

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 15**

MUY PIZZA SOUTHEAST, LLC,	)	Case No. 15-CA-174267
	)	
Respondent,	)	
and	)	<b>RESPONDENT MUY PIZZA</b>
	)	<b>SOUTHEAST, LLC'S</b>
STEVEN GREGORY COLVIN,	)	<b>MEMORANDUM OF LAW IN</b>
	)	<b>SUPPORT OF EXCEPTIONS TO</b>
an Individual.	)	<b>ADMINISTRATIVE LAW</b>
	)	<b>JUDGE'S DECISION</b>

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**INTRODUCTION**

The Administrative Law Judge's ("ALJ") recommendation that the Board deem Respondent's collective action waiver a violation of the National Labor Relations Act ("NLRA") is based entirely upon the Board's frequently rejected position that such waivers contravene the NLRA. *See, e.g., Murphy Oil USA*, 361 NLRB No. 72; *Select Temporaries, LLC & Dioselin Gray*, 31-CA-157821, 2016 WL 4772318 (Sept. 13, 2016). The Board's policy is at odds with almost two decades of U.S. Supreme Court precedent mandating that arbitration agreements must be enforced as written, in accordance with the Federal Arbitration Act ("FAA"). Supreme Court precedent also makes it clear that the NLRA could only override the FAA's mandate if its language expressly so provided. There is no such expression in the NLRA, and an override of the FAA cannot be inferred from the NLRA's general protection of certain concerted activities or from the underlying tenets of labor law and policy. Additionally, the Board's position is inconsistent with the Supreme Court's frequent recognition that a statutory right to bring a class or collective action is merely a procedural right, not a substantive right.

Moreover, as the ALJ recognized, the Board's position has been rejected by numerous federal courts. In particular, the U.S. Court of Appeals for the Fifth Circuit has twice rejected the Board's position, as have several district courts within the Eleventh Circuit. Because Respondent is a Texas limited liability company with operations in Florida, the law of those circuits will control the ultimate resolution of this issue. In addition, beyond the U.S. Supreme Court and the Fifth and Eleventh Circuits, the Board's position is out of step with the majority of other federal circuits. Accordingly, MUY takes exception to the ALJ's recommendation and urges the Board to reconsider its position and find that Respondent's conduct and its arbitration agreement do not violate the NLRA.

### **BACKGROUND**

On February 8, 2016, Charging Party Steven Gregory Colvin ("Colvin") filed a putative collective action in the U.S. District Court for the Northern District of Florida, alleging that his employer, Respondent MUY Pizza Southeast, LLC ("MUY"), had failed to fully reimburse him for expenses he incurred using his personal vehicle to deliver MUY's products to customers. This, he alleged, reduced his "net" wage to less than the federal minimum, in a violation of the Fair Labor Standards Act ("FLSA"). It was later determined that Colvin was subject to an arbitration agreement, and Colvin's counsel shortly thereafter agreed to dismiss the federal action. The District Court dismissed the federal action on April 18, 2016.

On April 21, 2016, Colvin filed a Statement of Claim with the American Arbitration Association ("AAA"), raising essentially the same claims he had raised in the federal action, and purporting to bring the arbitration as a collective arbitration on behalf of himself and other employees. On May 31, 2016, MUY filed its Answer to Statement of Claim, denying the allegations and asserting that, pursuant to the Arbitration Agreement, Colvin had waived any right to arbitrate his claims in a class or collective manner.

On April 18, 2016, counsel for Colvin filed the instant charge with the Board, alleging that the Arbitration Agreement and its collective action waiver provision violated the NLRA. On or about June 2, 2016, MUY filed its initial Position Statement and exhibits with the Board. On July 28, 2016, the Board's Regional Director for Region 15 issued a Complaint alleging that MUY violated the NLRA. In November 2016, MUY and the Board's General Counsel filed position briefs with the ALJ overseeing the Board proceeding.<sup>1</sup> On December 21, 2016, the ALJ issued a decision in which he recommended that the Board deem MUY's collective action waiver in violation of the NLRA. MUY now presents its Exceptions to the ALJ's Decision.

### **EXCEPTIONS**

MUY takes exception to the ALJ's Decision for the following reason:

The ALJ's decision is contrary to law because MUY's arbitration agreement and the collective action waiver contained therein fully comport with the NLRA, the FLSA, and the FAA, as established by controlling federal case law.

### **ARGUMENT**

Since *D.R. Horton*, 357 NLRB No. 184, the Board has held that class or collective action waivers contained in arbitration agreements, and their enforcement, violate Sections 7 and 8(a)(1) of the NLRA. See *D.R. Horton*, 357 NLRB No. 184, 2277-80. Yet even the ALJ's recommendation recognizes that "several [federal] circuit courts" have rejected this position. Similarly, the ALJ's recommendation asserts that this case "is controlled" by the Board's decisions in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014)—a decision that the Fifth Circuit unequivocally refused to enforce. The ALJ asserts that he is bound to apply Board precedent. However, the Board's current policy is contrary to U.S. Supreme Court precedent. It is all but

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<sup>1</sup> The parties stipulated to the undisputed facts of the case and agreed to proceed without a hearing.

certain that the Supreme Court would reject the Board's position, just as the Fifth, Eighth and Second Circuits have done. *See D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015); *Cellular Sales of Missouri, LLC v. Nat'l Labor Relations Bd.*, 824 F.3d 772 (8th Cir. 2016); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2nd Cir. 2013). And numerous federal district courts have done likewise. Accordingly, MUY takes exception to the ALJ's decision and recommendation and requests that the Board reverse its policy and reject the ALJ's recommendation.

**I. THE ALJ'S RECOMMENDATION IS CONTRARY TO U.S. SUPREME COURT PRECEDENT STRONGLY FAVORING THE ENFORCEMENT OF COLLECTIVE ACTION WAIVERS IN ARBITRATION AGREEMENTS.**

The Federal Arbitration Act (the "FAA") provides that written arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract. 9 U.S.C. § 2. Consistent with this mandate, the Supreme Court has broadly recognized that arbitration agreements are to be treated as any other contract and the "overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements *according to their terms* so as to facilitate streamlined proceedings." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344, 131 S. Ct. 1740, 1748, 179 L. Ed. 2d 742 (2011) (emphasis added). Consistent with the FAA's text, "courts must rigorously enforce arbitration agreements according to their terms, including terms that specify *with whom* [the parties] choose to arbitrate their disputes, and the rules under which the arbitration will be conducted." *Am. Exp. Co. v. Italian Colors Rest.*, 563 U.S. \_\_\_\_, \_\_\_\_, 133 S. Ct. 2304, 2309, 186 L. Ed. 2d 417 (2013) (quotations and citations omitted). Further, the FAA's requirement that arbitration agreements must be enforced according to their terms applies to federal statutory claims unless it "has been 'overridden by a contrary congressional command.'" *CompuCredit Corp. v.*

*Greenwood*, 132 S. Ct. 665, 669, 181 L. Ed. 2d 586 (2012) (quoting *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 226, 107 S.Ct. 2332, 96 L.Ed.2d 185 (1987)).

More specifically, a trilogy of U.S. Supreme Court decisions has established a framework strongly favoring the enforcement of class or collective action waivers within arbitration agreements. The Board’s position is directly contrary to those decisions. The first, *Gilmer v. Interstate/Johnson Lane Corp.*, held that the fact that the Age Discrimination in Employment Act (“ADEA”) provides a *procedural* right for collective actions does not bar the enforcement of a collective action waiver in an arbitration agreement. 500 U.S. 20, 32, 111 S. Ct. 1647, 1655, 114 L. Ed. 2d 26 (U.S. 1991). The Supreme Court determined that “the fact that the ADEA provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.” *Id.* at 30, 111 S.Ct. at 1654. The Court also rejected *Gilmer*’s claim that arbitration agreements are unenforceable in the ADEA context due to the unequal bargaining power between employers and employees, concluding that “[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.” *Id.* at 33, 111 S.Ct. at 1655. Thus, *Gilmer* demonstrates that even in the employment context, the fact that a federal statute provides a procedural mechanism for collective action does not otherwise invalidate a collective action waiver in an arbitration agreement.<sup>2</sup>

Next, in *AT&T Mobility LLC v. Concepcion*, the Supreme Court invalidated a California law deeming certain class action waivers in consumer arbitration agreements unconscionable as a matter of law. 563 U.S. 333, 340-41, 131 S. Ct. 1740, 1746-47, 179 L. Ed. 2d 742 (2011). The Court recognized that “[r]equiring the availability of classwide arbitration interferes with the

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<sup>2</sup> It should be noted that the collective action procedure set forth in the ADEA—which the Supreme Court held to be merely a *procedural* right—is *identical* to the collective action procedure in the FLSA at issue in this case.

fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” *Id.* at 344, 131 S. Ct. at 1748. The Court further explained that “class arbitration, to the extent it is manufactured by [the California statute] rather than consensual, is inconsistent with the FAA,” and thus preempted. *Id.* at 348, 131 S. Ct. at 1750-51. The Court noted that “the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate a procedural morass than final judgment.” *Id.*, 131 S. Ct. at 1751. L. Ed. 2d 742 (2011). The Court concluded that states do not have license to “require a procedure that is inconsistent with the FAA.” *Id.* at 351, 131 S. Ct. at 1753.

Finally, in *Am. Exp. Co. v. Italian Colors Rest.*, the Supreme Court reaffirmed the enforceability of class action waivers in arbitration agreements. 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013). There, plaintiffs argued that enforcement of the class action waiver in the contract at issue “would contravene the policies of the antitrust laws” underlying their claims. *Id.* at 2309, 186 L. Ed. 2d 417 (2013). The Court disagreed, because the antitrust laws “do not ‘evin[c]e an intention to preclude a waiver’ of class-action procedures.” *Id.*, 2309, 186 L. Ed. 2d 417. The Court also rejected the argument that even in the absence of a “congressional command” precluding class action waivers, such waivers should still be deemed unenforceable where they might bar the “effective vindication” of a plaintiff’s rights. *Id.* at 2310, 186 L. Ed. 2d 417. Recalling *Gilmer* and *Concepcion*, the Court explained that ensuring that plaintiffs possessed an “effective” means of litigating, by itself, was not reason enough to invalidate facially valid class action waivers. *Id.* at 2311–12, 186 L. Ed. 2d 417. The Court noted that such a rule would require the judge in each case to assess whether a plaintiff could achieve “effective vindication” through bilateral arbitration, which “would undoubtedly destroy the prospect of speedy

resolution that arbitration in general, and bilateral arbitration in particular, was meant to secure,” and as a result would be inconsistent with the FAA. *Id.* at 2312, 186 L. Ed. 2d 417.

As these cases demonstrate, the Supreme Court has consistently and strongly favored the enforcement of class and collective action waivers in both consumer and employment contexts. The common principle underlying each of these cases is the Court’s unwavering recognition that in enacting the FAA, Congress intended to promote and facilitate private arbitration, and that the enforcement of class and collective action waivers is central to achieving that goal. Further, the Supreme Court has been unwilling to infer a “contrary congressional command” from abstract principles, such as the general framework of, or policy underlying, a particular statute in order to override the FAA’s presumption in favor of class and collective action waivers. Thus, to affirm the Board’s position, the Supreme Court would have to conjure a contrary congressional command from the NLRA’s general protection of concerted activity, or from labor policy generally, effectively turning its back on all of the principles it has articulated in its prior decisions. For that reason, the Board’s position that class or collective action waivers violate the NLRA is unlikely to withstand Supreme Court scrutiny.

Accordingly, MUY urges the Board to reverse its policy in view of Supreme Court precedent and reject the ALJ’s recommendation.

**II. THE FIFTH AND ELEVENTH CIRCUITS, AS WELL AS A MAJORITY OF OTHER CIRCUITS, HAVE HELD THAT THE NLRA DOES NOT OVERRIDE THE FAA, REQUIRING ENFORCEMENT OF THE COLLECTIVE ACTION WAIVER.**

Should the Board persist in its position that class and collective action waivers violate the NLRA, the Fifth Circuit or the Eleventh Circuit will ultimately have jurisdiction over this case. *See* 29 U.S.C. § 160(f) (“Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any United States court

of appeals in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business...”).<sup>3</sup> Consistent with the U.S. Supreme Court’s pro-arbitration stance discussed above, decisions from within each of these circuits demonstrate that neither would enforce a Board decision finding that MUY’s conduct and arbitration agreement violate the NLRA.

The Fifth Circuit has serially rejected the Board’s position. First, in *D.R. Horton, Inc. v. NLRB*, the Fifth Circuit considered and rejected the NLRB’s view that collective action waivers violate the NLRA. 737 F.3d 344 (5th Cir. 2013). In a prior agency action, the Board had concluded that an agreement precluding employees from filing joint, class, or collective claims relating to wages, hours or working conditions “unlawfully restricts employees’ Section 7 right to engage in concerted action for mutual aid or protection . . . .” *D.R. Horton*, 357 NLRB No. 184, 2277. The Board opined that Section 7 of the NLRA provides employees with a substantive right to act in concert. *Id.* at 2278. It then suggested that the at-issue waiver interfered with that right. *Id.* at 2280. The Board also felt that the waiver was contrary to the Norris-LaGuardia Act. *Id.* at 2281 (citing 29 U.S.C. §§ 102 and 103). Finally, the Board concluded that there was no conflict between its interpretation of the NLRA and the pro-arbitration purposes of the FAA. *Id.* at 2283.

On appeal, the Fifth Circuit took issue with each of the Board’s predicate assumptions. Noting that the Board had failed to strike the proper balance between the NLRA and the FAA, the Court first held that the right to proceed in a class or collective fashion is procedural, not substantive. 737 F.3d at 357 and 361. Next, the Court rejected the Board’s conclusion that, to the extent there was a conflict between the NLRA and the FAA, the FAA would have to yield, in

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<sup>3</sup> MUY is a Texas LLC with operations in Florida and other southeastern states.

part, because the FAA would, of necessity, also be in conflict with the Norris-LaGuardia Act. *See id.* at 358-59. The Court found no expression of congressional intent that either the NLRA or the Norris-LaGuardia Act would preclude application of the FAA and its requirement that arbitration agreements be enforced according to their terms. *See id.* at 360-61.

The Fifth Circuit reached the same conclusions in *Murphy Oil USA, Inc. v. NLRB*. 808 F.3d 1013 (5th Cir. 2015). Despite the Fifth Circuit’s previous decision in *D.R. Horton*, the Board stated in *Murphy Oil USA* that “*D.R. Horton* was correctly decided by the Board.” *Murphy Oil USA*, 361 NLRB No. 72 at 5. On appeal, the Fifth Circuit again reversed the Board, holding that, “Murphy Oil committed no unfair labor practice by requiring employees to relinquish their right to pursue class or collective claims in all forums by signing the arbitration agreements at issue here.” *Murphy Oil*, 808 F.3d at 1018. Nonetheless, the ALJ here explicitly relied on the overruled *Murphy Oil* decision in issuing its adverse recommendation regarding MUY.

Further, it is noteworthy that even before being overruled by the Fifth Circuit, *Murphy Oil* elicited well-reasoned dissents from Members Miscimarra and Johnson. *Murphy Oil*, 361 NLRB No. 72 at 22 and 35. In particular, Member Miscimarra pointed out that nothing in the NLRA vested the Board with the authority “to dictate what internal procedures must govern non-NLRA claims adjudicated by courts and agencies other than the NLRB,” and therefore the Board lacked the authority to conclude that a class waiver constituted a violation of Section 8 of the NLRA. *Id.* at 22-23 (emphasis in original). Underlying this conclusion was the recognition that the NLRA did not create a substantive right to proceed collectively, and the right to pursue a class or collective action remains a waivable procedural right. *Id.* at 23.

Similarly, Member Johnson’s dissent concluded that the majority construed Section 7 too broadly, improperly transforming procedural class and collective action rules established under

other statutes into substantive rights under the NLRA. *Id.* at 36 (“We cannot simply ‘wave the magic wand’ of NLRA adjudication over this body of [class and collective action] law to declare what was formerly procedural to now be substantive under [the NLRA]”). Likewise, Member Johnson noted that the U.S. Supreme Court has consistently resolved conflicts between the FAA and other federal laws in favor of the FAA, and absent express language in the NLRA indicating that it controlled over the FAA, it was improper for the Board to interpret Section 7 in a manner that displaced the FAA’s mandate that arbitration agreements be enforced according to their terms. *Id.* at 37. Accordingly, not only has the Fifth Circuit rejected the Board’s reasoning articulated in both *D.R. Horton* and *Murphy Oil*, but the Board’s reaffirmation of its position in *Murphy Oil*, on which the ALJ’s expressly relied, was far from unanimous.<sup>4</sup>

The Eleventh Circuit has not directly addressed the Board’s position in the NLRA context, but it has upheld collective action waivers in the face of similar challenges premised on the FLSA. *See Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326 (11th Cir. 2014). In *Chipio*, like here, the plaintiffs brought a putative collective action under the FLSA. The defendant moved to compel individual arbitration and to dismiss the action or stay the proceedings during the pendency of the arbitration. *Chipio*, 745 F.3d at 1329. The district court granted the motion, ordered the parties to arbitrate, and dismissed the action. *See id.* The plaintiffs appealed to the Eleventh Circuit. *See id.* The *Chipio* Court considered whether the FLSA contains a “contrary congressional command” overriding the FAA’s mandate that arbitration agreements be enforced according to their terms. *See id.* at 1330-31. As the Court noted, if such a congressional command exists, it must be found in the text of the overriding statute. *See id.* at 1331 (citing *Mitsubishi Motors Corp. v. Soler Chrysler Plymouth, Inc.*, 473

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<sup>4</sup> In a recent unpublished decision, the Fifth Circuit again rejected the Board’s position. *See Citigroup Technology, Inc. v. National Labor Relations Board*, No. 15-60856, (5th Cir. Dec. 8, 2016).

U.S. 614, 628 (1985)). After careful review, the Court found no such congressional command in the FLSA's text.<sup>5</sup> *See id.* at 1332-36. Accordingly, the Eleventh Circuit affirmed the district court.

*Chipio's* holding is also consistent with prior Eleventh Circuit decisions. In particular, in *Caley v. Gulfstream Aerospace Corp.*, plaintiffs advancing FLSA, ADEA and ERISA claims challenged the enforceability of a class action waiver in an arbitration agreement on unconscionability grounds. 428 F.3d 1359, 1378 (11th Cir. 2005). The Court disagreed, explaining that the arbitration agreement's prohibition of class actions was "consistent with the goals of 'simplicity, informality, and expedition' touted by the Supreme Court," and therefore the agreement could not be unconscionable. *Id.* (quoting *Gilmer*, 500 U.S. at 31, 111 S.Ct. 1647, 114 L.Ed.2d 26). While the *Caley* Court did not address whether the FLSA provided a substantive non-waivable right to collective proceedings, as the *Chipio* Court did, it is nonetheless illustrative of the Eleventh Circuit's commitment to enforcing collective action waivers in the employment context.

Additionally, while the Eleventh Circuit has yet to address whether class or collective action waivers in arbitration agreements are inconsistent with the NLRA, district courts within the circuit have consistently rejected the Board's position on this issue. Most recently, in *Steingruber v. Family Dollar Stores of Florida, Inc.*, the Court concluded that the "argument that the [arbitration agreement] is void because it violates [plaintiff's] substantive rights under the NLRA to bring a collective action is without merit because 'neither the NLRA's statutory text nor its legislative history contains a congressional command against application of the FAA.'" No. 3:15-CV-199-J-20JBT, 2015 WL 10818618, at \*4 (M.D. Fla. Aug. 13, 2015) (quoting

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<sup>5</sup> Were it to undertake that same review of the NLRA, the Eleventh Circuit would undoubtedly reach the same conclusion, because the NLRA also lacks an express directive from Congress that it overrides the FAA.

*CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 669 (2012)). The Court also cited with approval the Fifth Circuit's *D.R. Horton* decision rejecting the Board's position that the NLRA's Section 7 provided a substantive, as opposed to procedural, right to proceed collectively. *See id.* (citing *D.R. Horton, Inc. v. NLRB*, 737 F.3d at 355–57).

Similarly, in *De Oliveira v. Citicorp N. Am., Inc.*, the Court rejected the assertion that a collective action waiver was invalid based on the Board's decision in *D.R. Horton*. No. 8:12-CV-251-T-26TGW, 2012 WL 1831230, at \*2 (M.D. Fla. May 18, 2012). The Court concluded that it was not bound by the Board's decision because it was inconsistent with Eleventh Circuit precedent "as announced by the *Caley* court." *Id.* The Court's decision not to follow the Board's lead is especially noteworthy because it came both before the Fifth Circuit overruled the Board's position in *D.R. Horton*, and before the Eleventh Circuit's waiver-friendly decision in *Chipio*. As a result, a court within the Eleventh Circuit presented with the Board's argument today would have an even stronger basis to reject it.

The approach adopted within the Fifth and Eleventh Circuits also aligns with other federal circuits that have considered the interplay between collective action waivers and the NLRA and FLSA. For example, in *Cellular Sales of Missouri, LLC v. Nat'l Labor Relations Bd.*, 824 F.3d 772 (8th Cir. 2016), the Court of Appeals for the Eighth Circuit held that Cellular Sales "did not violate section 8(a)(1) [of the NLRA] by requiring its employees to enter into an arbitration agreement that included a waiver of class or collective actions in all forums to resolve employment related disputes," and declined to enforce the Board's order to the contrary. *Id.* at 776. The Eighth Circuit relied upon its earlier decision in *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013), which even the Board conceded was "fatal to its argument that a mandatory agreement requiring individual arbitration of work-related claims violates the NLRA." *Id.* (quotation omitted). In *Owen*, the Eighth Circuit first determined that there is "no inconsistency

between either the FLSA text or its legislative history and the conclusion that arbitration agreements containing class waivers are enforceable in cases involving the FLSA,” and then went on to consider the Board’s then-recent decision in *D.R. Horton*, finding it unpersuasive, in part, because the Board has no agency-specific competence in interpreting the FAA. *Owen*, 702 F.3d 1 at 1053.

In *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2nd Cir. 2013), the Second Circuit similarly rejected an argument, premised largely on the Board’s then-recent *D.R. Horton* decision, that the waiver of the right to pursue a FLSA claim collectively in any forum violates the NLRA. *Id.* at 297, n. 8. Relying in part on the Eighth Circuit’s decision in *Owen*, the Second Circuit declined to follow the Board’s decision in *D.R. Horton* and noted that it owed no deference to the Board’s reasoning. *Id.* (citing *Owen*, 702 F.3d at 1053-54). The Court also held that the FLSA itself does not preclude the enforcement of a collective action waiver, as “Supreme Court precedents inexorably lead to the conclusion that the waiver of collection action claims is permissible in the FLSA context.” *Id.* at 297.

Only the Courts of Appeals for the Seventh and Ninth Circuits have ruled in favor of the Board’s position. See *Morris v. Ernst & Young, LLP*, 834 F.3d 975, 989–90 (9th Cir. 2016); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1161 (7th Cir. 2016). However, the Fifth Circuit has explicitly rejected the reasoning advanced in *Lewis* and *Morris* in *D.R. Horton* and in *Murphy Oil*. And while the Eleventh Circuit has not addressed the issue in the NLRA context, district court decisions within that circuit follow the Fifth Circuit’s approach, citing *D.R. Horton* favorably. See, e.g., *Steingruber*, 2015 WL 10818618, at \*4. Further, *Lewis* and *Morris* are out of step with the other circuits and with “more than two decades of pro-arbitration Supreme Court precedent.” See *Owen*, 702 F.3d at 1054.

Moreover, the Ninth Circuit’s decision in *Morris* elicited a dissent from Judge Ikuta that articulates many of the principles discussed above, including that the NLRA does not provide a substantive right to pursue class or collective actions, and no express language in the NLRA overrides the FAA’s requirement that arbitration agreements must be enforced as written. *See Morris v. Ernst & Young, LLP*, 834 F.3d 975, 995, 998 (9th Cir. 2016). The dissent noted that the singular question is “whether the text of the federal statute at issue expressly precludes the use of a predispute arbitration agreement for the underlying claims,” and where the statute does not expressly preclude arbitration, “the federal policy favoring arbitration” demands a conclusion that the federal statute lacks a contrary congressional command that would preclude enforcement of the arbitration agreement. *Id.* at 994 (quotation omitted). The dissent also recognized that the Supreme Court has rejected the argument that the legislative history or underlying policy of the federal statute would require a different result. *Id.* (citing *Green Tree Fin. Corp. v. Randolph*, 531 U.S. 79, 89–90 (2000)).

Turning to the text of the NLRA, the dissent also pointed out that Section 7 protects “concerted activity,” but it “does not expressly preserve any right for employees to use a specific *procedural* mechanism to litigate or arbitrate disputes collectively,” much less “create an unwaivable right to such mechanism.” *Id.* at 995 (emphasis in original). The dissent also concluded that the NLRA provides no basis to hold that Section 7 gives employees “a substantive, unwaivable right to use Rule 23, 216(b) of the FLSA, or any other [collective] procedural mechanism,” and therefore Supreme Court precedent “compels the conclusion that neither § 7 nor § 8 contains a ‘contrary congressional command’ that precludes” the enforcement of an arbitration agreement according to its terms. *Id.* at 995-96. Lastly, the dissent rejected the argument that the NLRA’s legislative history specifically evidenced an intent to preclude individual resolution of disputes, pointing out that the NLRA was enacted “decades before Rule

23 created the modern class action” and Congress did not otherwise “discuss the right to file class or consolidated claims against employers” in enacting the NLRA. *Id.* at 996. Accordingly, the dissent concluded that there was “no basis in history or Supreme Court precedent” to equate the right to certain concerted activities protected by the NLRA with a particular “legal procedural mechanism for resolving disputes.” *Id.*

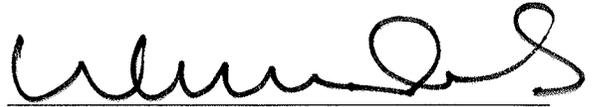
In conclusion, the Board’s position that class or collective action waivers in arbitration agreements violate the NLRA is out of step with precedent from the Fifth, Eighth and Second Circuits, as well as several district court decisions from the Eleventh Circuit. It is also inconsistent with longstanding Supreme Court precedent. In addition, it bears noting that the recent *Morris* decision from the Ninth Circuit includes a strong dissent that echoes the reasoning articulated by the Fifth Circuit in its *D.R. Horton* and *Murphy Oil* decisions. Similarly, the Board’s *Murphy Oil* decision, which despite being rejected by the Fifth Circuit is cited by the ALJ as authority for his recommendation, elicited several dissenting opinions. MUY therefore encourages the Board to reconsider its policy position, reject the ALJ’s recommendations, and find no violation of Section 7 or Section 8 of the NLRA in either MUY’s conduct or its arbitration agreement.

### **CONCLUSION**

For the reasons set forth herein, MUY respectfully contends that the ALJ erred in concluding that MUY has violated Section 7 or Section 8 of the NLRA.

Respectfully submitted,

Dated: January 11, 2017



William A. McNab MN Atty. No. 0320924

WINTHROP & WEINSTINE, P.A.

225 South Sixth Street, Suite 3500

Minneapolis, MN 55402

[wmcnab@winthrop.com](mailto:wmcnab@winthrop.com)

P: 612.604.6652

F: 612.604.6852

*Counsel for MUY PIZZA SOUTHEAST,  
LLC*

12924195v1

