UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BEENA BEAUTY HOLDING, INC. d/b/a
PLANET BEAUTY

and **Case No. 31-CA-144492**

MICHAEL SANCHEZ, an Individual

COUNSEL FOR GENERAL COUNSEL'S RESPONSE

TO THE BOARD'S NOTICE TO SHOW CAUSE

Counsel for the General Counsel respectfully opposes remanding the case to a judge for further proceedings, including if necessary the filing of statements, reopening of the record, and issuance of a supplemental decision, in light of *The Boeing Co.*, 365 NLRB No. 154, slip op. at 14-17 (2017). The instant case involves the issue of whether Respondent maintained a policy that interferes with employees' access to the Board and its processes.

The General Counsel has already set forth his position on the sole issue in this case in another matter that is currently pending before the Board, *Prime Healthcare*, 21-CA-133781. A copy of the General Counsel's brief in that case is attached as Exhibit 1. The Board deciding the issues before it in *Prime Healthcare*, which has been fully briefed

and fully sets forth the General Counsel's position, would likely obviate the need to remand other cases, like the instant matter, where the same issues are raised.

For the foregoing reasons, the Counsel for the General Counsel respectfully opposes remanding the instant matter to a judge for further proceedings.

Dated: November 2, 2018

/s/ Steven Wyllie
Steven Wyllie
Counsel for the General Counsel

Exhibit 1

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 21

PRIME HEALTHCARE PARADISE VALLEY, LLC

NLRB No. 16-1132

Case 21-CA-133781
Case 21-CA-133783

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF ON REMAND TO THE BOARD

I. INTRODUCTION AND STATEMENT OF THE ISSUE.

This action is before the Board on remand from the United States Court of Appeals for the District of Columbia to determine whether the Board's decision in The *Boeing Company*, 365 NLRB No. 154 (December 14, 2017), and the United States Supreme Court decision in *Epic Systems Corp. v. Lewis*, --- U.S. ---, 138 S. Ct. 1612, WL 2292444, 211 L.R.R.M. (BNA) 3061 (May 21, 2018), affect the Board's finding that Prime Healthcare Paradise Valley, LLC ("Prime Healthcare") violated Section (8)(a)(1) of the National Labor Relations Act (the "Act") by maintaining a "Mediation and Arbitration Agreement" that "employees reasonably would believe . . . bars or restricts their right to file unfair labor practice charges with the Board."[1]

In *Epic*, the United States Supreme Court enforced an employment arbitration agreement requiring individualized, rather than collective, arbitration of employment disputes. In so doing, the *Epic* majority applied the provisions of the Federal Arbitration Act to find that covered employment arbitration agreements should generally be enforced as written, and that a provision

[1] This remand involves only the arbitration agreement that Prime Healthcare maintained until May 13, 2014. The General Counsel did not allege that the arbitration agreement Prime Healthcare has maintained since May 13, 2014, which expressly exempts NLRA claims, is unlawful. See *Prime Healthcare Paradise Valley, LLC,* 363 NLRB No. 169, slip op. at 1, n.3 (April 22, 2016).

precluding collective arbitration did not violate any express employee right or interest under the Act.

For the reasons that follow, it is the position of the General Counsel that under *Boeing*, when viewed in light of *Epic*, the scope of the arbitration clause at issue in this action should be found unlawful. In this regard, the General Counsel equates the relevant arbitration provision at issue here to a Category 3 rule under *Boeing* because it prohibits NLRA-protected conduct and "the adverse impact is not outweighed by any justification associated with the rule." In this case, the provision, when reasonably interpreted, interferes with the exercise of NLRA rights to file unfair labor practice charges with the NLRB. The Board should find that Prime Healthcare's arbitration agreement is unlawful.

The Provision at Issue

Prime Healthcare's arbitration provision provides in relevant part:

> . . . Except as otherwise provided in this Agreement, the Company and the Employee hereby consent to the resolution by binding arbitration of all claims or controversies for which a federal or state court would be authorized to grant relief, whether or not arising out of, relating to or associated with the Employee's employment with the Company.
>
> Claims covered by this Agreement include, but are not limited to, claims for wages or other compensation due; claims for breach of any contract or covenant, express or implied; tort claims; claims for discrimination or harassment on bases which include but are not limited to race, sex, sexual orientation, religion, national origin, age, marital status, disability or medical condition; claims for benefits, (except as excluded in paragraph 9), and claims for violation of any federal, state or other governmental constitution, statute, ordinance, regulation, or public policy including but not limited to Title VII of the Civil Rights Act, Age Discrimination in Employment Act, The Americans with Disabilities Act, Family and Medical Leave Act, Equal Pay Act and their state equivalents. The purpose and effect of this Agreement is to substitute arbitration as the forum for resolution of the Claims; all responsibilities of the parties under the statutes applicable to the Claims shall be enforced.

ARGUMENT

The Supreme Court's decision in *Epic* and its Relevance Here

Analysis of *Epic* and its potential application is necessary because the provision at issue here, unlike that in *Boeing*, concerns a provision of an arbitration agreement. In *Epic*, the Court addressed the question: "Should employees and employers be allowed to agree that any disputes between them will be resolved through one-on-one arbitration? Or should employees always be permitted to bring their claims in class or collective actions, no matter what they agreed with their employers?" *Epic*, slip op. at 1. Although the Court did not address the type of arbitration provision presented in the instant case, the sweeping language of *Epic* included intensive analysis of its application to arbitration provisions that may affect NLRA-protected rights.

In *Epic*, a majority of the Supreme Court held that an arbitration agreement requiring individualized arbitration proceedings, and barring class or collective proceedings before judges or arbitrators, did not violate the NLRA. In so holding, the Court disagreed with *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), in which the Board had invalidated a similar individualized arbitration requirement because it infringed employees' NLRA Section 7 rights to engage in the "concerted activity" of pursuing claims as a class or collective action. The Supreme Court found no such infringement in the language of the NLRA, stating that Section 7 protects unionization and collective bargaining and "other concerted activities" that "employees 'just do' for themselves in the course of exercising their right to free association in the workplace," rather than the procedural formalisms of the courtroom and joint or class litigation. *Id.*, slip op. at 12.

The Court also refused to endorse the *D.R. Horton* decision because permitting any party to demand class-wide proceedings undermines "a fundamental attribute of arbitration" -- "the traditionally individualized and informal nature of arbitration." *Id.*, slip op. at 7-9, citing *AT&T Mobility LLC* v. *Concepcion*, 563 U. S. 333, 347, 348 (2011). As the Court noted in *Epic*, arbitration is an individualized proceeding and class-wide arbitration procedures may not be imposed without the individual parties' affirmative consent. *Id.*, slip op. at 8-9, citing *Stolt-Nielsen S. A.* v. *AnimalFeeds Int'l Corp.*, 559 U. S. 662, 684–687 (2010).

The Court further cautioned that federal statutes must be read to give effect to both laws and it, as well as lower courts, were not at "liberty to pick and choose among congressional enactments." The NLRA and the Federal Arbitration Act (FAA) should thus be read in harmony, and without hostility to arbitration and the arbitration agreements entered into by the parties. If the statutes cannot be harmonized, one statute can displace the other only if there is "'a clearly expressed congressional intention'" to do so. Given no congressional indication that the NLRA supplants the FAA, the Court directed that FAA covered arbitration agreements are to be enforced as they are written, unless clearly unlawful. As to interpretation of the NLRA's Section 7 provisions, "… a statute's meaning does not always 'turn solely' on the broadest imaginable 'definitions of its component words,'" *id*, slip op. at 23 (citation omitted). The NLRA should, therefore, not be read in its broadest possible interpretation if it would conflict with and essentially negate the parties' agreements under the FAA.

The *Epic* majority analysis suggests that the Supreme Court will not lightly infer illegality of an FAA-enforceable arbitration contract, and will not apply the concept of protected concerted activity broadly to invalidate an agreed to arbitration agreement. Accordingly, in pursuing future cases, the General Counsel and the Board should carefully review the language of arbitration agreements for actual, as opposed to theoretical, violations of the NLRA and should identify with precision language alleged to irreconcilably conflict with the FAA, and the policy bases on which the Board would rely in contending that the FAA is, in fact, in conflict with the NLRA. Thus, to the extent specific clauses in arbitration provisions are confined to the arbitral process and do not reach beyond their confines to interfere with Section 7 rights of employees to engage in the type of concerted activities that employees "just do" for themselves, the wording should generally be considered lawful under the Act.

This analysis is consistent with the Board's reasoning in *Boeing* in which the Board retreated from reading into employee handbook provisions the broadest possible application of the "reasonably construe" standard in *Lutheran Heritage* that resulted in the invalidation of facially neutral policies "*solely* because they were ambiguous in some respect." Thus, if an arbitration provision is facially neutral, and does not, on its face, "prohibit or interfere with the exercise of NLRA rights," it should be deemed lawful. An adjudicative body should not search

beyond the language of the provision for theoretical or hypothetical conflicts with NLRA protected rights.

Were the Board to apply the *Boeing* analysis to the arbitration provision in *Epic*, it should find that arbitration provisions prohibiting class actions fall into the Category 1 rule since the provision, according to the Supreme Court, does not prohibit or significantly interfere with the exercise of NLRA rights. *See Epic*, slip op. at 2 ("The NLRA secures to employees rights to organize unions and bargain collectively, but it says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum. This Court has never read a right to class actions into the NLRA—and for three quarters of a century neither did the National Labor Relations Board."). Similarly, an arbitration provision that requires that employment related claims be resolved by arbitration, but which does not prohibit the filing of an unfair labor practice charge, would be a lawful Category 1 rule under *Boeing* because no interference with any NLRA rights are implicated. Any other reading of such a provision would violate the interpretive directives of *Epic.*

However, where arbitration provisions on their face implicate Section 7 rights, they should be categorized as, and analyzed under, the *Boeing* Category 2 rules. Thus, arbitration provisions that suggest that employment-related claims be brought exclusively to arbitration touch on core Section 7 rights of employees to access the Board's processes. These provisions "warrant individualized scrutiny." *Boeing*, slip op. at 16.

Arbitration Agreements Limiting Access to Board Process Are Unlawful

Under *Epic*, arbitration agreements that limit access to the Board and its processes continue to be unlawful under the Act. It is thus essential to recognize the important distinction between agreements that merely *require arbitration* and agreements that also *limit access* to the Board. *See, e.g., Applebee's Restaurant*, 363 NLRB No. 75, slip op. at 3-5 (December 22, 2015) (Miscimarra, concurring in part and dissenting in part). Thus, there is nothing unlawful about requiring employees to bring their work-related claims to arbitration. This process may have many benefits to both employers and employees, and ample precedent makes it clear that

employers and employees may lawfully enter into agreements that bind them to mandatory arbitration of work-related claims.

Arbitration agreements violate the Act, however, when they *also* limit or preclude employees from filing unfair labor practice charges or otherwise accessing the Board's processes. *See, e.g.*, *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, slip op. at 2 n.5 (March 16, 2015) (Johnson, concurring in part). In stark contrast to the questionable NLRA statutory right asserted in *Epic*, the Court has expressly acknowledged that "Congress has made it clear that it wishes all persons with information about [unfair labor] practices to be completely free from coercion against reporting them to the Board." *Nash v. Florida Industrial Comm'n*, 389 U.S. 235, 238 (1967). The Court has long emphasized that "[i]mplementation of the Act is dependent upon the initiative of individual persons who must, as petitioner has done here, invoke its sanctions through filing an unfair labor practice charge." *Id*. Indeed, since the Board does not initiate its own proceedings, "implementation is dependent 'upon the initiative of individual persons.'" *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972), quoting *Nash*, 389 U.S. at 238. For this reason, "it is unlawful for an employer to seek to restrain an employee in the exercise of his right to file charges" with the Board. *Id*. The Court has further stated that "[a] proceeding by the Board is not to adjudicate private rights but to effectuate a public policy. . . The policy of keeping people 'completely free from coercion,' . . . against making complaints to the Board is therefore important in the functioning of the Act as an organic whole." *NLRB v. Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418, 424, (1968).

This extensive recognition of Congressional intent to protect access to the Board is consistent with the Supreme Court's treatment of other agencies. Thus, even where the Court upheld the legality of arbitration agreements that precluded employees from bringing lawsuits in court under federal civil rights laws, the Court also expressly acknowledged that employees retain their right to file charges with the EEOC. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (an individual claimant who signed an agreement to submit an employment discrimination claim to arbitration "will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action").

This analysis does not appear to be in dispute. For example, in *Murphy Oil* itself, the Fifth Circuit enforced the Board's order holding that the employer had violated Section 8(a)(1) because employees could reasonably believe the contracts at issue precluded the filing of Board charges." *Murphy Oil USA Inc. v. NLRB*, 808 F.3d 1013, 1019 (5th Cir. 2015) ("Wherever private contracts conflict with [the Board's] functions, they . . . must yield or the [NLRA] would be reduced to a futility," quoting *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944)). In enforcing the Board's order, the Fifth Circuit explained that Section 10(a) of the Act empowers the Board to prevent unfair labor practices, and that power "cannot be limited by an agreement between employees and [an] employer."[2] *Id*. *See also D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 363-64 (5th Cir. 2013). In *Epic*, no party sought Supreme Court review of those Board-access violations. Indeed, we are not aware of any employer that has argued that it may lawfully limit employees' right to file charges lawfully, or otherwise interfere with employees' right to access the Board and its processes. In any event, Respondent has not made such an argument. Rather, the argument has always been what Respondent argues here -- that the particular provision at issue does not, in fact, interfere with employees' right to file charges.

The *Epic* decision did not overrule these holdings. An arbitration provision that prevents the Board from fulfilling its mandates or employees from accessing Board procedures exemplifies the type of exceptional provision that militates against enforcement of a parties' FAA-covered arbitration agreement.

[2] Section 10(a) states: "The Board is empowered . . . to prevent any person from engaging in any unfair labor practice. . . This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. . . ."

New Principles of Interpretation Applicable to Arbitration Agreements under *Epic* and *Boeing*.

The pre-*Boeing* rationale underlying the allegations in the instant case was that the employer maintained an agreement that employees would "reasonably construe" as restricting their access to the Board's processes. Those allegations were originally based on the analytical framework for assessing whether workplace rules interfere with employees' rights under the Act set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) -- the extant precedent at the time of the complaint here. Because the Board in *Boeing* overturned its prior "reasonably construe" standard, the question now is whether the employer's policy or, in this case, the parties' arbitration agreement, unduly interferes with employee rights under *Boeing*.[3] In this regard, as directed by *Epic* that the parties' agreed-to language should be enforced, the Board should review the language of the arbitration agreement to determine whether there is an actual, as opposed to a hypothetical, interference with Section 7 rights. If the agreement's provisions, when reasonably interpreted, do not interfere with Section 7 rights, or interfere only marginally with Section 7 rights, the provisions should be deemed lawful and all inquiry should end there. If, as reasonably interpreted, the provisions interfere with or prohibit employees' access to the Board, the provisions should be found unlawful because the Section 7 rights at issue here are not "peripheral," but "deemed central to the Act," and outweigh any legitimate employer business justification. *Boeing*, slip op. at 16.

In interpreting arbitration agreements, the Supreme Court's decision in *Epic* must be considered in addition to *Boeing*, which addressed employer-issued employee handbook provisions. Arbitration provisions are agreed to by the individual parties and, under *Epic*, are entitled to greater deference than unilaterally issued policies. *Epic* dictates that an arbitration agreement should be enforced, unless it is clearly in conflict with the NLRA or has been applied in a manner that violates the Act. Thus, if an agreement does not clearly interfere with or

[3] Although the Court in *Epic* addressed voluntary agreements between an employer and employee, and *Boeing* (and previously *Lutheran Heritage*) expressly applies to employer-implemented handbook rules and not voluntary agreements, the analysis in *Boeing* regarding how employees would interpret ambiguous language and how to balance the impact on Section 7 rights with legitimate employer business interests is a useful and appropriate framework for considering the legality of these provisions as well.

prohibit NLRA-protected activities, "the rule is lawful. . ., and the Board's inquiry into maintenance of the rule comes to an end." *Boeing.* If an agreement is ambiguous concerning its impact on NLRA-protected rights, the Board should use the *Boeing* analytical framework of Category 2 rules to determine whether the agreement would reasonably be read to prohibit or interfere with the exercise of NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.

Of course, even if provisions of arbitration agreements are facially lawful, the *Boeing* Board made clear that application of an otherwise lawful rule may still be unlawful. The Board explained that "even when a rule's *maintenance* is deemed lawful, the Board will examine the circumstances where the rule is *applied.*" *Boeing,* slip op. at 5. If such application negatively affects NLRA-protected activity, such application may violate the Act. Thus, to the extent a lawful Category 1 or Category 2 arbitration agreement is applied so as to interfere with core Section 7 rights, such application of the agreement should be found unlawful.

<u>Applying these general principles to scope of arbitration provisions</u>

1) Arbitration agreements that explicitly prohibit the filing of claims with administrative agencies, that state that employees must use arbitration "exclusively" for all of their work-related claims, that state that employees cannot use any other forum, that indicate that statutory claims must be brought exclusively in arbitration or otherwise use language that employees would reasonably understand as prohibiting the filing of claims with the Board, should be unlawful. This would fall under Category 3 of *Boeing.*
2) With respect to provisions that merely state that all employment disputes *shall* or *must* be "resolved" through arbitration, exclusivity should not be read into them, unless other language in the provision indicates exclusivity. Such arbitration agreements merely require employees to utilize the employer's arbitration system for employment-related disputes but, in the absence of other language, do not prohibit employees from utilizing Board processes such as unfair labor practice proceedings. Arbitrations agreements should thus be read as whole to determine whether they actually prohibit charge-filing with the Board or bringing claims to administrative agencies. In other words, in the

absence of an explicit prohibition on pursuing proceedings in other fora, the Board should not read a prohibition on pursuing other proceedings into an arbitration provision that is silent on the issue. Such provisions would be considered *Boeing* Category 2 clauses, and should be analyzed to determine whether they would reasonably be read to interfere with the exercise of NLRA rights.

3) A savings clause that explicitly provides for utilization of administrative proceedings in tandem with arbitration proceedings would be lawful and clearly put the provision in Category 1 of the *Boeing* analysis. Thus, as long as employees would understand that they retain their right to access the Board and its processes, there should be nothing unlawful about requiring the use of arbitration as well. Therefore, even arbitration agreements that provide for "exclusive" arbitration of all claims should be lawful if they contain express language that preserves employees' rights to access the Board and its processes, at least where the disclaimer language is reasonably proximate to the mandatory arbitration language so that the entire agreement would be read by employees as permitting Board access. As the Fifth Circuit stated in its *Murphy Oil* opinion, "it would be unreasonable for an employee to construe [an arbitration agreement] as prohibiting the filing of Board charges when the agreement says the opposite." *Murphy Oil USA, Inc. v. NLRB*, 808 F. 3d at 1020.

4) A vague or general savings clause that requires employees to themselves meticulously determine the state of the law are likely, "when reasonably interpreted," to interfere with the exercise of NLRA rights. Although these agreements should not automatically be interpreted as prohibiting access to the Board or interfering with the exercise of NLRA rights, such language, to the extent it creates confusion about what is covered by the arbitration agreement, would reasonably be read as interfering with access to NLRB processes. Thus, an agreement stating that "nothing in this agreement shall be construed to require any claim to be arbitrated if an agreement to arbitrate such a claim is prohibited by law" would likely be unlawful because it is ambiguous as to whether or not the arbitration provision covers NLRA claims. Thus, vague or contradictory agreements such as those that exclusively require arbitration, but limit that requirement to those circumstances where a claim "may lawfully be resolved by arbitration," should be

interpreted as unlawful because employees may reasonably believe they are prevented from filing a charge with the NLRB.

5) In deciding whether a savings clause is adequate, the Board should also be mindful of the view expressed in *Boeing* that "perfection should not be the enemy of the good." Thus, in some cases, in evaluating savings clauses, the Board has required a degree of comprehensiveness and precision that should not be required. *See, e.g., Securitas Security Services USA, Inc*., 363 NLRB No. 182, slip op. at 2, 3-5 (2016) (finding unlawful an agreement that included language stating: "Claims may be brought before an administrative agency but only to the extent applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate. Such administrative claims include without limitation claims or charges brought before . . . the National Labor Relations Board"); *Solarcity Corp*., 363 NLRB No. 83, slip op. at 4-6 (2015) (finding unlawful an agreement that excluded from coverage "claims with local, state, or federal administrative bodies or agencies authorized to enforce or administer related laws, but only if, and to the extent, applicable law permits such agency or administrative body to adjudicate the applicable claim notwithstanding the existence of an enforceable arbitration agreement. Such permitted agency claims include filing a charge or complaint with . . . the National Labor Relations Board"). Under the *Boeing* and *Epic* analyses articulated above, the Board should find these arbitration clauses to be lawful Category 2 provisions.

6) Arbitration agreements containing language that permits filing a charge with the Board, but precludes a Board remedy, or that limits employees' remedies to those awarded by an arbitrator, should also be unlawful. The impact of such a limitation on employees' rights to an effective NLRB remedy outweighs any legitimate employer business justification for such a limitation. As the Supreme Court has noted, "there should be as great a freedom to ask the Board for relief as there is to petition any other department of government for a redress of grievances." *NLRB v. Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. at 424.

Applying these Principles to the Arbitration Agreement Here

The Prime Healthcare arbitration provision states that claims covered by the agreement include "claims for violation of any federal, state or other governmental constitution, statute, ordinance, regulation, or public policy. . . The purpose and effect of this Agreement is to substitute arbitration as the forum for resolution of the Claims. . ." Because the provision explicitly states that all other forums are displaced by arbitration for all claims, including federal statutory claims, this provision restricts the filing of unfair labor practice charges with the NLRB. Under *Epic* and *Boeing*, the Board should find that the arbitration agreement here unlawfully interferes with employees' right to access the Board and its processes.

Accordingly, we urge the Board to uphold the Complaint allegation that the arbitration agreement the Employer maintained until May 13, 2014, unlawfully interferes with employees' access to the Board and its processes (as set forth in paragraph 4 of the Complaint).

DATED AT _Los Angeles, California, this 31st day of August, 2018

Respectfully submitted,

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STATEMENT OF SERVICE

I hereby certify that a copy of Counsel for the General Counsel's Brief On Remand to the Board was submitted for E-filing to the Executive Secretary of the National Labor Relations Board on August 31, 2018.

The following parties were served with a copy of said document by electronic mail on August 31, 2018:

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Respectfully submitted,

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National Labor Relations Board

Dated at Los Angeles, California, this 31st day of August, 2018.

Re: Beena Beauty Holding, Inc. d/b/a Planet Beauty
Case 31-CA-144492

CERTIFICATE OF SERVICE

I hereby certify that a copy of the *COUNSEL FOR THE GENERAL COUNSEL'S RESPONSE TO THE BOARD'S NOTICE TO SHOW CAUSE* was served on November 5, 2018.

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National Labor Relations Board
Office of the Executive Secretary

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