

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

FOUR SEASONS HEALTHCARE &  
WELLNESS CENTER, LP, A CALIFORNIA  
LIMITED PARTNERSHIP

Case No. 31-CA-169143

and

ANA CRUZ, AN INDIVIDUAL

**RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGE'S DECISION**

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Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board (“NLRB” or “Board”), Respondent Four Seasons Healthcare & Wellness Center, LP (“Respondent”) files the following Brief in Support of its Exceptions to the Decision of Administrative Law Judge Ariel L. Sotolongo (“ALJ”) dated June 21, 2017 in the above-captioned matter.<sup>1</sup>

## **I. INTRODUCTION & STATEMENT OF THE CASE**

This is another one of the many cases before the Board involving the validity of a class action waiver in an arbitration agreement. As explained in detail below, the ALJ’s Decision should not be adopted because it improperly relies upon erroneous Board precedent and fails to consider numerous Supreme Court decisions which have established that such arbitration agreements must be enforced in accordance with the Federal Arbitration Act, 9 U.S.C. § 1, *et seq.* (“FAA”). Alternatively, in light of the Supreme Court’s recent granting of certiorari on the exact same issues at stake in this matter, the Board should hold this matter in abeyance pending a decision by the Supreme Court in order to limit the use of unnecessary resources.

The facts here are not in dispute. Respondent is engaged in the operation of a skilled nursing facility in North Hollywood, California and provides rehabilitation, personal care, and other similar services for the elderly. [GC Exs. 1(n) and 1(l) at ¶2(a).] Since July 1, 2011, Respondent has maintained (1) an Alternative Dispute Resolution Policy and (2) an Agreement to be Bound by Alternative Dispute Resolution Policy (together referred to as “ADR Policy”). [Jt. Exs. 1 & 2.] Respondent has required “some” of its employees, including the Charging

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<sup>1</sup> Citations to the record shall be as follows: the ALJ’s decision shall be “Decision [Page]:[Lines]”; the Joint Motion to Transfer Proceedings to the Division of Judges and Joint Stipulation of Facts shall be “JM [Paragraph Number]”; the General Counsel’s Exhibits shall be “GC Ex. [Number]”; and the Joint Exhibits shall be “Jt. Ex. [Number]”.

Party, to sign the ADR Policy as a condition of employment. [JM at ¶ 15.] Respondent has enforced the ADR Policy in a class action litigation brought by the Charging Party and Judge Elihu Berle of the Los Angeles Superior Court has granted Respondent’s motion to compel arbitration. [Jt. Exs. 3-6.]

The ADR Policy is intended to “ensure that all parties have an opportunity to meet and see if there is a mutually satisfactory basis for resolving” any potential disputes. [Jt. Ex. 1 at p. 1.] Any disputes that cannot otherwise be resolved pursuant to the ADR Policy must be presented “for a fair hearing before an impartial, objective [arbitrator] who has been selected by both sides” through “final and binding arbitration.” [Jt. Exs. 1 and 2.] The ADR Policy is mutually binding on Respondent (*i.e.*, any claims it may have against its employees) and it requires Respondent to pay all costs of the arbitrator. [See *id.*] Employees who have signed the ADR Policy also waive their right to pursue claims against Respondent on a class-wide basis. Notably, the ADR Policy expressly preserves the right of employees to file charges or otherwise participate in proceedings before the Board.<sup>2</sup>

On September 30, 2016, the Counsel for the General Counsel filed the instant Complaint alleging that Respondent maintained and enforced a class action waiver which restricted employees’ rights under the Act. [GC Ex. 1(l).] On January 3, 2017, the General Counsel, Charging Party and Respondent jointly moved to waive trial and submit this matter to the Division of Judges on a stipulated record of facts and exhibits. On June 21, 2017, the ALJ —

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<sup>2</sup> Jt. Ex. 1 at p. 3 (“Nothing in this Alternative Dispute Policy is intended to preclude any employee from filing a charge with the Equal Employment Opportunity Commission, the National Labor Relations Board or any similar federal or state agency seeking administrative resolution.”); Jt. Ex. 2 at p. 2 (“nothing in this ADR Policy shall be construed as precluding any employee from filing a charge with a state or federal administrative agency, such as . . . the National Labor Relations Board.”)

relying solely on recent Board precedent without any reference to contradictory Supreme Court and Circuit Court precedent — found that Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing the ADR Policy.

The ALJ’s failure to consider non-Board authority is a critical error — this is not a typical case that can be decided solely on NLRB precedent. Rather, this matter addresses an issue which Congress has chosen to regulate through the FAA. At least four recent Supreme Court decisions have established the broad preemptive sweep of the FAA and the strong policy in favor of arbitration. *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). These decisions require that arbitration agreements with class waivers be enforced in accordance with the FAA unless the FAA’s mandate has been overridden by a clear, contrary “congressional command.”

Although the ALJ relies upon Board authority erroneously holding otherwise, the overwhelming weight of authority from the Supreme Court and Circuit Courts of Appeals have held that the NLRA does not override the FAA and they have explicitly or implicitly rejected the Board’s position that class action waivers violate the Act. In fact, the Fifth Circuit has denied enforcement of the Board’s decision in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), *enf. denied*, 808 F.3d 1013 (5<sup>th</sup> Cir. 2015), *cert. granted* 2017 WL 125666 (Jan. 13, 2017) — which was relied upon by the ALJ in the underlying decision — and it has denied enforcement to its predecessor decision in *D.R. Horton v. NLRB*, 737 F.3d 344 (5th Cir. 2013). If that was not enough, well over 40 courts across the country have expressly held that class action waivers do not violate the NLRA because any NLRA-derived rule prohibiting such waivers is preempted by

the FAA. Contrary to the Board’s decision in *Murphy Oil*, these cases have held that the right to bring a class or collective action is a procedural mechanism and not a substantive right under the NLRA. They have also held there is an utter lack of any contrary congressional command proscribing arbitration in either the NLRA or Norris-LaGuardia Act, 29 U.S.C. § 101 *et seq.* (“NLGA”).

The ALJ’s Decision is also erroneous because unlike the arbitration agreements at issue in *Murphy Oil* — which was unquestionably mandatory — the ADR Policy here is voluntary and does not require execution as a condition of employment. Furthermore, the ADR Policy’s broad carve-out makes clear that it allows for the filing of unfair labor practice charges with the Board in sharp contrast to the ALJ’s decision in this regard.

Accordingly, for the reasons set forth herein, Respondent respectfully requests that the Board reverse the ALJ’s decision and dismiss the Complaint in its entirety, with prejudice. Alternatively, the Board should hold this matter in abeyance pending a decision by the Supreme Court on the issue.

## **II. QUESTIONS PRESENTED**

As set forth in more detail in Respondent’s exceptions, the questions presented to the Board are as follows:

1. Whether the ALJ erred in its failure to enforce the ADR Policy in accordance with Supreme Court precedent interpreting the FAA. [Exception Nos. 6-8, 18-19.]
2. Whether the ALJ erred in its reliance upon the Board’s decision in *Murphy Oil*, 361 NLRB No. 72, because the decision and its progeny contradict Supreme Court precedent and should be overturned. [Exception Nos. 3-8, 14-16, 18-19.]

3. Whether the ALJ erred in its failure to conclude that the ADR Policy does not infringe on Section 7 rights because it was optional and not required as a condition of employment. [Exception Nos. 17.]

4. Whether the ALJ erred in its conclusion that employees could not reasonably understand that the ADR Policy allows charges to be filed with the Board. [Exception Nos. 1-2, 9-13, 20.]

5. Whether the ALJ erred in recommending a vague and overbroad Remedy, Order, and/or Appendix, all of which are related to the ALJ's determination that Respondent "engaged in certain unfair labor practices?" [Exception Nos. 21-22.]

**III. THE ALJ ERRED IN REFUSING TO ENFORCE THE ADR POLICY IN ACCORDANCE WITH SUPREME COURT PRECEDENT INTERPRETING THE FAA. [EXCEPTION NOS. 6-8, 18-19.]**

The ALJ noted that that he was "bound to follow Board precedent, not that of circuit courts which disagree with the Board." [Decision 6:2-3.] However, the ALJ erred in his failure to consider the recent Supreme Court decisions that have already ruled on this dispute.

**A. Validity of The ADR Policy Must Be Determined By The FAA.**

The Supreme Court has consistently held that the validity of private agreements to arbitrate, such as the instant ADR Policy, must be determined under the FAA. *See generally, American Express Co*, 133 S. Ct. 2304; *Marmet Health Care*, 132 S. Ct. 1201; *CompuCredit Corp.*, 132 S. Ct. 665; *Concepcion*, 131 S. Ct. 1740. More specifically, the High Court has determined that a class/collective action waiver must be enforced according to its terms in the absence of a "contrary congressional command." *American Express Co.*, 133 S. Ct. at 2309. Therefore, the ALJ's improper reliance on *Murphy Oil USA, Inc.*, 361 NLRB No. 72, fails to give the required deference to the FAA as that statute has been interpreted by the Supreme Court.

The basis for the Supreme Court’s decisions in this regard stem from Section 2 of the FAA, which provides that private agreements to arbitrate are “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 (2016). The Court has described this provision as reflecting two important principles:

- First, “that arbitration is a matter of contract” which must be enforced according to its terms. *Concepcion*, 131 S. Ct. at 1745; *CompuCredit Corp.*, 132 S. Ct. at 669 (The FAA “requires courts to enforce agreements to arbitrate according to their terms”); *Marmet Health Care Ctr.*, 132 S. Ct. at 1203 (The FAA “requires courts to enforce the bargain of the parties to arbitrate”) (internal citation omitted); *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015) (reversing invalidation of class-action waiver based on failure to place arbitration contract “on equal footing with all other contracts”) (internal citation omitted); *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010); *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 109 S. Ct. 1248, 1255-56 (1989) (noting that the “principal purpose” of the FAA is to “ensur[e] that private arbitration agreements are enforced according to their terms” and the parties are free to “specify by contract the rules under which the arbitration will be conducted.”).
- Second, that the FAA evinces a “liberal federal policy favoring arbitration.” *Concepcion*, 131 S. Ct. at 1745 (quoting *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 103 S. Ct. 927, 941 (1983)); see also *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 25 (2011) (“The [FAA] reflects an emphatic federal policy in favor of arbitral dispute resolution.”) (internal citations omitted); *Perry v. Thomas*, 107 S. Ct. 2520, 2526 (1987) (arbitration agreements are to be “rigorously enforced”).

“Indeed, short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes.” *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1763 (2010) (The parties to an arbitration “may agree to limit the issues they choose to arbitrate,” “may agree on [the] rules under which any arbitration will proceed,” and “may specify with whom they choose to arbitrate their disputes”) (internal citations omitted). This policy applies with equal force in the employment context. See *Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302, 1312-13 (2001); *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1655-56 (1991) (enforcing arbitration agreement in an employment claim even if there may be “unequal bargaining power between employers and employees” and even if “the arbitration could not go forward as a class action.”).

In keeping with the “liberal federal policy favoring arbitration,” the Supreme Court has made clear that under the FAA, arbitration agreements must be “enforce[d] . . . according to their terms,” unless one of the following exceptions apply: (1) the FAA saving clause is triggered, or (2) the FAA is overridden by a “contrary congressional command.” *Concepcion*, 131 S. Ct. at 1745-46; *CompuCredit Corp.*, 132 S. Ct. at 669; *American Express Co.*, 133 S. Ct. at 2309 (quoting *Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 2332, 2337 (1987)). As explained further below with respect to the ALJ’s improper reliance on the Board’s decision in *Murphy Oil*, neither exception applies here. Therefore, the ALJ erred when it failed to consider the FAA and Supreme Court precedent in its decision regarding Respondent’s ADR Policy.

**B. Following Supreme Court Precedent, Federal Courts Have Routinely Rejected Board Decisions That Have Invalidated Class Action Waivers.**

As indicated above, the Supreme Court has consistently upheld arbitration provisions under which parties waive their right to participate in class or collective actions. *See e.g., DIRECTTV, Inc.*, 136 S. Ct. 463; *Concepcion*, 131 S. Ct. 1740; *American Express Co.*, 133 S. Ct. 2304; *CompuCredit Corp.*, 132 S. Ct. 665.

Dozens of Circuit Court decisions have also overturned decisions that invalidate class waivers. For example, in *D.R. Horton, Inc.*, the Fifth Circuit set aside the NLRB's decision to invalidate an arbitration agreement with a class waiver clause. 737 F.3d at 355. The Fifth Circuit concluded that neither the NLRA, its legislative history, nor any policy consideration contain any congressional command to override the FAA. *Id.* at 360. The Court further held that an individual's right to bring a class or collective action is properly waivable in an arbitration agreement. *Id.* at 362.

The Fifth Circuit reinforced its *D.R. Horton* holding by issuing a second opinion on the issue in *Murphy Oil*, 808 F.3d 1013. The Court did not bother to rehash the substantive reasons for granting the respondent's petition for review. Instead, the Court held:

Our decision in [*D.R. Horton*, 737 F.3d at 348] was issued not quite two years ago; we will not repeat its analysis here. *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.

*Id.* at 1018. The Fifth Circuit explained that the NLRB was required to follow controlling law and almost issued a contempt order “to restrain [the NLRB] from continuing its nonacquiescence practice with respect to th[e] court’s directive.” *Id.* It further admonished: “The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders.” *Id.* at 1021.

The Eighth Circuit has also reversed the Board and held that an employer “did not violate section 8(a)(1) 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.” *Cellular Sales of Mo., LLC v. NLRB*, 824 F.3d 772 (8<sup>th</sup> Cir. 2016). To the extent there remains any ambiguity as to how it should rule on this matter, this tribunal need only look to the legion of other circuit and district courts that have almost universally upheld class-action waivers and rejected the NLRB’s position:

- 2nd Circuit: *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297-98, n.8 (2d Cir. 2013); *Parisi v. Goldman, Sachs, & Co.*, 710 F.3d 483 (2d Cir. 2013); *LaVoice v. UBS Fin. Servs., Inc.*, No. 11 Civ. 2308(BSJ)(JLC), 2012 WL 124590 (S.D.N.Y. Jan. 13, 2012); *Patterson v. Raymours Furniture Co.*, 96 F. Supp. 3d 71 (S.D.N.Y. 2015).
- 3rd Circuit: *Vilches v. Travelers Cos.*, 413 Fed. App’x 487 (3d Cir. 2011); *Litman v. Cellco P’ship*, 655 F.3d 225 (3d Cir. 2011); *Quilloin v. Tenet Healthsystem Phila.*, 673 F.3d 221 (3d Cir. 2012); *Brown v. TrueBlue, Inc.*, No. 1:10-cv-00514, 2013 WL 5408575 (M.D. Pa. Sept. 25, 2012).
- 4th Circuit: *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 506 (4th Cir. 2002); *Green v. Zachry Indus.*, 36 F. Supp. 3d 669, 675 (W.D. Va. 2014)
- 5th Circuit: *D.R. Horton, Inc.*, 737 F.3d 344; *Murphy Oil*, 808 F.3d 1013; *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004); *Carey v. 24 Hour Fitness USA, Inc.*, No. H-10-3009, 2012 WL 4754726 (S.D. Tex. Oct. 4, 2012).
- 8th Circuit: *Cellular Sales of Mo., LLC*, 824 F.3d 772; *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1054 (8th Cir. 2013); *Delock v. Securitas Sec. Servs. USA, Inc.*, 883 F. Supp. 2d 784, 786-92 (E.D. Ark. 2012).
- 10<sup>th</sup> Circuit: *Hickey v. Brinker Int’l Payroll Co.*, No. 1:13-cv-00951-REB-BNB, 2014 WL 622883 (D. Colo. Feb. 18, 2014); *Spears v. Mid-Am. Waffles, Inc.*, No. 11-2273-CM, 2012 WL 2568157 (D. Kan. July 2, 2012).
- 11th Circuit: *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005); *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1340 (11th Cir. 2014); *Levison v. MasTec, Inc.*, No. 8:15-cv-1547-T26AEP, 2015 WL 5021645 (M.D. Fla. Aug. 25, 2015); *De Oliveira v. CitiCorp N. Am., Inc.*, No. 8:12-cv-251-T-

26TGW, 2012 WL 1831230 (M.D. Fla. May 18, 2012); *Palmer v. Convergys Corp.*, No. 7:10-cv-145 (HL), 2012 WL 425256 (M.D. Ga. Feb. 9, 2012).<sup>3</sup>

The NLRB is constrained to rule on this matter in a manner that is consistent with the holdings of the Supreme Court and the federal Circuit Courts. It is well-established that the Board is not entitled to deference when it interprets other statutes or accommodates them to the NLRA. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002) (“[W]e have accordingly never deferred to the Board’s remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA.”). Indeed, it is the courts, not the NLRB, that “have the final word on matters of statutory interpretation.” See *Ithaca Coll. v. NLRB*, 623 F.2d 224, 228 (2d Cir. 1980). “[A]s must a district court, an agency is bound to follow the law of the Circuit.” *Id.* at 228; *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 969-70 (3d Cir. 1979); *NLRB v. Gibson Prods. Co.*, 494 F.2d 762, 766 (5th Cir. 1974); *Stacey Mfg. Co. v. Comm’r of Internal Revenue*, 237 F.2d 605, 606 (6th Cir. 1956); *DIRECTV, Inc.*, 139 S. Ct. at 468 (“No one denies that lower courts must follow this Court’s holding in *Concepcion*.... The Federal Arbitration Act is a law of the United States, and *Concepcion* is an authoritative interpretation of that Act. Consequently, the judges of every State must follow it.”).

The *Ithaca College* Court recognized the “practice of the Board to refuse to follow unfavorable decisions from the Courts of Appeals.” 623 F.2d at 228. The Court explained that all litigants are expected to abide by those decisions and, to the extent there is any disagreement,

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<sup>3</sup> Against the overwhelming weight of authority, the Sixth, Seventh, and the Ninth Circuits, recently held that arbitration agreements with a class action waiver violated the Act. *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016) cert. granted 2017 WL 125664 (Jan. 13, 2017); *Morris v. Ernst & Young, LLP*, 834 F.3d 974 (9th Cir. 2016) cert. granted 2017 WL 125665 (Jan. 13, 2017); *NLRB v. Alternative Entertainment, Inc.*, 858 F.3d 393 (6<sup>th</sup> Cir. 2017).

they may “seek review in the Supreme Court.” *Id.* Under no circumstances, however, may the NLRB “choose to ignore the decision as if it had no force or effect.” *Id.*

In light of the foregoing, the Board must give deference to the overwhelming number of decisions of the Supreme Court and Circuit Courts of Appeals which hold that the ADR Policy must be upheld. Alternatively, if the Board is inclined to uphold the ALJ’s Decision, Respondent respectfully requests that the matter be held in abeyance until the Supreme Court decides the issue.

**IV. THE ALJ ERRED IN ITS RELIANCE UPON *MURPHY OIL* BECAUSE THE DECISION AND ITS PROGENY CONTRADICT SUPREME COURT PRECEDENT AND SHOULD BE OVERTURNED. [EXCEPTION NOS. 3-8, 14-16, 18-19.]**

The ALJ erred in relying upon the Board’s untenable decision in *Murphy Oil*. The *Murphy Oil* majority panel insisted that its decision did not conflict with the FAA because: (1) Section 7 rights are substantive, not procedural in nature; (2) the NLRA contains a contrary congressional command that overrides the FAA; and (3) even presuming a direct conflict between the NLRA and FAA, the NLGA mandates that the FAA yield to the NLRA. For the reasons discussed below, because the majority panel was wrong on all of these accounts, the ALJ erred by relying upon *Murphy Oil*.

**A. The FAA’s Saving Clause Does Not Invalidate The ADR Policy Because The Joint Pursuit Of Legal Claims Is Not A Substantive Right.**

The FAA’s saving clause provides that arbitration provisions may be struck down “upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. The Supreme Court in *Concepcion* unambiguously held that the “saving clause” does not apply to class-action waivers. 131 S. Ct. at 1748. While the “saving clause permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability,” *Id.* at 1746 (internal quotations omitted), the Court concluded that a ban on

class waivers does not fall under the purview of these traditional contract defenses. *Id.* at 1747-48. Indeed, such a ban would “stand as an obstacle to the accomplishment of the FAA’s objectives.” *Id.* at 1748.

Although not explicitly stated in the underlying Decision, the ALJ’s reliance upon the Board’s decision in *Murphy Oil* provides implicit credence to the holding in that case that the FAA permits striking down class-action waivers under the guise of preserving the “substantive right to engage in collective action” under Section 7. *Murphy Oil*, 361 NLRB No. 72. However, the authority to prosecute class actions is not provided by the NLRA, but rather by Federal Rule of Civil Procedure 23 and the collective action procedures of substantive labor laws. F.R.C.P. Rule 23; *see e.g.*, 29 U.S.C. § 216(b) (availability of class action procedures for alleged violations of Federal Labor Standards Act). The Supreme Court has expressly determined that the ability to seek class actions pursuant to these federal laws “is a procedural right only, ancillary to the litigation of substantive claims.” *Deposit Guaranty National Bank v. Roper*, 100 S. Ct. 1166, 1171 (1980). As stated above, the Court has further held that the right to exercise such class procedures is in fact waivable. *Concepcion*, 131 S. Ct. 1748.

In addition, several Circuit Courts of Appeals have also found that class mechanisms are procedural, not substantive, and overturned *Murphy Oil* and other Board decisions holding otherwise. *See e.g.*, *D.R. Horton, Inc. v. NLRB*, 737 F.3d at 359-60 (holding that no substantive right to class or collective proceedings exists under NLRA and that a contrary holding would frustrate the FAA); *Murphy Oil*, 808 F.3d at 1016 (citing its prior decision in *D.R. Horton, Inc.* and again overturning the Board and holding that “use ‘of class action procedures ... is not a substantive right’ under Section 7 of the NLRA”); *see also Deposit Guaranty National Bank*, 100 S. Ct. at 1171 (“[T]he right of a litigant to employ Rule 23 [class action] is a procedural right

only, ancillary to the litigation of substantive claims.”); *Carter*, 362 F.3d at 298 (holding that collective action under the Fair Labor Standards Act is a matter of procedure, not a substantive right); *Horenstein v. Mortg. Market, Inc.*, 9 Fed. App’x 618, 619 (9th Cir. 2001) (“Although plaintiffs who sign arbitration agreements lack the procedural right to proceed as a class, they nonetheless retain all substantive rights under the statute”); *Adkins*, 303 F.3d at 506; *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319-20 (9th Cir. 1996).<sup>4</sup>

The underlying ALJ Decision and the Board’s previous holdings in *Murphy Oil* and its progeny mistakenly equate the general Section 7 rights to discuss employment claims with other employees, to pool resources to hire an attorney, and to seek advice and litigation support from a union as legally equivalent to having a single forum to adjudicate common legal claims. Even if the above-mentioned activities leading up to the filing of a claim in court are considered protected by Section 7, it does not follow that Section 7 dictates the process by which the employees’ claims are ultimately adjudicated, whether in a single or collective forum. Furthermore, whether an employment law claim is litigated on a class or collective basis has nothing to do with organizing or bargaining collectively under the NLRA. Instead, the instant ADR Policy is an agreement designed to resolve non-NLRA claims efficiently through arbitration without a class action. *Concepcion* and other related case law described above are clear that the “saving clause” cannot be applied to invalidate such class-action waivers.

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<sup>4</sup> *But see, Lewis*, 823 F.3d 1147 (finding right to collective action under the Act is not merely procedural in nature); *Morris*, 834 F.3d 974 (9th Cir. 2016) (same). As noted above, these decisions go against the clear majority of courts that have decided this issue. Moreover, even the *Lewis* court acknowledged that the class action mechanism is a procedural mechanism—referring to it as a “collective process.” *Lewis*, 823 F.3d at 1161. Where the *Lewis* court erred, but virtually every other court to consider the issue has gotten right, is that this class action process may be waived by contract. *See Gilmer*, 111 S. Ct. at 1652, 1655. The FAA, therefore, mandates the enforcement of such waivers. *See e.g., D.R. Horton, Inc.*, 737 F.3d at 357; *Owen*, 702 F.3d at 1052-53; *Sutherland*, 726 F.3d at 295-98.

**B. The NLRA Does Not Contain A Contrary Congressional Command To Override The FAA And Invalidate The ADR Policy.**

The Supreme Court has allowed a second narrow exception to the FAA. In *CompuCredit Corp.*, the Court held that courts must enforce arbitration agreements according to their precise terms unless “the [FAA’s] mandate has been overridden by a contrary congressional command.” 132 S. Ct. at 669 (internal citation omitted); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346, 3354-55 (1985) (arbitration agreements are enforceable “unless Congress itself has evinced an intention,” when enacting the statute, to “override” the FAA mandate by a clear “contrary congressional command”). “If Congress did intend to limit or prohibit [the] waiver of a judicial forum for a particular claim, such an intent ‘will be deducible from [the statute’s] text or legislative history’” or “from an inherent conflict between arbitration and the statute’s underlying purpose.” *Shearson/American Express, Inc.*, 107 S. Ct. at 2337-38 (internal citation omitted). However, any expression of congressional intent in this regard must be clear and unequivocal. *See, e.g., CompuCredit Corp.*, 132 S. Ct. at 673 (If a statute “is silent on whether claims under [it] can proceed in an arbitr[al] forum, the FAA requires the arbitration agreement to be enforced according to its terms”).

Once again, the ALJ’s reliance upon the Board’s decision in *Murphy Oil* suggests that the ALJ is implicitly relying upon the holding in that case stating that the NLRA presents a contrary congressional demand to invalidate class waivers. However, nothing in the NLRA’s text or legislative history suggests that Congress intended to ban class-action waivers in arbitration agreements. Section 7 does not even use the word “arbitration,” nor does it mention the right to particular procedural options to resolve legal claims. As the Fifth Circuit explained in *D.R. Horton*:

[G]eneral language is an insufficient congressional command, as much more explicit language has been rejected in the past. Indeed, the text does not even mention arbitration. By comparison, statutory references to causes of action, filings in court, or allowing suits all have been found insufficient to infer a congressional command against application of the FAA.

737 F.3d at 360 (finding no “congressional command against application of the FAA” to class-action waivers based on review of the NLRA’s text and legislative history); *see also Richards v. Ernst & Young, LLP*, 734 F.3d 871, 873-74 (9th Cir. 2013); *Sutherland*, 726 F.3d at 297-98, n.8; *Owen*, 702 F.3d at 1055; *Vilches*, 413 Fed. App’x at 494; *Carter*, 362 F.3d at 298; *Adkins*, 303 F.3d at 503; *Caley*, 428 F.3d at 1378; *Horenstein*, 9 Fed. App’x at 619; *Morvant v. P.F. Chang’s China Bistro, Inc.*, 870 F. Supp. 2d 831, 845 (N.D. Cal. 2012) (“Congress did not expressly provide that it was overriding any provision in the FAA when it enacted the NLRA or the Norris-LaGuardia Act”); *Jasso v. Money Mart Express, Inc.*, 879 F. Supp. 2d 1038, 1049 (N.D. Cal. 2012) (“Because Congress did not expressly provide that it was overriding any provision in the FAA, the Court cannot read such a provision into the NLRA and is constrained by *Concepcion* to enforce the instant agreement according to its terms”).

Moreover, a congressional command to override the FAA cannot be inferred from an inherent conflict between the FAA and the NLRA’s purpose. To the contrary, “arbitration has become a central pillar of Federal labor relations policy and in many different contexts the Board defers to the arbitration process both before and after the arbitrator issues an award.” *D.R. Horton*, 737 F.3d at 361. The Supreme Court has also understood the NLRA to permit and require arbitration. *See, e.g., 14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009) (arbitration provision in collective-bargaining agreement must be honored unless a statute removes such claims from NLRA’s scope). “Having worked in tandem with arbitration agreements in the past, the NLRA has no inherent conflict with the FAA.” *D.R. Horton*, 737 F.3d at 361.

In *Murphy Oil*, the Board has asserted there is a distinction between the treatment of collectively bargained arbitration provisions and mandatory individual arbitration agreements imposed by an employer. *Murphy Oil USA, Inc.*, 361 NLRB No. 72. However, there is no legitimate basis for distinguishing between a unionized and non-unionized context in this case. The Supreme Court has explained that “[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative.” *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. at 1457; *Gilmer*, 111 S. Ct. at 1655 (“unequal bargaining power between employers and employees” is no bar to FAA’s enforceability of arbitration provisions).

Even if there were an irreconcilable conflict between the FAA and the NLRA, the FAA must control. *See Chi. & N.W. Ry. Co. v. United Transp. Union*, 91 S. Ct. 1731 (1971). The FAA was re-enacted twelve years after the passage of the NLRA. *Owen*, 702 F.3d at 1053. Congress’s decision to re-enact the FAA, by itself, suggests that Congress intended the FAA’s arbitration protections to remain intact even in light of the earlier enactment of the NLRA. *Id.*

Like the “saving clause,” any “congressional intent” argument is inconsistent with settled Supreme Court precedent and a myriad of lower court decisions. Since the NLRA “is silent on whether claims under [it] can proceed in an arbitr[al] forum, the FAA requires the arbitration agreement be enforced according to its terms.” *CompuCredit*, 132 S. Ct. at 673.

**C. The NLGA Does Not Apply To Invalidate Arbitration Agreements.**

In *Murphy Oil*, the Board asserted that the NLGA repealed the FAA to the extent the FAA compels courts to enforce mandatory individual arbitration agreements. According to the Board, in the event of a conflict between the NLGA and the FAA, the NLGA would prevail because it was enacted seven years after the FAA and expressly repeals all conflicting acts.

The Board's interpretation of the NLGA as prohibiting class action waivers is without foundation. *D.R. Horton, Inc.*, 737 F.3d at 362 ("It is undisputed that the NLGA is outside the Board's interpretive ambit."). The NLGA is an anti-injunction statute that restricts the power of federal courts to issue injunctions under certain circumstances. 29 U.S.C. § 101. The NLGA specifically defines the contracts to which it applies as limited to contracts in which the employee "promises not to join, become, or remain a member of any labor organization" or to quit his employment if the employee becomes a member of a labor organization. 29 U.S.C. § 103(a), (b).

The NLGA does not apply because this case is not an injunction proceeding and Respondent's ADR Policy does not prohibit employees from joining a union or compel employees to forego employment if they become a union member. Indeed, the NLGA "specifically defines those contracts to which it applies" and it is clear that an "agreement to arbitrate is not one of those contracts to which the [NLGA] applies." *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d at 844.

Furthermore, to the extent any tension exists between the NLGA and the FAA, there is no congressional command under which the FAA must yield to the NLGA. The FAA was reenacted fifteen years after the passage of the NLGA and, as noted above, twelve years after the NLRA. *See Owen*, 702 F.3d at 1053 ("The decision to reenact the FAA suggests that Congress intended its arbitration protections to remain intact even in light of the earlier passage of three major labor relations statutes [including the NLGA and the NLRA].") Thus, the NLRA and the NLGA provide no basis for concluding that the class action waiver in the arbitration agreement is unlawful.

V. **THE ALJ ERRED IN FAILING TO CONCLUDE THAT THE ADR POLICY DOES NOT INFRINGE UPON SECTION 7 RIGHTS BECAUSE IT WAS OPTIONAL. [EXCEPTION NOS. 17.]**

The ALJ erroneously dismissed the fact that Respondent’s ADR Policy was optional and completely voluntary. It is undisputed that many employees never signed the agreement and that no one was disciplined or rejected for hire if they refused to sign. Under these circumstances, the ADR Policy was clearly voluntary and did not infringe on Section 7 rights because it is tantamount to an employee voluntarily exercising the right to “refrain” from participating in concerted activity (*i.e.*, class/collective action litigation). *See* 29 U.S.C. § 157 (“Employees shall have the right to . . . engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities.”) (emphasis added).

There is no question that the Act preserves an employee’s freedom of choice in deciding whether to engage in concerted activity or “refrain” from any such activity. This “freedom of choice” extends to voluntarily deciding whether to participate or not participate in a class/collective action. *Salt River Valley Water Users’ Ass’n v. NLRB*, 206 F.2d 325 (9th Cir. 1953). In *Salt River*, a case heavily relied on by the NLRB in its past decisions, the Ninth Circuit held that employees have a Section 7 right to collect signatures on a petition to file a collective action. However, in a part of the decision not cited by the Board, the Ninth Circuit reversed an unfair labor practice against the employer for allegedly coercing an employee to remove his name from the petition. It did so because the employee had removed his name voluntarily and without coercion and did not perceive the employer’s articulated displeasure with the petition as a “threat.” In other words, the Ninth Circuit recognized that the employee had simply exercised his right to “refrain” from participating in the proposed collective action. *Id.* at 329.

Similarly, the Supreme Court has previously determined that a union may waive an employee's rights in litigating non-NLRA claims in court. *See 14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456 (2009). Therefore, it is difficult to “so easily adopt the view that a union may waive employees' rights with regard to the litigation of employment claims — even over an individual employee's strenuous objection — but employees somehow cannot waive the same rights on their own. That defies logic.” *Murphy Oil USA, Inc.*, 361 NLRB No. 72 at p. 48 (Johnson, dissenting).

Here, the undisputed facts reflect that Respondents ADR Policy was optional and completely voluntary. In fact, not all employees signed the ADR Policy and no one was disciplined or rejected for hire if they refused to sign. Under these circumstances, the ADR Policy was clearly voluntary and employees must be allowed the right to voluntarily “refrain” from participating in class/collective action litigation.

**VI. THE ALJ ERRED IN ITS FINDING THAT EMPLOYEES WOULD REASONABLY BELIEVE THAT THE ADR POLICY RESTRICTS THEIR RIGHT TO FILE BOARD CHARGES. [EXCEPTION NOS. 1-2, 9-13, 20.]**

Although the ALJ noted that the ADR Policy contained a “savings clause” in two different places which allowed employees to file charges with the NLRB, it nevertheless reached the unreasonable conclusion that these savings clauses are illusory and employees would reasonably feel inhibited from filing Board charges. [Decision 7:3-7.] The ALJ's conclusion does not withstand scrutiny.

First, the ADR Policy cannot reasonably be construed to restrict employees from filing charges with the Board 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 (“Nothing in this Alternative Dispute Policy is intended to preclude any employee from filing a charge with the Equal Employment Opportunity Commission, the National Labor Relations Board or any similar

federal or state agency seeking administrative resolution.”); Jt. Ex. 2 at p. 2 (“nothing in this ADR Policy shall be construed as precluding any employee from filing a charge with a state or federal administrative agency, such as . . . the National Labor Relations Board.”).] The judge erred in failing to adequately consider both provisions which clearly allow employees to file charges with the NLRB. These provisions were clearly delineated at the end of each document — one was even right next to the signature line — so they were in no way “buried” within the ADR Policy as the ALJ improperly concluded.

Second, there has been no evidence presented in the record that any employees have been confused by the language of the ADR Policy or that they somehow believed the ADR Policy prohibited them from filing charges with the Board. The judge jumped to the conclusion that the “savings clauses” made the ADR Policy ambiguous without any actual evidence from employees in this regard.

Third, the ALJ’s reliance upon *Ralph’s Grocery Co.*, 363 NLRB No. 128 (2016), and other similar cases, to find that employees could somehow misunderstand the above provisions, is also misplaced. The Board’s longstanding test for these issues is premised on the recognition that language which would predictably be understood only by someone with specialized legal knowledge will not render lawful an otherwise illegal rule. Yet, as stated in the dissent to *SolarCity*, the Board has turned this precedent on its head: “Every employee who reads English would understand the [arbitration] [a]greements have no impact on NLRB charge-filing, since this is precisely what the Agreements say.” 363 NLRB No. 83, at \*8-10 (Miscimarra, dissenting). But the Board has “devised an implausible interpretation that ... could only be advocated or adopted by lawyers.” *Id.* Only a lawyer could isolate and twist snippets of the ADR Policy and argue for an interpretation that prohibits the filing of charges when the ADR

Policy says the opposite. In fact, the Fifth Circuit, when confronted with similar language in an arbitration agreement has overruled the NLRB. *Murphy Oil USA, Inc.*, 808 F.3d at 1020 (“[I]t would be unreasonable for an employee to construe the [arbitration agreement] as prohibiting the filing of Board charges when the agreement says the opposite.”) Here too, logic dictates that Respondent’s employees would not reasonably understand the ADR Policy to restrict their access to the Board when the agreement explicitly says the exact opposite.

**VII. THE ALJ ERRED IN RECOMMENDING A VAGUE AND OVERBROAD REMEDY, ORDER AND NOTICE. [EXCEPTION NOS. 21-22.]**

As stated above, since the ALJ erred in determining that Respondent engaged in unfair labor practices in violation of Section 8(a)(1) of the Act, its recommended Remedy, Order, and Notice to Employees are all improper. In addition, notwithstanding the foregoing, the Board should refuse to enforce the following vague and ambiguous statements in the ALJ’s proposed remedy that “Respondent has engaged in certain unfair labor practices” and that Respondent “must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.” [Decision 7:30-33.]

**VIII. CONCLUSION**

For all of the foregoing reasons, Respondent respectfully requests that the Board reverse the ALJ’s decision and dismiss the Complaint in its entirety, with prejudice. 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: July 19, 2017

Respectfully Submitted,  
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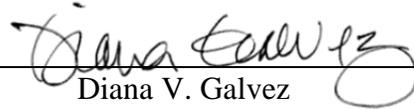
**CERTIFICATE OF SERVICE**

I hereby certify that, on July 19, 2017, I filed a copy of **Respondent's Brief In Support Of Exceptions To The Administrative Law Judge's Decision** 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.

  
Diana V. Galvez