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San Rafael Healthcare Wellness, LLC

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD – REGION 20

SAN RAFAEL HEALTHCARE AND WELLNESS, LLC and NATIONAL UNION OF HEALTHCARE WORKERS	NLRB Case No.: 20-CA-204948

RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

Respondent San Rafael Healthcare Wellness, LLC ("Employer" or "Respondent"), by its attorneys Epstein Becker Green, P.C. and pursuant to Section 102.46 of the National Labor Relations Board's ("Board" or "NLRB") Rules and Regulations, hereby excepts to Administrative Law Judge Jeffrey D. Wedekind's ("ALJ") Decision in Case No. 20-CA-204948 issued on February 14, 2018 ("Decision"). Respondent files Respondent's Exceptions to the ALJ's Decision concurrently and together with Respondent's Brief in Support of Its Exceptions (collectively "Exceptions").

As described below, Respondent hereby respectfully excepts to the legal standards, factual findings, rulings and conclusions in the ALJ's Decision that Respondent's Alternative Dispute Resolution Policy ("ADR Policy") can be reasonably interpreted to restrict employees' protected Section 7 rights and his failure to find that the legitimate business justifications of Respondent's ADR Policy outweigh any potential impact on such rights.

Specifically, Respondent excepts to the following portions of the ALJ's Decision:

1. Respondent excepts to the ALJ's factual findings, legal conclusions and legal standards applied and relied upon on page 5, line 1 through page 6, line 10 in his Decision to (erroneously) conclude that Respondent's ADR Policy, when reasonably interpreted, would potentially interfere with the exercise of NLRA-protected rights. (ALJD[1] 7:3-5).

2. Respondent excepts to the ALJ's factual findings, legal conclusions and legal standards applied and relied upon on page 5, lines 3 through 13 that the "Who is Covered by the ADR Policy" section, the "Covered Disputes" section, and the "Class Action Waiver" section, when reasonably interpreted, would potentially interfere with the exercise of NLRA-protected rights. (ALJD 5:1-18).

3. Respondent excepts to the ALJ's findings on page 5, lines 13 through 18 as follows:

> [A]lthough the policy later states that nothing there is intended to preclude "any employee from filing a charge…with the National Labor Relations Board…seeking administrative resolution," this statement does not appear until the very end of the three-page policy, after several additional sections, and is not

[1] Throughout these Exceptions, "ALJD" shall refer to Administrative Law Judge Jeffrey Wedekind's Decision in NLRB Case No. 20-CA-204948.

> highlighted by either a separate section heading (it has no apparent relation to "Severability") or by capitalizing or italicizing the statement. (ALJD 5:13-18).

4. Respondent excepts to the portions of the ALJ's conclusion on page 6, line 20 that "[t]he General Counsel's argument is consistent with past Board decisions." (ALJD 6:20).

5. Respondent excepts to the ALJ's conclusion that the portion of the ADR Policy which explicitly allows employees to file charges with the Board does not exempt unfair labor practice charges filed with the Board from the final and binding alternative dispute resolution and arbitration mandate in the ADR Policy. (ALJD 5:1-6:10); *see* Jt. Ex. 7, Amended Complaint, Ex. A 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. However, any claim that cannot be resolve through administrative proceedings shall be subject to the procedures of this ADR Policy.").

6. Respondent excepts to the portions of the ALJ's factual findings, legal conclusions and legal standards applied and relied upon on page 6, lines 4-10 of his Decision as follows:

> The company also argues (Br. 9, 11, 13) that its mandatory arbitration policy is distinguishable from those in *Lincoln Eastern* and *Solar City* and other similar cases because the sentence preserving the right to file Board charges is "strategically" and "conspicuously" placed near the end rather than in the middle of the policy. However, as indicated by the General Counsel, there is nothing conspicuous about the placement of the sentence. Nor is there any other record or rational basis to conclude that the Company's strategy was to emphasize or highlight the right of employees to file unfair labor practice charges. (ALJD 6:4-10).

7. Respondent excepts to the ALJ's reliance upon *Lincoln Eastern*, 364 NLRB No. 16 (2016), *Solar City*, 363 NLRB No. 83 (2015), and *U-Haul of California*, 347 NLRB 375 (2006), *enf'd mem.* 255 Fed. Appx. 527 (D.C. Cir. 2007), which are not valid and enforceable authority in light of the Board's decision in *The Boeing Co.*, 365 NLRB No. 154 (Dec. 14, 2017). (ALJD 5:20-28, 5:38-6:2, 6:39-7:3).

8. Respondent excepts to the ALJ's finding that Respondent's ADR policy is not distinguishable from *Lincoln Eastern*, 364 NLRB No. 16 (2016), *Solar City*, 363 NLRB No. 83 (2015), *U-haul of California*, 347 NLRB 375 (2006) and other past Board decisions in which the Board found mandatory arbitration agreements unlawfully interfered with NLRA-protected rights. (ALJD 5:20-28, 5:38-6:2, 6:39-7:3).

9. Respondent excepts to the portions of the ALJ's conclusion on page 6, lines 39 through 41:

> As the company's argument implicitly acknowledges, however, the *Boeing* majority did not specifically address or expressly overrule *U-Haul*, *SolarCity*, and *Lincoln Eastern* or similar cases involving mandatory arbitration provisions. (ALJD 6:39-41).

10. Respondent excepts to the portions of the ALJ's conclusion on page 7, lines 1-5:

> Nor, as indicated by the General Counsel, does the [*Boeing*] majority's balancing test dictate a different result, either in those cases or here. As discussed above, regardless of whether the plurality or concurring statement of the threshold inquiry is applied, the mandatory arbitration policies, as reasonably interpreted, prohibit or restrict the right of employees to file charges with the Board. (ALJD 7:1-5).

11. Respondent excepts to the ALJ's conclusion that the ADR Policy's preamble and subsequent sections indicating that the ADR policy applies to employment disputes traditionally resolved in the "court system" and claims "that cannot be resolved…during an investigation by an administrative agency" or "through administrative proceedings" does not convey to employees that the ADR Policy does not restrict the filing of unfair labor practice charges with the Board. (ALJD 5:30-6:2).

12. Respondent excepts to the ALJ's implication that the ADR Policy would prohibit the General Counsel or an employee from appealing a decision of the Board as the ADR Policy only applies to disputes between the Employer and employee and all such appeals are by law between the agency and the adverse party, not between the employer and the employee. (ALJD 5:35-6:2, fn. 6).

13. Respondent excepts to the portions of the ALJ's conclusion on page 7, lines 8-13 and footnotes 8-9 as follows:

> Finally, while the benefits of arbitrating disputes are generally well recognized—as indicated by the Company, arbitration may substantially benefit employers and

employees by providing an "expedient, cost-effective resolution of disputes" (Br. 14) [fn. 8 See also *Stolt-Nielsen S.A. v. AnimalFeeds International Group*, 559 U.S. 662, 685 (2010)]—there is insufficient basis in current law and precedent to conclude that this justification is sufficient to outweigh such potentially pervasive interference with employees' fundamental rights and protections under the Act. [fn. 9 Indeed, citing *Scrivener*, above, the General Counsel argues (Br. 8) that "[n]o legitimate justification could be offered for interfering with Congress' intent to secure complete freedom for employees to access or participate in the Board's processes."] (ALJD 7:8-13, fn. 8-9).

14. Respondent excepts to the ALJ's failure to evaluate whether "the nature and extent of the potential impact on NLRA rights" is outweighed by the "legitimate justifications associated with the rule" as required by the Board's decision in *The Boeing Co.*, 365 NLRB No. 154 (Dec. 14, 2017) ("*Boeing*"). (ALJD 7:6-13).

15. Respondent excepts to the ALJ's finding that "the Company's ADR Policy violates Section 8(a)(1) of the Act, as alleged." (ALJD 7:15).

16. Respondent excepts to the ALJ's failure to consider or rule on Respondent's request to reopen the record to receive evidence relevant to the new standard articulated in *Boeing*. (Respondent's Brief on the Merits, p. 15, § C).

DATED: March 14, 2018

EPSTEIN BECKER & GREEN, P.C.

By: _____
Adam C. Abrahms
Christina C. Rentz
ATTORNEYS FOR SAN RAFAEL HEALTHCARE WELLNESS, LLC

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My business address is 1925 Century Park East, Suite 500, Los Angeles, CA 90067-2506.

3. I served copies of the following documents (specify the title of each document served):

RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

4. I served the documents listed above in item 3 on the following persons at the addresses listed:

Counsel for the NLRB

Joseph D. Richardson
National Labor Relations Board, Region 20
901 Market Street, Suite 400
San Francisco, California, 94103
Facsimile: (415) 356-5156
Email: joseph.richardson@nlrb.gov

Counsel for Charging Party

Florice Hoffman, Esq. Date
Law Office of Florice Hoffman
8502 E Chapman Avenue Suite 353
Orange, CA 92869-2461
Facsimile: (714) 282-7918
Email: fhoffman@socal.rr.com

5. a. ☒ **By United States mail.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses in item 4 and placed the envelope for collection and mailing on the date shown below, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

   I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Los Angeles, California.

   b. ☐ **By overnight delivery.** I enclosed the documents on the date shown below in an envelope or package provided by an overnight delivery carrier and addressed to the person at the addresses in item 4. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

   c. ☐ **By e-mail or electronic transmission.** I caused the documents to be sent on the date shown below to the e-mail addresses of the persons listed in item 4. I did not receive within a reasonable time after the transmission any electronic message or other indication that the transmission was unsuccessful.

6. I served the documents by the means described in item 5 on **March 14, 2018**.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

3/14/18	Lynne Conner	
DATE	(TYPE OR PRINT NAME)	(SIGNATURE OF DECLARANT)