

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

MONTECITO HEIGHTS HEALTHCARE &
WELLNESS CENTRE, LP

and

Case No. 31-CA-129747

SERVICE EMPLOYEES INTERNATIONAL
UNION, UNITED LONG TERM CARE
WORKERS

**RESPONDENT'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE
ADMINISTRATIVE LAW JUDGE'S DECISION AND IN RESPONSE TO THE
CHARGING PARTY AND GENERAL COUNSEL'S ANSWERING BRIEFS**

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Dated: February 28, 2017

Pursuant to Section 102.46(h) of the Rules and Regulations of the National Labor Relations Board (“NLRB” or “Board”), Respondent Montecito Heights Healthcare & Wellness Centre, LP (“Respondent”) files this Reply Brief in support of its Exceptions to the Administrative Law Judge’s Decision (“ALJ’s Decision”) and in Response to Charging Party and General Counsel’s Answering Briefs.¹

The Charging Party and General Counsel do not raise any novel arguments. The General Counsel’s Answering Brief did not address any substantive legal arguments and the Charging Party’s Answering Brief is nearly identical to its Brief in support of its Cross-Exceptions. Respondent has thoroughly addressed and dismissed all outstanding issues in its Brief in support of its Exceptions and its Answering Brief to Charging Party’s Cross-Exceptions. To avoid reiterating Respondent’s previous arguments, this Reply is limited to addressing some nuances in those arguments in more detail.

1. The Charging Party argues that the Federal Arbitration Act (“FAA”) does not apply for a variety of reasons. However, both the California and the U.S. Supreme Courts have consistently held that the validity of private agreements to arbitrate, such as the ADR Policy, must be enforced under the FAA. *See generally, American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *Marmet Health Care Ctr. v. Brown*, 132 S. Ct. 1201 (2012); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Iskanian v. CLS Transp. Los Angeles, LLC*, 59 Cal. 4th 348 (2014).

¹ On January 30, 2017, the Deputy Executive Secretary extended the deadline for answering briefs until February 15, 2017. Notwithstanding this extension of time, the Charging Party filed its answering brief on January 31, 2017, and the General Counsel filed its answering brief on February 13, 2017. In accordance with Section 102.46(h) of the Board’s Rules and Regulations, Respondent’s reply brief is due to be filed “[w]ithin 14 days from the last date on which an answering brief may be filed,” which would be March 1, 2017. This reply brief responds to the answering briefs of both the Charging Party and the General Counsel.

Therefore, the ALJ's improper reliance on *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), *enf. denied*, 808 F.3d 1013 (5th Cir. 2015), *cert. granted* 2017 WL 125666 (Jan. 13, 2017), fails to give the required deference to the FAA as that statute has been interpreted by the Supreme Court.

2. The General Counsel claims that the question of whether the FAA should be applied to the ADR Policy has “been thoroughly dealt with in” the ALJ's Decision. This is false. The ALJ's Decision did not even mention the FAA. To the contrary, the ALJ avoided the issue by simply relying upon the Board's *Murphy Oil* decision without taking into consideration that the Fifth Circuit has denied enforcement of that decision because it contradicted with the FAA.

3. The General Counsel argues that the record does not support the fact that the ADR Policy was optional and voluntary. Once again, this is not true. The parties stipulated that Respondent presented the ADR Policy to its employees and “some of those employees signed” the policy. [Jt. Stip at ¶ 14(b).] Since only “some” of Respondent's employees signed the ADR Policy, this is direct evidence that the ADR Policy was not a mandatory term and condition for employees. If the ADR Policy was truly a mandatory term and condition of employment, employees who chose not to sign the ADR Policy would have been terminated or not hired. Under those circumstances, Respondent would have had a signed ADR Policy for all its employees rather than just “some” of them.

4. The ALJ's Decision as well as the Charging Party and General Counsel's reliance upon *On Assignment Staffing Services*, 362 NLRB No. 189 (2015), *enf. denied* 2016 WL 3685206 (5th Cir. June 6, 2016) is misplaced because it is inapplicable to this case and wrongly decided. As indicated above, unlike *On Assignment*, the ADR Policy here does not require employees to proactively opt out of arbitration — instead, employees may simply avoid executing the ADR Policy. The ADR Policy here is obviously less restrictive than the one in *On*

Assignment, such that rational in that case is inapplicable here. In addition, like *Murphy Oil, On Assignment* is founded upon the erroneous premise that Section 7 creates a substantive right to engage in class and collective litigation and that the FAA does not apply — foundational arguments the Supreme Court and the Fifth Circuit has squarely refuted by denying enforcement of the decision. Furthermore, even before the Board decided *On Assignment*, in a case the ALJ did not reference in its decision, the Ninth Circuit in *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072 (9th Cir. 2014), enforced a voluntary, opt-out arbitration agreement with a class action waiver and rejected the employee's claim that the agreement violated the NLRA by interfering with or restraining the employee in the exercise of her right to file a class action under the FLSA. In doing so, the Ninth Circuit directly rejected the Board's premise in *On Assignment* that an agreement offered on an opt-out basis was a mandatory condition of employment. The Ninth Circuit instead correctly held that under the opt-out process, the employee was free to exercise her right to choose not to litigate, including on a class or collective basis. *Id.* at 1075–76.

5. Contrary to the ALJ's Decision and the Charging Party and General Counsel's contentions, Respondent's employees have the freedom to choose whether to sign or not sign the ADR Policy and arbitrate claims on an individual basis. Rather than infringing upon employees' Section 7 rights, Respondent's ADR Policy protects employees' ability to elect to engage in class actions (which the Board has incorrectly classified as protected activity), or elect to "refrain from any or all of such [protected] activities," as is their right. *See* 29 U.S.C. § 157. That is, under the Act, employees have a right to choose not to engage in the alleged protected concerted activity of preserving their rights to file a class action. *Id.* The fact that some employees have not signed

the ADR Policy indicates that Respondent has preserved their ability to engage in this certain protected activity or to refrain from doing so.

6. The Charging Party's assertion that the ADR Policy somehow restricts concerted activity is also mistaken. The ADR Policy cannot reasonably be construed to restrict employees from filing charges with the Board or limiting rights under the Act because it explicitly allows the filing of such charges and exempts them from arbitration in two different parts of the policy. [Jt. Ex. 1 at p. 3; Jt. Ex. 2 at p. 2.] As the Fifth Circuit has held, it is not reasonable for employees to read an arbitration agreement "as prohibiting the filing of Board charges when the agreement says the opposite." *Murphy Oil*, 808 F.3d at 1020. Just because employees do not have access to one procedural mechanism (*i.e.*, class actions) does not mean that they have been denied the right to engage in concerted activity. Section 7 does not and cannot reach into the judicial system to regulate the procedural manner such an action shall be litigated.

7. The Charging Party further claims that the ADR Policy should be invalidated because it allegedly imposes additional costs on employees who bring employment related disputes. However, the Charging Party offers no evidence that any employee has suffered any expenses, let alone additional expenses by having entered the ADR Policy. In fact, the ADR Policy precludes the imposition of additional expenses on employees because the Respondent is bound to cover "the arbitrator's fee and expenses and any costs associated with the facilities" for any arbitration. [Jt. Ex. 1 at p. 3.] Likewise, despite the Charging Party's contrary allegations, nothing in the ADR Policy prohibits employees from sharing costs by joining together to use the same counsel in any litigation or to use collateral estoppel in subsequent litigation if one employee obtains a favorable judgment. In addition, since the ADR Policy clearly allows employees to file charges or claims with administrative agencies, employees would be allowed to

file claims with the California Labor Commissioner free of charge despite the Charging Party's contrary claims. Therefore, the ADR Policy does not impose any additional costs on employees.

For all the foregoing reasons, and those previously stated in Respondent's Brief in support of its Exceptions and its Answering Brief to Charging Party's Cross-Exceptions, the Board should reverse the ALJ's Decision and dismiss the Amended Complaint. Alternatively, if the Board is inclined to uphold the ALJ's Decision, the Board should hold this matter in abeyance pending a decision by the Supreme Court on the issue.

Dated: February 28, 2017

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I hereby certify that, on February 28, 2017, I filed a copy of **Respondent's Reply Brief In Support of Exceptions To The Administrative Law Judge's Decision And In Response To The Charging Party and General Counsel's Answering Briefs** using the NLRB's e-filing system and also served the following individuals via e-mail.

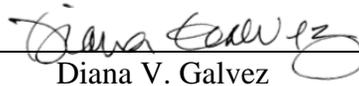
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I declare under penalty of perjury under the laws of the United States.


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