

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES – SAN FRANCISCO, CA**

**GC SERVICES LIMITED PARTNERSHIP,
a limited partnership, and G C FINANCIAL
CORP., general partner**

and

Case 28-CA-166389

BRADLEY NELSON, an Individual

**GENERAL COUNSEL’S ANSWERING BRIEF
TO RESPONDENT’S EXCEPTIONS**

Rodolfo Martinez
Counsel for the General Counsel
National Labor Relations Board
Region 28 –Albuquerque Resident Office
P.O. Box 244
421 Gold Ave SW, Suite 310
Albuquerque, NM 87102-3254
Telephone: (505) 313-7222
Facsimile: (505) 206-5695
E-Mail: Rodolfo.Martinez@nlrb.gov

TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. THE ALJ’S FINDINGS AND RELEVANT FACTS 2

III. THE BOARD SHOULD UPHOLD THE ALJ’S DECISION 4

A. The ALJ Correctly Found That the MADR Violates Section 8(a)(1) of the Act..... 4

B. The ALJ’s Decision Comports with the FAA, Supreme Court Precedent, and Board Law 8

C. The MADR Is an Unlawful Rule Because It Explicitly Restricts Access to the Board..... 14

D. The ALJ Correctly Declined to Take Notice of Extra-Record Evidence..... 16

IV. CONCLUSION 17

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES – SAN FRANCISCO, CA**

**GC SERVICES LIMITED PARTNERSHIP,
a limited partnership, and G C FINANCIAL
CORP., general partner**

and

Case 28-CA-166389

BRADLEY NELSON, an Individual

**GENERAL COUNSEL’S ANSWERING BRIEF
TO RESPONDENT’S EXCEPTIONS**

I. INTRODUCTION

On March 19, 2019, Administrative Law Judge Eleanor Laws (ALJ) found that GC Services Limited Partnership and G C Financial Corp., whose correct legal name is GC Services Limited Partnership and ORG GC GP Buyer, LLC, General Partner (Respondent), violated Section 8(a)(1) of the National Labor Relations Act (Act or NLRA) by maintaining an arbitration agreement that restricts access to the Board’s processes. JD-SF-09-19.¹ In conjunction with its Brief in Support of Exceptions to the Administrative Law Judge’s Decision (Brief), Respondent filed 16 exceptions to the ALJ’s decision and recommended order (Decision) and urges the Board to overturn the Decision, rulings, and well-reasoned conclusions of the ALJ. R. Br. 1-2. The Decision issued by the ALJ is supported by the record, reflects sound analysis, and establishes that Respondent violated the Act. Accordingly, Respondent’s exceptions are without merit and should be denied.

¹ “JD _: _” refers to the Decision of the Administrative Law Judge page followed by the line or lines of the cited decision; “R. Br. ___” means Respondent’s Brief in Support of Exceptions to the Administrative Law Judge’s Decision; “JX__” means Joint Exhibit followed by the exhibit number. “Jt. Mot. at pg. ___” means Joint Motion and Stipulation of Facts followed by the page number; “Jt. Mot. at ¶” means Joint Motion and Stipulation of Facts followed by the paragraph number.

II. THE ALJ'S FINDINGS AND RELEVANT FACTS

Respondent is a limited partnership headquartered in Houston, Texas and maintains an office and place of business in Tucson, Arizona. JD 2:15-25. Respondent is engaged in the business of providing customer care and accounts receivable management services for public and private sector organizations. JD 2:15-25. Since at least December 15, 2015, at all its nationwide offices and places of business, Respondent has maintained and required all of its employees, managers, and executives to sign, as a condition of employment a Mutual Agreement for Dispute Resolution (MADR) which includes the following provision:

MUTUAL AGREEMENT FOR DISPUTE RESOLUTION

This Mutual Agreement for Dispute Resolution ("Agreement") is for the purpose of resolving claims by single-party arbitration and is mutually binding upon both the employee whose name appears on the signature block below ("Employee") and GC Services Limited Partnership and all GC-Related Entities for which Employee works or has ever worked, which are defined as any entity owned, controlled, or managed in any manner or to any extent by GC Services Limited Partnership (collectively, the "Company"). The following contains the terms and conditions of the mutually binding Agreement:

1. **All Disputes Must be Arbitrated.** It is the intent of the parties hereto that all legally cognizable disputes between them that cannot be resolved to the parties' satisfaction through use of the Company's personnel policies, **must be resolved by final and binding arbitration. Claims subject to arbitration include all legally cognizable claims in the broadest context and include**, but are not limited to, any dispute about the interpretation, applicability, validity, existence, enforcement, or extent of arbitrability of or under this Agreement, and any claim arising under federal, state, or local statute, regulation, or ordinance, any alleged contract, or under the common law. This includes, by way of non-exhaustive illustration only, any claim of employment discrimination in any alleged form, any claim for wage and hour relief, including under the Fair Labor Standards Act or state or local law, any claim under the Family Medical Leave Act or state or local law or regulation, **any claim under the National Labor Relations Act** or state or local law or regulation, any claim under the Americans with Disabilities Act, as amended, or state or local law or regulation, or any other claim, whether contractual, common-law, statutory, or regulatory arising out of, or in any way related to, Employee's application for employment with and/or employment with Company, the termination thereof, this Agreement, or any other matter incident or in any manner related thereto. It is the intent of the parties that this Agreement shall be construed as broadly as legally possible and shall apply to any and all

legally cognizable disputes between them regardless of when the dispute has arisen or may arise and includes any dispute that occurred before or after the parties execute this Agreement as well as disputes that arise or are asserted after Employee leaves the Company's employ, regardless of the reason for separation. This Agreement will apply to all claims, no matter when they accrue, excepting only claims which have already been filed in a court of proper jurisdiction in which both parties are expressly identified by name in such pending lawsuit filed before this Agreement is signed by both parties. The parties jointly agree neither may file any lawsuit to resolve any dispute between them but Employee may file a complaint with any federal, state, or other governmental administrative agency, regarding any perceived infringement of any legally protected rights.

[. . .]

JD 2:30-3:35 (emphasis added). Likewise, since at least December 15, 2015, at all its nationwide offices and places of business, Respondent has maintained and required all of its employees, managers, and executives to sign, as a condition of employment, a Code of Business Ethics and Conduct, which includes the following Dispute Resolution Program (DRP) provision:

GC Services' Dispute Resolution Program

The Company **maintains a mandatory mutual dispute resolution program**. As a condition and qualification for employment or continued employment, All applicants and employees are required to sign and agree to GC Services' Mutual Agreement for Dispute Resolution, which is attached as Attachment D. Should an employee decline to sign and agree to the Mutual Agreement for Dispute Resolution, effective immediately, the Company shall consider the employee to have voluntarily separated his or her employment from GC Services.

JD 4:1-15 (emphasis added). Moreover, Respondent gave notice of its MADR and DRP described above through electronic issuance through an intranet system and required its employees to electronically sign acknowledgments of receipt of each provision. JD 4:15-27. Respondent has not disciplined or terminated any employee for filing an administrative charge or complaint with, or participating in an investigation by, any federal, state, or local administrative agency. JD 4:15-27. From January 1, 2015 to December 15, 2015, Respondent's employees filed 13 charges or complaints with various federal, state, and local administrative agencies. JD 4:15-27. Finally, for the time period from December 15, 2015 to the filing of the parties' Joint Motion and Stipulation of

Facts, Respondent's employees have filed 41 charges or complaints with various federal, state, and local administrative agencies, including the Board, Equal Employment Opportunity Commission, and Department of Labor. JD 4:15-27.

The ALJ concluded that Respondent violated Section 8(a)(1) of the Act by maintaining the MADR. JD 10:25-35. In doing so, the ALJ determined that "because the MADR states, on its face, that any claims under the National Labor Relations Act must be arbitrated, I find it interferes with employees' Section 7 right to access to Board procedures." JD 10:24-26.

III. THE BOARD SHOULD UPHOLD THE ALJ'S DECISION

A. The ALJ Correctly Found That the MADR Violates Section 8(a)(1) of the Act

Longstanding Supreme Court and Board precedent establish that Section 7 of the NLRA protects employees' right to pursue work-related legal claims concerted. It also makes clear that individual agreements that prospectively waive Section 7 rights are unlawful. Such waivers violate Section 8(a)(1) of the Act, which bars interference with Section 7 rights. Accordingly, Respondent's maintenance of an arbitration agreement that explicitly requires employees to arbitrate claims under the Act is unlawful.

The ALJ correctly found that the MADR explicitly restricts Section 7 activity. JD 5:25-35. A plain reading of the MADR shows that it explicitly requires that "disputes . . . must be resolved by final and binding arbitration." JD 3:5-18. In turn, "claims subject to arbitration include . . . any claim under the National Labor Relations Act." JD 5:25-30. Respondent also makes it abundantly clear that the MADR is a mandatory condition of employment by equating an employee's refusal to agree to its terms to "the employee to hav[ing] voluntarily separated his or her employment" with Respondent. JD 4:5-15.

Respondent places great weight on the fact that its employees “have availed themselves of the administrative process more than 40 times.” R. Br. 8. Respondent excepts to the ALJ’s correctly refusing to consider this evidence in its favor. R. Br. 1; JD 7:14-17; fn13. “[T]he actual practice of employees is not determinative” of whether an employer has committed an unfair labor practice. *Murphy Oil USA Inc. v. NLRB*, 808 F.3d 1013, 1019 (5th Cir. 2015), citing *Flex Frac Logistics, LLC v. NLRB*, 746 F.3d 205, 209 (5th Cir.2014). Even if Respondent has not disciplined or discharged employees pursuant to the MADR, the maintenance of a policy that violates employees’ Section 7 rights is in and of itself a violation of Section 8(a)(1). See *Register-Guard*, 351 NLRB 1110, 1110 fn. 2 (2007), *enfd. in part* 571 F.3d 53 (D.C. Cir. 2009), citing *Eagle-Picher Industries*, 331 NLRB 169, 174 fn. 7 (2000).

Moreover, Respondent’s reliance of non-controlling dissenting opinions in factually distinguishable cases is misplaced. The ALJ correctly rejected Respondent’s reliance on the dissent in *GameStop Corp.* 363 NLRB No. 89 (2015). JD 7:14-17; fn13. The ALJ correctly pointed out that *GameStop* involved the inverse of the present context because, in that case, “the prohibition did not specifically include NLRA claims, but the agreement at issue specifically excluded from the term “Covered Claim” “[m]atters within the jurisdiction of the National Labor Relations Board.”” JD 7:14-17; fn13 citing *GameStop* above, slip op. at 4. As such, the Board did not have opportunity to analyze an arbitration agreement like the one here and the dissenting opinion’s reasoning is unsuited to this case because the MADR explicitly restricts access to the Board by mandating that its employees must arbitrate NLRA claims or be discharged.

Likewise, the ALJ correctly found that “[i]n none of the other cases where the Respondent encourages reliance on the dissent’s reasoning does the arbitration agreement at issue say explicitly and with specific statutory reference that employees must arbitrate all of their

NLRA claims.” *Id.* Indeed, none of the arbitration agreements explicitly required arbitration of claims under the Act. See *GameStop*, above; *Applebee’s Rest.*, 363 NLRB No. 75 (Dec. 22, 2015); *Ralphs Grocery Co.*, 363 NLRB No. 128 (Feb. 23, 2016); *Hobby Lobby Stores, Inc.*, 363 NLRB No. 195 (May 18, 2016). Respondent strains to make the dissenting opinions of those cases persuasive by arguing the arbitration agreements in those cases “required arbitration of NLRA claims.” R. Br. 9-11. But a reading of those cases reveals that while the Board interpreted the agreements and found that they required arbitration of claims under the Act, it reached that conclusion by interpreting ambiguous language rather than restriction being explicitly stated. Accordingly, the ALJ correctly distinguished the dissenting opinions in cases involving factually distinguishable arbitration agreements.

Respondent also contends that the “savings clause” of the MADR somehow erases the explicit requirement that “any claim under the National Labor Relations Board” “must be resolved by final and binding arbitration. JD 3:5-18; JD 5:25-30. Specifically, Respondent argues that “[n]othing about this language, even when read in isolation from the rest of the MADR, can be reasonably interpreted as prohibiting [Respondent’s] employees from filing ULP charges with the Board.” R. Br. 7-8.²

The ALJ correctly rejected Respondent’s “savings clause” argument. First, the ALJ found that the MADR is not neutral because, as discussed above, it explicitly restricts Section 7 activity. Further, the ALJ found that the “savings clause” purporting to permit filing of charges with administrative agencies results in a contradiction without a way to harmonize the provisions without nullifying one of them. JD 6:10-30. Since “specific terms and exact terms are given greater weight than general language . . . [t]he MADR’s specific requirement to individually

² Respondent makes no argument regarding the filing of representation petitions under Section 9(a) of the Act which, given the MADR’s inclusive language, could be interpreted as falling under “any claim under the National Labor Relations Act.”

arbitration any claim under the NLRA thus prevails over the language that employees may file any claim with any federal, state, or other governmental administrative agency, regarding any perceived infringement of any legally protected rights.” JD 6:30-7:5 *citing* Rest. (Second) of Contracts § 203 (1981). Courts have relied on the Restatement of Contracts when interpreting contract language. See e.g. *Cent. Int’l Co. v. Kemper Nat. Ins. Companies*, 202 F.3d 372, 374 (1st Cir. 2000) (specific language is treated as a limitation on general language) *citing* Rest. (Second) of Contracts § 203(c); 3 Corbin, Contracts § 24.23 (Joseph M. Perillo ed., rev. ed.1993); cf. *Bordenave v. Intermedics Intraocular, Inc.*, 56 F.3d 703, 707 (5th Cir.1995) (similarly, in statutory construction, “*lex generalis non derogat speciali*”).

Moreover, the ALJ correctly found that, even assuming that a specific clause does not prevail over the general and therefore uncertainty remains, the result is the same because, in cases of uncertainty, a contract’s language should be interpreted most strongly against the drafting party who cause the uncertainty to exist. JD 7:5-12, *citing* Rest. (Second) of Contracts § 206; *United States v. Seckinger*, 397 U.S. 203, 210 (1970). Indeed, the Supreme Court has relied on the common law rule of contract interpretation that ambiguous language should be construed against the interest of the party that drafted it. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62-63 (1995), *citing* *United States Fire Ins. Co. v. Schnackenberg*, 88 Ill.2d 1, 4 (1981); *Graff v. Billet*, 64 N.Y.2d 899, 902 (1984); Rest. (Second) of Contracts § 206; *United States v. Seckinger*, above. Under these circumstances, the ALJ reasonably determined, in the alternative, that Respondent “drafted ambiguous document, and they cannot now claim the benefit of the doubt.” JD 7:10-12.

Finally, the ALJ also correctly found that “interpreting an arbitration agreement to permit waiver of an employee’s right to file Board charges encourages an absurd result.” JD 10:10-23.

Respondent' argues that, like in this case, "employees that are not coerced will find their way to the Board." R. Br. 19. But as discussed above "the actual practice of employees is not determinative" of whether an employer has committed an unfair labor practice. *Murphy Oil USA Inc.*, above at 1019.

Based on the foregoing, the ALJ's findings are supported by the record. Therefore, Respondent's exceptions 1, 2, 3, 4, 5, 10, 13, and 14 lack merit and the Board should uphold the ALJ's findings.

B. The ALJ's Decision Comports with the FAA, Supreme Court Precedent, and Board Law

The ALJ correctly found that an arbitration agreement that on its face imposes a restriction on employees' rights to utilize the Board's procedures is not valid under the Federal Arbitration Act (FAA). JD 7:19-8:2. The ALJ started her analysis by identifying that Congress "explicitly and exclusively" commanded the Board to "prevent any person from engaging in any unfair labor practices" and that 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." JD 8:4-7, citing Section 10(a) of the Act. The ALJ then analyzed the MADR under the FAA and applicable caselaw, concluding that because the provision requiring individual arbitration of claims under the NLRA unlawfully restricts employees' rights to invoke the Board's procedures, it meets the criteria of the FAA's savings clause for non-enforcement of an illegal contract, the two statutes can be effectively read together. JD 8-15:9:1-5.

Respondent excepts to the ALJ's well-reasoned conclusions, arguing that the MADR should be enforced as written, that none of the FAA's savings clauses apply and that the Board has long found that arbitration of NLRA claims is appropriate. For the reasons below, Respondent's exceptions lack merit.

Section 2 of the FAA provides that arbitration agreements “shall be 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 (emphasis added). That enforcement mandates, with its savings-clause exception, “reflect[s] both a liberal federal policy favoring arbitration and the fundamental principle that arbitration is a matter of contract.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (internal quotations omitted). “[C]ourts must [therefore] place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms.” *Id.*; *see also Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) (FAA’s purpose is “to make arbitration agreements as enforceable as other contracts, but not more so”). Nevertheless, the FAA’s savings clause is an express limitation on the FAA’s mandate to enforce arbitration agreements as written and, consequently, on the broad federal policy favoring arbitration. Under the savings clause, general defenses that would serve to nullify any contract also bar enforcement of arbitration agreements. Conversely, defenses that affect only arbitration agreements conflict with the FAA, as do ostensibly general defenses “that derive their meaning from the fact that an agreement to arbitrate is at issue.” *Concepcion*, 563 U.S. at 339.

One well-established general contract defense is illegality. As the Supreme Court explained in *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83-84 (1982), “a federal court has a duty to determine whether a contract violates federal law before enforcing it.” Giving effect to that principle, the Court held that if a contract required an employer to cease doing business with another company in violation of the NLRA, it would be unenforceable. *Id.* at 84-86; *see also Courier-Citizen Co. v. Boston Electrotypers Union No. 11*, 702 F.2d 273, 276 n.6 (1st Cir. 1983) (explaining that “the federal courts may not enforce a contractual provision that violates section 8 of the [NLRA]”).

Since its early days, the Board, with court approval, has consistently rejected, as unlawful under the NLRA, a variety of individual contracts that are unrelated to arbitration because they prospectively restrict Section 7 rights. *Nat'l Licorice v. NLRB*, 309 U.S. 350 at 360-61, 364 (1940). It has set aside settlement agreements that require employees to agree not to engage in concerted protests, *Bon Harbor Nursing & Rehab. Ctr.*, 348 NLRB 1062, 1073 (2006); *Bethany Med. Ctr.*, 328 NLRB 1094 (1999), and has found unlawful a separation agreement that was conditioned on the departing employee's agreement not to help other employees in workplace disputes. *Ishikawa Gasket Am., Inc.*, 337 NLRB 175, 175-76 (2001). That unbroken line of precedent, dating from shortly after the NLRA's enactment, demonstrates that illegality under the NLRA has consistently served to invalidate a variety of contracts, not just arbitration agreements, and does not derive its meaning from arbitration.

In sum, because the defense that a contract is illegal under the NLRA is unrelated to the fact that an agreement to arbitrate is at issue, that defense falls comfortably within the FAA's savings-clause exception. The Board should thus adhere to the FAA policy of enforcing arbitration agreements on the same terms as other contracts in finding that Respondent violated the NLRA by maintaining an arbitration agreement that explicitly requires arbitration of NLRA claims. There is no conflict between either the express statutory requirements, or animating policy considerations, of the FAA and NLRA with respect to that unfair labor practice. For that reason, it is unnecessary to reach the question of whether the NLRA clearly contains a "contrary congressional command" overriding the FAA. That inquiry is designed to determine which statutory command controls when another federal statute conflicts with the FAA and the two cannot be reconciled. Here, there is no conflict between the statutes; both can – and should – be given effect. *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

Finally, Respondent's argument that the Board has long found that arbitration of NLRA claims is appropriate is unpersuasive. The ALJ's finding that the MADR violates Section 8(a)(1) is consistent with longstanding Board and court precedent establishing that restrictions on Section 7 rights are unlawful even if they take the form of agreements between employers and employees. In *Nat'l Licorice*, above at 360-61, the Supreme Court held that individual contracts in which employees prospectively relinquish their right to present grievances "in any way except personally" or otherwise "stipulate[] for the renunciation ... of rights guaranteed by the [Act]" are unenforceable, and are "a continuing means of thwarting the policy of the [Act]." As the Court explained, "employers cannot set at naught the [Act] by inducing their workmen to agree not to demand performance of the duties which [the statute] imposes." *Id.* at 364. Similarly, in *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942), the Seventh Circuit held that individual contracts requiring employees to adjust their grievances with their employer individually violate the Act, even when "entered into without coercion." See also *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944) (individual contracts conflicting with Board's function of preventing Act's violations "obviously must yield or the [Act] would be reduced to a futility").

Applying that principle, the Board has found unlawful a variety of individual agreements under which employees or job applicants forfeit their Section 7 rights. See, e.g., *First Legal Support Servs., LLC*, 342 NLRB 350, 362-63 (2004) (unlawful to have employees sign contracts stripping them of right to organize); *Eddyleon Chocolate Co.*, 301 NLRB 887, 887 (1991) (unlawful to ask job applicant to agree not to join union); *Carlisle Lumber Co.*, 2 NLRB 248, 264-66 (1936) (unlawful to require agreement to "renounce any and all affiliation with any labor organization"), *enforced as modified*, 94 F.2d 138 (9th Cir. 1937). It has also regularly set aside settlement agreements that require such waivers as conditions of reinstatement. See, e.g., *Bon*

Harbor Nursing & Rehab. Ctr., 348 NLRB 1062, 1073, 1078 (2006) (employer unlawfully conditioned employees' reinstatement, after dismissal for non-union concerted protest, on agreement not to engage in further similar protests); *Bethany Med. Ctr.*, above (same); cf. *Ishikawa Gasket Am., Inc.*, above (employer unlawfully conditioned employee's severance payments on agreement not to help other employees in workplace disputes or act "contrary to the [employer's] interests in remaining union-free"), *enforced*, 354 F.3d 534 (6th Cir. 2004). Similarly, the Board has found unlawful agreements in which employees have prospectively waived their Section 7 right to access the Board's processes. See, e.g., *McKesson Drug Co.*, 337 NLRB 935 (2002) (finding employer violated Section 8(a)(1) by conditioning return to work from suspension on broad waiver of rights, both present and future, to invoke Board's processes for alleged unfair labor practices); *Reichhold Chems.*, 288 NLRB 69 (1988) (explaining "in futuro waiver" of right to access Board's processes is contrary to NLRA). In sum, all individual contracts that prospectively waive Section 7 rights violate Section 8(a)(1) "no matter what the circumstances that justify their execution or what their terms." *J.I. Case*, 321 U.S. at 337.

Collective waivers negotiated on behalf of employees by their exclusive bargaining representative, by contrast, are permissible. For example, a union may waive the employees' right to engage in an economic strike, for the term of a collective-bargaining agreement, provided that the waiver is clear and unmistakable. *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 705-06 (1983); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956). Such waivers are themselves the product of concerted activity – the choice of employees to exercise their Section 7 right "to bargain collectively through representatives of their own choosing." 29 U.S.C. § 157; see also *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 248 (2009) (emphasizing that the agreement was a "bargained-for exchange" which "stem[med] from an exercise of Section 7 rights: the

collective-bargaining process”). Therefore, Respondent’s citations to cases involving collectively bargained arbitration processes is of no aid to Respondent because it stands on an entirely different footing from the MADR here, which Respondent imposed on individual employees as a condition of employment. *See Stone*, 125 F.2d at 756 (rejecting employer’s attempt to analogize collectively bargained waivers to individual arbitration agreements waiving Section 7 rights, which “thereafter impose[] a restraint upon collective action”).

Employees have an unquestionable Section 7 right to file and pursue charges before the Board. *See Util. Vault Co.*, 345 NLRB 79, 82 (2005). *McKeesson Drug Co.* 337 NLRB 935, 938 (2002). Arbitration agreements violate the Act when they limit or preclude employees from filing unfair labor practice charges or otherwise accessing the Board’s processes. *See Cellular Sales of Missouri, LLC*, 362 NLRB 241 (2015); *Bills Elec., Inc.*, 350 NLRB 292 (2007). In stark contrast to the NLRA statutory right asserted in *Epic Systems Corp. v. Lewis*, --- U.S. ---, 138 S. Ct. 1612, WL 2292444, 211 LRRM (BNA) 3061 (May 21, 2018), 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 also 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*, above at 238.

In *Epic*, no party sought Supreme Court review of those Board-access violations. Indeed, it would be absurd for an employer to argue that it may lawfully limit employees’ right to file

charges or otherwise interfere with employees' right to access the Board and its processes. In any event, it appears Respondent has not made such an argument. Rather, the argument has always gone as 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 holdings finding unlawful arbitration policies that prohibit or restrict access to the Board. An arbitration provision, like the MADR, 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.

The MADR explicitly requires arbitration of NLRA claims. Respondents cannot contractually waive an employee's right to access the Board by filing charges. The peaceful resolution of labor disputes is a core objective of the Act and that objective is ill-served by individual arbitration agreements that prospectively waive a core Section 7 right of employees to file charges with the Board. Therefore, for the reasons stated above, the Board should reject Respondent's exceptions 6, 7, 8, 9.

C. The MADR Is an Unlawful Rule Because It Explicitly Restricts Access to the Board

The ALJ correctly found that "a document that explicitly restricts employee's core Section 7 rights on its face, whether a handbook rule about workplace conduct or an arbitration contract, doesn't survive under any paradigm." JD 6:18-26, fn. 6. In *Lutheran Heritage*, 343 NLRB 646, 647 (2004), the Board stated its "inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule *explicitly restricts activities protected by Section 7*. *If it does, we will find the rule unlawful*. (emphasis added). Only if the rule does not explicitly restrict Section 7 activity does the Board proceed to analyze the rule

under other criteria. *Id.*; *Boeing* above, , slip op at 1. *Boeing* did not overturn *Lutheran Village's* holding that the Board “will find the rule unlawful” if it “explicitly restricts activities protected by Section.” *Boeing*, slip op. at 2.

In this case, as discussed above, the ALJ correctly found that a plain reading of the MADR explicitly restricts Section 7 activity by barring access to the Board’s processes. As such, as dictated by *Lutheran*, which remains precedent, the Board should find that the MADR is unlawful in violation of Section 8(a)(1).

If the Board finds that the MADR does not explicitly restrict Section 7 activity, the Board should find that it is a Category 3 rule. The “nature and extent of the potential impact on NLRA rights” is high because filing charges with the Board is a “core” Section 7 right. Indeed, the Congressional command of Section 10(a) of the Act would be reduced to a futility as the Board relies on persons filing charges in order to prevent unfair labor practices. While employers contend that arbitration provides speedy resolutions of labor disputes, such a reason does not justify an evisceration of core Section 7 rights. It would be absurd to argue that an employer may unilaterally contract away Congress’ clear command to the Board to enforce the Act.

Employers cannot require employees to arbitrate these claims because such a requirement would “impede an individual employee’s access to the Board.” *Ralphs Grocery Co.*, above citing *Babcock & Wilcox Construction Co.*, 361 NLRB 1127, slip op at 1129-1130 (2014). Filing unfair labor practice charges with the Board “is a vital employee right designed to safeguard the procedure for protecting all other employee rights guaranteed by Section 7.” *Mesker Door, Inc.*, 357 NLRB 591, 596 (2011). As such, employees’ “complete freedom” to access to the Board’s processes is a fundamental purpose of the Act and must be vigorously safeguarded. *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972) (citations omitted). Notably, Respondent presented no

record evidence of a business justification regarding these clauses. Even if it did, under the *Boeing* analysis, no business justification of the rule would outweigh the adverse impact on Section 7 rights. *Boeing* above, slip op. at 4. As such, the limitation on employees' right to file with the Board is a Category 3 violation of the Act. Therefore, for the reasons stated above, the Board should reject Respondent's exceptions 11, 12, and 15.

D. The ALJ Correctly Declined to Take Notice of Extra-Record Evidence

It is well established that portions of briefs incorporating extra-record evidence may be stricken and disregarded. See, e.g., *The Fund for the Public Interest*, 360 NLRB 877, 877 n.2 (2014); *United Steel, Paper & Forestry Local Union 193-G (PPG Industries)*, 356 NLRB 996, 996 n.2 (2011); *Kimtruss Corp.*, 305 NLRB 710 (1991). The ALJ's decision must be based on the record. 29 C.F.R. § 102.45.

The "Stipulation of Facts, with attached exhibits described [in the Joint Motion and Stipulation of Facts] constitutes the entire record in this case . . ." Joint Motion at ¶3. Despite the plain language of the parties' agreement, Respondent unilaterally attached Exhibit 1 to its Brief to the ALJ. R. Br. 4-5, fn. 2. Respondent's "Exhibit 1" is neither a part of the Stipulation of Facts or an attached exhibit. Rather, Respondent's "Exhibit 1" is extra-record evidence that Respondent improperly attempts to make part of the record, and the Board should disregard it.

Respondent's reliance on *City. of Santa Clara v. Trump*, 267 F. Supp. 3d 1201 (N.D. Cal. 2017), is misplaced. In that case, the court took judicial notice of a press release regarding "Remarks on Sanctuary Jurisdictions" from then-Attorney General Jeff Sessions that were "posted on an official government website." *Id.* at 1217, fn. 7. To the contrary, in this case Exhibit 1 is not posted publicly. Rather, presumably after searching private email servers, Respondent created a .pdf file of settlement discussion emails between its counsel and a Board agent. Notably, Respondent makes no assertion that Exhibit 1 was ever publicly posted on an

official government website. Additionally, as Exhibit 1 contains emails of private settlement discussions, it is inadmissible under Rule 408 of the Federal Rules of Evidence. Therefore, the ALJ correctly declined to consider Respondent's belated extra-record submission. Therefore, for the reasons stated above, the Board should reject Respondent's exception 16.

IV. CONCLUSION

For the forgoing reasons, the Board should affirm the ALJ's determination that Respondent violated Section 8(a)(1) of the Act. Accordingly, the General Counsel respectfully urges the Board to reject Respondent's exceptions and to adopt the ALJ's Decision, findings and recommended order.

Dated at Albuquerque, New Mexico this 30th day of April 2019.

Respectfully submitted,

/s/ Rodolfo Martinez

Rodolfo Martinez

Counsel for the General Counsel

National Labor Relations Board

Region 28 –Albuquerque Resident Office

P.O. Box 244

421 Gold Ave SW, Suite 310

Albuquerque, NM 87102-3254

Telephone: (505) 313-7222

Facsimile: (505) 206-5695

E-Mail: Rodolfo.Martinez@nlrb.gov

CERTIFICATE OF SERVICE

I hereby certify that the **GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS** in *GC SERVICES LIMITED PARTNERSHIP*, a limited partnership, and *G C FINANCIAL CORP.*, general partner, Case 28-CA-166389, was served via E-Gov, E-Filing, and E-Mail, on this 30th day of April 2019, on the following:

Via E-Gov, E-Filing:

Roxanne L. Rothschild, Executive Secretary
NLRB Office of the Executive Secretary
1015 Half Street SE – Room 5100
Washington, DC 20570

Via Electronic Mail:

Christopher J. Meister, Attorney at Law
Ogletree, Deakins, Nash, Smoak & Stewart, PC
2415 East Camelback Road, Suite 800
Phoenix, AZ 85016-9291
Email: christopher.meister@ogletreedeakins.com

Bradley Nelson
2327 East Helen Street
Tucson, AZ 85719-4709
Email: nelztec@yahoo.com



Dawn M. Moore
Administrative Assistant
National Labor Relations Board
Region 28 - Las Vegas Resident Office
Foley Federal Building
300 Las Vegas Boulevard South, Suite 2-901
Las Vegas, Nevada 89101
Telephone: (702) 820-7466
Facsimile: (702) 388-6248
E-Mail: Dawn.Moore@nlrb.gov