (2016) (applying the Board's decision in *D.R. Horton* and *Murphy Oil*); *Nijar Realty Inc., d/b/a Pama Management*, 363 NLRB No. 38 (2015) (applying the Board's decision in *D.R. Horton* and *Murphy Oil*); *Beyoglu*, 362 NLRB No. 152 (2015) (relying entirely on the Board's opinions in *D.R. Horton* and *Murphy Oil*). Respondents have addressed the Board's analysis in *D.R. Horton* and *Murphy Oil* in their Brief in Support of Exceptions and CGC's reliance on subsequent cases that simply cite to *D.R. Horton and Murphy Oil*, does not make the Board's analysis in those cases any more persuasive. The CGC's position assertion that there is a substantive right under Section 7 to pursue collective action should be rejected for the reasons stated in Respondents' Brief in Support of Exceptions.

II. ARGUMENTS PERTAINING TO REPUDIATION OF THE NO SOLICTATION POLICY

In his Answering Brief, CGC only asserts that Respondents' repudiation was "ineffective because Respondents neither notified employees of the unfair labor practices being remedied nor were their actions free from other proscribed illegal conduct," and for no other reason.[4] (Answering Brief at 19). As explained in Respondents' Brief in Support of Exceptions, CGC's reliance on *Lily Transportation Corporation* and *Douglas Division, The Scott & Feltzer Company*, are both misplaced. (*See* Respondent's Brief in Support of Exceptions at III.B.) In

[4] CGC also states that Respondents' "efforts to repudiate and remedy this violation occurred more than four (4) months after the Board's issuance of its ***original*** Complaint." (Answering Brief at 19). CGC's representation is deceptive, however, because he conveniently omits that the original Complaint contained no allegation whatsoever that Respondents' violated Section 8(a)(1) by maintaining an overly broad no solicitation policy. (GCX-1(g)). In fact, Charge No. 12-CA-170543, which first raised this issue, was not filed with the Board until February 24, 2016 (more than three months after the Board issued its initial complaint). (GCX-1(n)). Thus, the ALJ correctly held that Respondent's repudiation was timely. (ALJD 10:15–19).

response, CGC relies entirely on cases where the employer argued that revision of the unlawful handbook provisions, without any accompanying notice whatsoever to employees about the handbook revision, was insufficient repudiation. Here, there is no dispute that Respondents' posted a notice simultaneously with the 2016 Associate Handbook revisions. (ALJD 6:6–17; JX-1 at ¶¶ 33–35; JX-19). The language in Respondent's posting notice is nearly identical to the posting language that the Board found to be an effective repudiation in *Atlas Logistics*, 357 NLRB No. 353, 357–58 (2011), and in that case the Board also affirmed that it was not dispositive that the repudiation did not occur in a context free of unremedied unfair labor practices so long as the other unfair labor practices were "not of a nature that would tend to undermine the assurances that [the employer] gave to employees concerning the [unlawful] work rules." Here, the only unremedied alleged unfair labor practices concern the class and collective action waiver, which are of an entirely different nature than the alleged unlawful solicitation policy. *Id; see also* Respondent's Brief in Support of Exceptions at Section III. B. CGC has articulated no reason whatsoever why the Board's decision in *Atlas Logistics* is inapplicable here.[5]

CGC also asserts that "[t]here is no evidence to establish that Respondents posted the April 2016 notice of the revised no solicitation policy at other affiliates of Respondent Corporation." (Answering Brief at 16). This is a clear misstatement of the Joint Motion and Stipulated Record, wherein the parties agreed that "Respondents acknowledge in addition to the dissemination and maintenance of the Arbitration Agreement, 2010 Associate Handbook, 2016 Associate Handbook and Posted Notices by TBC Corporation to employees of Respondents, these documents were disseminated and maintained with respect to employees of several, but not

[5] Rather, CGC ignores this case entirely.

all of, Respondents' subsidiaries." (JX-1 at ¶ 36). Thus, the record establishes that the dissemination of the Posted Notice was coterminous (with respect to breadth of dissemination) with the dissemination of the 2010 Associate Handbook. CGC has no factual basis for stating that dissemination of the 2010 Associate Handbook was any broader than dissemination of the Posted Notice. To the contrary, the language in the Posted Notices and the 2016 Associate Handbook were disseminated at all subsidiary locations where the 2010 Associate Handbook had been in effect.

III. PROPOSED REMEDIES

A. Proposed Attorney Fees'

Respondents' have argued in their Brief in Support of Exceptions that many of the remedies sought by CGC are inappropriate. (*See* Respondents' Brief in Support of Exceptions at IV.G.) Even CGC admits that where a charging party has opposed a motion to compel arbitration, the Board has only ordered payment of "reasonable litigation expenses and attorneys' fees." (Answering Brief at 13). As argued by Respondents in their Brief in Support of Exceptions, neither Charging Party nor Plaintiffs in the Lawsuit have incurred any "reasonable" attorney fees for opposing Respondents' Motion to Compel. (Brief in Support of Exceptions at IV.G. 3.) For example, Plaintiff Desimoni requested an evidentiary hearing, specifically to contest that he was never provided and did not sign the Arbitration Agreement. (JX-14 at 1, 3). Based on Plaintiff Desimoni's testimony during the evidentiary hearing, the Magistrate Judge found "Desimoni's testimony to be less than credible." (JX-14 at 8, 13). Rodriguez did not testify at all or otherwise introduce any evidence that he did not sign the Arbitration Agreement. (JX-14 at 8, 13). Neither did Charging Party nor Plaintiffs ever argue to the District Court that that the Arbitration Agreement was unenforceable under the NLRA or that *D.R. Horton* or *Murphy Oil* were applicable. (JX-12). Thus, the fees or expenses incurred in relation to the

evidentiary hearing or to any pleadings filed by Plaintiffs regarding the Motion to Compel Arbitration were not "reasonable," and should not be awarded to Plaintiffs and/or Charging Party.

B. CGC's Proposed Order to the District Court (CGC's Cross Exceptions No. 3)

Respondents also deny that the ALJ erred by failing to order Respondents to file a motion to vacate with the United States District Court for the Middle District of Florida ("District Court"), which is an unnecessary remedy. In his decision, the ALJ has already ordered Respondents to:

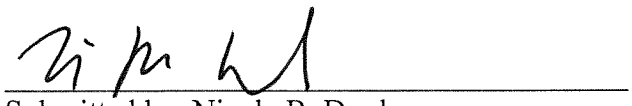
> Notify arbitral or judicial panels, if any, where Respondents have attempted to enjoin or otherwise prohibit employees from bringing or participating in class or collective actions, that it is withdrawing those objections and that it [sic.] no longer seeking to compel arbitration pursuant to the Arbitration Agreement.

(ALJD at 12:21–24). It is irrelevant whether the notice filed with the District Court is a motion to "withdraw objections" or a motion "vacate."

IV. CONCLUSION

Accordingly, for the reasons stated above and in Respondents' Brief in Support of Exceptions to the Administrative Law Judge's Decision, Respondents respectfully submits that the Complaint should be dismissed in its entirety.

This 12th day of December 2016.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was filed electronically with the National Labor Relations Board at www.nlrb.gov and was duly served electronically upon the following named individuals on this 12th day of December 2016:

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Attached E-File(s):
Reply Brief to Answer to Exceptions TBC - Rodriguez - Respondent's Reply Brief to CGC's Answering Brief to Respondent's Exceptions to the ALJ's Decision and Answering Brief to CGC's Cross-Exceptions to the ALJ's Decision (12-12-2016).pdf