

**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 SUPPLEMENTAL BRIEF SEEKING DISMISSAL OF THE
COMPLAINT**

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Dated: August 13, 2018

Pursuant to the July 30, 2018 Order of the National Labor Relations Board (“NLRB” or “Board”) in the above-captioned matter, Respondent Montecito Heights Healthcare & Wellness Centre, LP (“Respondent”) files this Supplemental Brief Seeking Dismissal of the Complaint in this matter.¹

This case turned in its entirety on whether arbitration agreements waiving the right to proceed on a class or collective basis violated the National Labor Relations Act (“NLRA” or “Act”). In *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (May 21, 2018), the Supreme Court of the United States determined that such agreements are enforceable under the Federal Arbitration Act (“FAA”) and do not violate the NLRA. Accordingly, the Complaint and the entire case should be summarily dismissed.

I. THE SUPREME COURT’S DECISION IN EPIC SYSTEMS MANDATES DISMISSAL OF THIS CASE.

Beginning with its opinion in *D.R. Horton*, 357 NLRB 2277 (2012), the Board took the position that arbitration agreements containing class action waivers violated the Act because they precluded employees from engaging in the concerted activity of pressing their claims on a class basis. *Id.* at 2280. The Board subsequently relied on the reasoning in *D.R. Horton* to find dozens of arbitration agreements invalid on the same basis. *See, e.g., Murphy Oil*, 361 NLRB 774 (2014). In this case, the Amended Complaint continued to rely on this theory to assert that the class action waiver in Respondent’s arbitration agreement “interfer[ed] with, restrain[ed], and coerc[ed] employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.” (Am. Compl., ¶ 6.)

¹ Respondent hereby incorporates all arguments previously submitted in the adjudication of this dispute, as set forth fully in its Post-Hearing Brief to the ALJ, its Brief in support of Exceptions to the ALJ’s Decision, its Answering Brief to Charging Party’s Cross-Exceptions to the ALJ’s Decision, and its Reply Brief in Support of Exceptions to the ALJ’s Decision.

The Supreme Court’s decision in *Epic Systems* decisively rejected the “novel right to class action procedures that the Board’s own general counsel disclaimed as recently as 2010.” The Court held that arbitration agreements are favored under the Federal Arbitration Act and that nothing in the NLRA “even hint[s] at a wish to displace the” FAA. 138 S. Ct. at 1617. Accordingly, the Board’s position that class action waivers violate the NLRA is no longer the law of the land.

The Board has recognized and agreed with the Court’s decision. In light of *Epic Systems*, the Board has summarily dismissed pending cases relying on the *D.R. Horton* theory of liability. See *Northrop Grumman Sys. Corp.*, 366 NLRB No. 147, slip op. at 1 (Aug. 2, 2018) (“In light of the Supreme Court’s decision in *Epic Systems*, which overrules the Board’s holding in *Murphy Oil*, we conclude that the complaint must be dismissed.”); *Kellogg, Brown & Root, LLC*, 366 NLRB No. 153, slip op. at 1 (Aug. 2, 2018) (same). This is the obvious outcome, given that the only basis for finding that arbitration agreements violate the Act has been rejected by the Supreme Court.

II. THE BOARD’S RULES PRECLUDE THE CHARGING PARTY FROM RAISING NEW THEORIES OR ARGUMENTS AT THIS STAGE OF THE PROCEEDINGS.

To the extent that the Charging Party seeks to use this supplemental briefing to raise new arguments or theories of relief, the Board should reject such efforts. Under the Board’s regulations, “[m]atters not included in exceptions or cross-exceptions may not thereafter be urged before the Board, or in any further proceeding.” 29 C.F.R. § 102.46(f). In addition to barring new objections not raised in initial exceptions, this rule bars parties from raising new arguments not raised in its initial briefs. See, e.g., *Oncor Elec. Delivery Co.*, 364 NLRB No. 58, slip op. at 1, n.1 (“Because the Respondent failed to raise these arguments in its exceptions or at any earlier point in this proceeding, the arguments are waived.”).

In the event that the Union seeks to raise new theories or arguments in its supplemental brief and the Board does not categorically reject such efforts, Respondent requests that the Board provide it with the opportunity to address those items. The easiest and proper solution, however, is to strike such briefing outright.

III. THE BOARD SHOULD CONTINUE TO REJECT THE UNION’S FRIVOLOUS “KITCHEN SINK” ARGUMENTS.

In its request for supplemental briefing, the Charging Party claims that it has any number of additional issues mandating that the Board find that the arbitration agreement violates the Act. These arguments, however, are frivolous and should be rejected for the same reasons set forth in Respondent’s Answering Brief to Charging Party’s Cross Exceptions to the ALJ’s Decision.

As an initial matter, any exceptions that are beyond the scope of the Amended Complaint must be rejected categorically. The decision as to whether to issue a complaint regarding a charge is committed to the unreviewable discretion of the General Counsel. 29 U.S.C. § 153(d); 29 C.F.R. § 101.6; *Newport News Shipbuilding & Dry Dock Co. v. Schauffler*, 303 U.S. 54, 57-58 (1938) (NLRA “confers upon the Board exclusive initial power to make the investigation” of charges). Accordingly, parties to Board proceedings have no authority whatsoever to direct the Board to resolve exceptions that go beyond the theory of the case articulated by the General Counsel in a complaint. *United Nurses*, 359 NLRB No. 42, n.4 (2012).

Even if the Board considers the individual challenges, they must be dismissed. The majority of the Union’s exceptions are either inconsequential boilerplate (1, 4, 27-30), or foreclosed by *Epic Systems* (2-3, 5-18, 21). The exceptions alleging that the arbitration agreement violates some other federal law (19, 22, 26) are beyond the scope of the Amended Complaint, irrelevant to determining whether the arbitration agreement constitutes an unfair labor practice, and (in the case of the Union’s Religious Freedom Restoration Act claim)

inapplicable to private actors. The exceptions to the ALJ's decision to decide the matter on a stipulated record approved by the Region (20, 24) should be rejected given that the decision was a proper exercise of the ALJ's discretion supported by all parties to the case other than the Union.

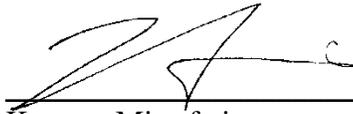
Finally, the Union argues that (a) the arbitration agreement is ambiguous, (b) the ambiguity should be resolved against Respondent, and (c) the resulting interpretation of the agreement should be unlawful under a new standard the Board should create for interpretation of employer policies after overruling *Lutheran Heritage Village – Livonia* (21, 23). Of course, since the Union's initial briefing, the Board did establish such a new standard. See *Boeing Co.*, 365 NLRB No. 154 (Dec. 14, 2017). Unfortunately for the Union, the standard establishes beyond doubt that the arbitration agreement is enforceable. *Boeing* indeed reversed a portion of *Lutheran Heritage*. But instead of ruling ambiguous policies unenforceable, the Board instead held that it would measure the "nature and extent of the potential impact on NLRA rights" implicated by the rule against the employer's "legitimate justifications associated with the rule." Under this standard, the Union's arguments fail.

IV. CONCLUSION

For all of the reasons set forth above and in Respondent's Exceptions Brief, the Board should reverse the ALJ's Decision and dismiss the Amended Complaint in its entirety, with prejudice.

Dated: August 13, 2018

Respectfully Submitted,
FOLEY & LARDNER LLP

A handwritten signature in black ink, appearing to read 'Kamran Mirrafati', is written over a solid horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that, on August 13, 2018, I filed a copy of **Respondent's Supplemental Brief Seeking Dismissal of the Complaint** using the NLRB's e-filing system and also served the following individuals via e-mail.

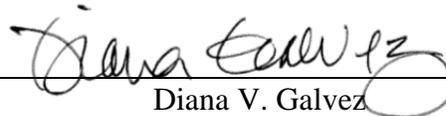
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I declare under penalty of perjury under the laws of the United States.


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