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

QUALITY DINING, INC. and RYAN RUTHERFORD, an Individual	CASE 04-CA-175450

RESPONDENT QUALITY DINING'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Respondent, Quality Dining, Inc. ("Quality Dining"), hereby files exceptions to the December 15, 2016 Decision and rulings of the Administrative Law Judge (ALJ) in the above captioned matter, pursuant to Board Rule 102.46 and the January 3, 2019 letter of the Executive Secretary setting a date for filing exceptions, as follows:

1. The ALJ erred by finding ALJ's finding that "this case is controlled by the Board's decision in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), *enf. denied*, 808 F.3d 1013 (5th Cir. 2015)" and subsequent Board decisions. (ALJD 4:5-7).

2. The ALJ erred by finding that requiring employees to execute arbitration agreements containing class actions waivers is a violation of Sections 8(a)(1) of the National Labor Relations Act ("NLRA") in light of the Supreme Court's decision in *Epic Systems Corp. v. Lewis*, 584 U.S. __, 138 S. Ct. 1612 (2018). (ALJD 4:7-8).

3. The ALJ erred by relying on *Murphy Oil USA, Inc*., 361 NLRB No. 72 (2014), *enf. denied*, 808 F.3d 1013 (5th Cir. 2015). (ALJD 4:7-8).

4. The ALJ erred by failing to conclude that the Federal Arbitration Act ("FAA"), 9

U.S.C. § 1, et seq., as interpreted by the U.S. Supreme Court, prevails over the Board's decisions in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), *enf. denied*, 808 F.3d 1013 (5th Cir. 2015). (ALJD 4:7-8).

5. The ALJ erred by failing to conclude that Quality Dining's Arbitration Agreement is a valid and lawful contract that must be enforced according to its terms pursuant to the FAA. (ALJD 4:21-22.)

6. The ALJ erred by finding that "the Respondent threatened employees with discharge in violation of Section 8(a)(1) of the Act." (ALJD 4:35-38.)

7. The ALJ erred in directing remedies in this matter rather than dismissing the Complaint. (ALJD 4:25-48, 5:1-39).

Respectfully submitted,

/s/ Rachel Fendell Satinsky

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Dated: January 31, 2019

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of January, 2019, the foregoing was electronically filed with Regional Director David Walsh, by using the E-Filing system on the Board's website. And on this same date the foregoing was served by email upon the following:

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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION FOUR

QUALITY DINING, INC. and RYAN RUTHERFORD, an Individual	CASE 04-CA-175450

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

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January 31, 2019

I. INTRODUCTION

Pursuant to Board Rule 102.46 and the January 3, 2019 letter of the Executive Secretary, Respondent Quality Dining, Inc. ("Quality Dining") submits this Brief in Support of its Exceptions to the December 15, 2016 Decision issued by Administrative Law Judge ("ALJ") Raymond P. Green.

ALJ Green concluded that Quality Dining violated Section 8(a)(1) of the National Labor Relations Act ("NLRA") by maintaining an arbitration agreement that precluded class or collective actions by employees, relying on the Board's decision in *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014). Since ALJ Green's Decision, the United States Supreme Court has overruled the Board's holding in *Murphy Oil* and held that arbitration agreements that contain class action waivers are enforceable under the Federal Arbitration Act ("FAA") and do not violate the NLRA. Accordingly, the Board should summarily dismiss the instant Complaint and the entire case.

II. STATEMENT OF THE CASE AND FACTS

Quality Dining is an Indiana corporation with an office and principal place of business in Mishawaka, Indiana. (Stipulated Record (hereinafter referred to as "S.R.") ¶ 3.) Quality Dining, through its wholly-owned subsidiaries, Bravogrand, Inc., Bravokilo, Inc., Full Service Dining, Inc., Grayling Corporation, and Southwest Dining, Inc. (collectively, "the Subsidiaries"), operates franchise and non-franchise restaurants ("the Restaurants") in various states.[1] (S.R. ¶ 3.)

Between November 4, 2015 and about April 25, 2016, Quality Dining required the employees of the Restaurants to sign an arbitration agreement (attached to S.R. as

[1] Quality Dining's formerly wholly-owned subsidiary, Bluewater Grille, LLC, is no longer in operation.

Joint Exh. 7) as a condition of employment. Beginning on April 25, 2016, Quality Dining started requiring the employees of the Restaurants to sign a revised Arbitration Agreement (attached to S.R. as Joint Exh. 9) (hereinafter referred to as the "2016 Agreement") as a condition of employment. The 2016 Agreement contains a class action waiver. (ALJD 2, 3; S.R. ¶ 6, 7, 8, Joint Exhs. 9, 10, 11.)

On March 22, 2016, Mr. Rutherford and another Grayling Corporation employee filed a class-action lawsuit in state court alleging violations of the state minimum wage law. (ALJD 3:26-30; S.R. ¶ 9, Joint Exh. 12). Quality Dining removed the case to federal court, plaintiffs amended the complaint to allege violations of the Fair Labor Standards Act, and Quality Dining moved to dismiss the case based upon the Arbitration Agreement. (ALJD 3:31-39; S.R. ¶ 10, Joint Exhs. 12-14). The suit was thereafter settled and dismissed. *Id.*

In addition to the civil lawsuit, the Charging Party filed a charge in this case on May 3, which was amended on June 9 and July 26, 2016, asserting a violation of Section 8(a)(1) based upon the maintenance and invocation of the mandatory Arbitration Agreement by Quality Dining. On October 17, 2016, the NLRB issued an Amended Complaint and Notice of Hearing. Quality Dining served its Answer to the Amended Complaint on November 2, 2016.

On October 21, 2016, the Parties submitted a stipulated record addressing all allegations of the Amended Complaint and filed a joint motion requesting that the Administrative Law Judge issue a decision on this matter, without a hearing and based upon the stipulated record. On October 25, 2016, ALJ Green granted the request and directed the parties to file briefs no later than November 28, 2016, which the parties did.

On December 15, 2016, ALJ Green issued his Decision in which he held that the Agreement violated Section 8(a)(1) by requiring employees to execute an arbitration agreement containing a class action waiver ("Decision").[2] In his Decision, ALJ Green relied on *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014) in which the Board held that requiring employees to execute an arbitration agreement containing a class action waiver is a violation of Section 8(a)(1).

On December 20, 2016, Quality Dining requested that its time in which to file exceptions to the Decision be extended for an indefinite period of time, pending the Supreme Court's action in *Lewis v. Epic Sys. Corp*., 823 F.3d 1147 (7th Cir. 2016). On December 21, 2016, the Board granted this request.

On January 13, 2017, the Supreme Court granted certiorari in *Lewis v. Epic Sys. Corp*. and two other cases, *Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013 (5th Cir. 2015) and *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016) (collectively "*Epic Systems*") that presented the same issue— whether arbitration agreements that require employees to resolve employment-related disputes through individual arbitration and to waive class and collective proceedings are enforceable under the FAA, notwithstanding employees' right under the NLRA to engage in "concerted activities" in pursuit of their "mutual aid or protection."[3] On May 21, 2018, the Court issued its

[2] Citations to the ALJ's Decision are referenced as "(ALJD page number:line number.)"

[3] The exact wording of the questions presented by these consolidated appeals differed slightly, but was substantively the same. *Compare* Question Presented, *Epic Systems Corp.*, No. 16-285 (available at https://www.supremecourt.gov/docket/docketfiles/html/qp/16-00285qp.pdf) ("Whether an agreement that requires an employer and an employee to resolve employment-related disputes through individual arbitration, and waive class and collective proceedings, is enforceable under the Federal Arbitration Act, notwithstanding the provisions of the National Labor Relations Act."); *with* Question Presented, *Ernst & Young LLP*, No. 16-300 (available at https://www.supremecourt.gov/docket/docketfiles/html/qp/16-00300qp.pdf) ("Whether the collective-bargaining provisions of the National Labor Relations Act prohibit the enforcement under the Federal Arbitration Act of an agreement requiring an employee to arbitrate claims against an employer on an individual, rather than collective, basis."); *and* Question Presented,

decision in *Epic Systems*, holding that the FAA requires courts to enforce individual arbitration agreements, even if the agreement contains a class action waiver and that such action including class waiver provisions did not violate the NLRA.

On January 3, 2019, the Board ordered the Parties to submit exceptions to ALJ Green's Decision by January 31, 2019.

III. QUESTION INVOLVED

Whether ALJ Green erred in concluding, based on *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), that Quality Dining violated Section 8(a)(1) by maintaining and enforcing an arbitration agreement that prohibited employees from pursuing claims in a class or representative capacity. (Exceptions 1-6.)

IV. LEGAL ARGUMENT

Since 2012, the Board has taken the position that arbitration agreements containing class action waivers violate the NLRA by precluding employees from engaging in the concerted activity of joining together to pursue claims against employers on a class basis. *D.R. Horton*, 357 NLRB 2277, 2280 (2012). In *Murphy Oil*, 361 NLRB 774 (2014), the Board invalidated several arbitration agreements because those agreements contained class action waivers. ALJ Green applied the Board precedent established in *D.R. Horton* and *Murphy Oil* to support his finding that Quality Dining's Agreement violated the NLRA. (ALJD 4:5-7).

The Supreme Court's decision in *Epic Systems* considered and expressly

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Murphy Oil Co., No. 16-307 (available at https://www.supremecourt.gov/docket/docketfiles/html/qp/16-00307qp.pdf) ("Whether arbitration agreements with individual employees that bar them from pursuing work-related claims on a collective or class basis in any forum are prohibited as an unfair labor practice under 29 U.S.C. §158(a)(1), because they limit the employees' right under the National Labor Relations Act to engage in "concerted activities" in pursuit of their "mutual aid or protection," 29 U.S.C. § 157, and are therefore unenforceable under the saving clause of the Federal Arbitration Act, 9 U.S.C. § 2.").

overturned the Board's holding in *Murphy Oil* (and in doing so, also expressly overturned the Board's holding in *D.R. Horton*). In *Epic Systems*, the Court rejected the claim that Section 7 of the NLRA confers upon employees a substantive right to class and collective action mechanisms that overrides the FAA's mandate that arbitration agreements be enforced according to their terms—including terms regarding with whom the parties will arbitrate and the procedures they will utilize. To the contrary, the Court explained that "Section 7 [of the NLRA] focuses on the right to organize unions and bargain collectively. …. [I]t does not express approval or disapproval of arbitration. It does not mention class or collective action procedures. It does not even hint at a wish to displace the Arbitration Act…." *Epic Sys*, 138 S.Ct. at 1624.

Since the Court's decision in *Epic Systems*, the Board has dismissed pending cases that relied upon *D.R. Horton* and *Murphy Oil* to establish liability. *See, e.g.*, *Montecito Heights Healthcare & Wellness Centre, LP*, 367 NLRB No. 57, slip op. at 1 (Jan. 9, 2019) ("In light of the Supreme Court's decision in *Epic Systems*, which overrules the Board's holding in *Murphy Oil USA, Inc.*, we conclude that the complaint allegation that the Alternative Dispute Policy is unlawful based on *Murphy Oil* must be dismissed."); *Northrop Grumman Sys. Corp.*, 366 NLRB No. 147, slip op. at 1 (Aug. 2, 2018) (same); *Kellogg, Brown & Root, LLC*, 366 NLRB No. 153, slip op. at 1 (Aug. 2, 2018) (same). Because ALJ Green's Decision relies exclusively on *Murphy Oil* to establish liability under the NLRA, the Board should reverse the ALJ's Decision and dismiss the Amended Complaint in its entirety, with prejudice.

V. CONCLUSION

For the foregoing reasons and based on the record evidence, Quality Dining respectfully requests that the Board reject those portions of the ALJ's Decision to which it has excepted and dismiss the Amended Complaint in its entirety.

Respectfully submitted,

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