UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PFIZER INC.	)	
AND	)	
REBECCA LYNN OLVEY MARTIN, an individual	)	**Cases 10-CA-175850** **07-CA-176035**
AND	)	
JEFFREY J. REBENSTORF, an individual	)	

PFIZER INC.'S EXCEPTIONS TO THE SUPPLEMENTAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the Respondent, Pfizer Inc. ("Pfizer" or "Respondent") hereby files the following Exceptions to the Administrative Law Judge's ("ALJ") Supplemental Decision dated March 21, 2019.

1. The Respondent excepts to the ALJ's conclusion, on p. 4, lines 2-3, that the confidentiality clause chills the exercise of Section 7 rights and violates Section 8(a)(1)of the Act.
2. The Respondent excepts to the ALJ's conclusion, on p. 5, lines 10-20, that the premise that the "rules and procedures applied to workplace disputes in arbitration typically do not implicate Section 7 rights" is "wobbly" and "adds confusion because it fails to distinguish between a rule concerning procedure and a rule affecting substance."

3. The Respondent excepts to the ALJ's conclusion, on p. 5, lines 19-20, that "a rule which specifies procedure differs significantly and materially from a rule creating or affecting a substantive right."
4. The Respondent excepts to the ALJ's application of the principle, on p. 5, lines 35-38, that there is a "fundamental distinction between procedural and substantive rights" and that, "[u]nlike *Epic Systems*, the present case concerns a substantive right."
5. The Respondent excepts to the ALJ's conclusion on p. 5, footnote 5, that "the Respondent's argument, if accepted, would preclude any consideration of how the prohibition in the confidentiality clause may restrict employees in the exercise of rights granted by Section 7 of the NLRA" and that "[p]rohibiting the use of labor law standards to judge whether the clause infringes upon rights granted by Section 7 of the NLRA would effectively negate those rights."
6. The Respondent excepts to the ALJ's characterization, on p. 6, lines 39-41, that if the choice to agree to arbitration "really were voluntary, a party would only agree to use an arbitrator if he believed that the arbitrator would be as fair as a court" and the ALJ's finding that "a problem arises because many arbitration agreements are not fully, truly voluntary."
7. The Respondent excepts to the ALJ's conclusion, on p. 7, lines 23-27, that if employers could "insist that employees give up their statutory rights or else quit and seek work elsewhere, then companies would possess the power to nullify any legal requirement they didn't like" and "pull the teeth out of all sorts of laws protecting workers by forcing them to waive their rights under such laws."

8. The Respondent excepts to the ALJ's conclusion, on p. 7, lines 30-37, that a "Supreme Court decision allowing someone to waive the right to a judge and jury could establish precedent easily misused, a precedent allowing the powerful to force the less powerful to give up many other rights, such as the right to receive minimum wage, the right to a workplace which complies with federal safety regulations, and the right to be free of invidious discrimination."
9. The Respondent excepts to the ALJ's suggestion, on p. 7, lines 37-38, that the Supreme Court "established a limiting principle to prevent the compelled waiver of such rights by making a distinction between 'procedural rights' and 'substantive rights.'"
10. The Respondent excepts to the ALJ's conclusion, on p. 8, lines 23-26, that "nothing in the Court's recent *Epic Systems* decision overrules or modified the procedural right/substantive right distinction the Court had made in these previous cases" and the ALJ's conclusion that "the case did not involve the assertion of any substantive right."
11. The Respondent excepts to the ALJ's conclusion, on p. 9, lines 13-15, that "[u]nlike the claimed Section 7 right which the Court considered and rejected in *Epic Systems*, the Section 7 right at issue here does not concern supposed entitlement to use a procedure but rather the right to engage in *activity*" (emphasis in original).
12. The Respondent excepts to the ALJ's conclusion, on p. 9, lines 38-41, that "[b]ecause the Section 7 right affected by the Respondent's confidentiality clause is a substantive right rather than a procedural right, the *Epic Systems* decision, which found that a claimed procedural right did not exist, but which did not concern a well-established substantive right, can be and should be distinguished."

13. The Respondent excepts to the ALJ's conclusion, on p. 10, lines 27-31, that since Congress "gave the Board exclusive authority to determine whether an action constituted an unfair labor practice, it seems highly unlikely that it contemplated another body exercising that authority simply because the language which potentially interfered with Section 7 right appeared in a contract rather than elsewhere."
14. The Respondent excepts to the ALJ's conclusion, on p. 10, lines 31-33, that the Board possesses the authority to decide whether the confidentiality clause violates the NLRA.
15. The Respondent excepts to the ALJ's statement, on p. 10, lines 37-41, that "[b]ecause of the substantive right/procedural right distinction discussed above, I reject the Respondent's arguments that the *Epic Systems* decision controls here, and that it compels the conclusion that the Federal Arbitration Act deprives the Board of authority to consider whether the confidentiality clause conveys a message which violates Section 8(a)(1) of the National Labor Relations Act."
16. The Respondent excepts to the ALJ's characterization, on p. 11, lines 14-16, that "the present case does not involve an expansive interpretation of Section 7 to create a new right but, as the cases cited above illustrate, concerns a long-recognized and firmly-established old right."
17. The Respondent excepts to the ALJ's characterization, on p. 11, lines 28-30, that the Respondent "advocates an interpretation of the Federal Arbitration Act which would encroach upon the NLRA by reducing the rights granted by Section 7 of the NLRA and restricting the Board's authority to enforce those rights."

18. The Respondent excepts to the ALJ's conclusion, on p. 11, lines 36-38, that the "interpretation advocated by the Respondent creates an unnecessary conflict between statuses of the very sort condemned by the Court in *Epic Systems*."
19. The Respondent excepts to the ALJ's characterization, on p. 12, lines 3-4, that the Respondent's interpretation "would wield the FAA to clobber rights granted by the NLRA" and that such an interpretation "is needless and must be avoided."
20. The Respondent excepts to the ALJ's characterization, on p. 12, lines 22-24, that the Respondent attempts to use the FAA "as a shield to prevent the Board from performing the law enforcement duties which Congress entrusted to it."
21. The Respondent excepts to the ALJ's conclusion, on p. 12, lines 30-33, that "Congress certainly did not intend that one of the laws it enacted be used to thwart another. Instead, it protected the Board's power to enforce the NLRA by including in Section 10(a) the language quoted above. It is entirely appropriate for the Board to use that authority here."
22. The Respondent excepts to the ALJ's rejection, on p. 12, lines 35-37, of the argument that *Epic Systems* precludes the Board from considering the lawfulness of the confidentiality clause and from ordering a remedy should the clause violate the Act.
23. The Respondent excepts to the ALJ's conclusion, on p. 13, lines 1-8, that the General Counsel's reasoning (for concluding that the confidentiality clause does not violate Section 8(a)(1)) "rests on an incorrect assumption, namely, that neither what happens during an arbitration not the arbitrator's award is a condition of employment."

24. The Respondent excepts to the ALJ's conclusion, on p. 13, lines 14-21, that the General Counsel's assumption "can be correct only if what happens during an arbitration, and the arbitrator's award, do not pertain to terms and conditions of employment."

25. The Respondent excepts to the ALJ's conclusion, on p. 14, lines 1-2 and 11-13, that the "arbitration system which the Respondent imposed most certainly is a condition of employment" and "[m]oreover, an arbitration of a work-related dispute not only is *itself* a condition of employment, imposed by the Respondent, but any such arbitration *affects* working conditions and for this reasons, too, employees have a Section 7 right to discuss it."

26. The Respondent excepts to the ALJ's characterization, on p. 14, lines 21-24, that "employee discussion about an arbitrator's decision concerning claims of sexual harassment, or concerning any other employment condition, would be protected" and "[b]ecause the Respondent established the arbitration system to decide legal claims arising out of employment, every such case would relate to terms and conditions of employment."

27. The Respondent excepts to the ALJ's conclusion, on p. 14, lines 26-28, that because arbitration "is a condition of employment and because the arbitration affects conditions of employment, employees have the same right to discuss arbitrations and disclose information about them as they do to discuss their wages."

28. The Respondent excepts to the ALJ's rejection, on p. 14, lines 33-38, of the General Counsel's "implicit assumption" that arbitration is not a condition of employment and his rejection of the conclusion based on that assumption. Respondent further objects to the conclusion that "[b]ecause the arbitration system which the Respondent imposed, as a

condition of employment, is precisely that, any rule that prohibits employees from discussing or disclosing information about an arbitration necessarily infringes on their exercise of rights granted by Section 7 of the NLRA."

29. The Respondent excepts to the ALJ's conclusion, on p. 15, lines 34-36, that the Supreme Court's *Epic Systems* decision is distinguishable on its facts and not controlling on the question of whether the Board may apply the *Boeing* framework, rather than general contract law standards, to determine the legality of the confidentiality clause.
30. The Respondent excepts to the ALJ's conclusion, on p. 15, lines 36-41, that "[b]y prohibiting employee discussion and disclosure of information about an arbitration or an arbitrator's award, the confidentiality clause prevents employees from exercising substantive rights granted by Section 7 of the NLRA. In contrast, the prohibition at issue in *Epic Systems* – denying employees the right to use class action procedures – did not have any impact on a Section 7 right because the Court held that no such right to use class action procedures existed."
31. The Respondent excepts to the ALJ's conclusion, on p. 15, lines 45-46, that "[t]he present facts would present to the Court a case of first impression requiring an analysis beyond the scope of the *Epic Systems* decision."
32. The Respondent excepts to the ALJ's conclusion, on p. 16, lines 7-12, that "there is a crucial difference between the facts in *AT&T Mobility LLC v. Concepcion* and the facts here" because *AT&T Mobility LLC v. Concepcion Systems* did not involve a conflict between language in an arbitration agreement and a substantive statutory right and the people affected by the arbitration agreement in that case were not employees, but customers.

33. The Respondent excepts to the ALJ's conclusion, on p. 16, lines 29-32, that "another distinction that is equally important and perhaps moreso" is that the present case, unlike either *AT&T Mobility LLC v. Concepcion* or *Epic Systems* concerns a substantive civil right granted by a federal statute, the right of workers to act in concert for their mutual aid or protection.
34. The Respondent excepts to the ALJ's conclusion, on p. 17, lines 7-14, that the Supreme Court's decisions in *AT&T Mobility LLC v. Concepcion* and *Epic Systems* "can and must be distinguished" because neither involved a substantive federal civil right which Congress granted to employees as part of a comprehensive federal policy.
35. The Respondent excepts to the ALJ's suggestion, on p. 17, footnote 9, that even though the Supreme Court's reference to confidentiality in *AT&T Mobility LLC v. Concepcion* as an example of "streamlined procedures" appeared to classify confidentiality as a procedural matter, the application of confidentiality provisions to *employees* converts confidentiality into a substantive right because of employees' rights under Section 7 of the Act.
36. The Respondent excepts to the ALJ's conclusion, on p. 17, line 24, that the text of the confidentiality clause "does more than function as a term in a contract."
37. The Respondent excepts to the ALJ's conclusion, on p. 18, lines 11-12, that the confidentiality clause plainly satisfies the first criterion of a "work rule" or "employment policy" because it communicates to employees what conduct is required.
38. The Respondent excepts to the ALJ's conclusion, on p. 18, lines 13-29, that the confidentiality clause satisfies the second criterion of a "work rule" or "employment policy" because employees would reasonably believe, under the totality of circumstances,

that discharge or other discipline could result from a failure to maintain the confidential nature of arbitration. The Respondent further excepts to the ALJ's conclusion that even though (a) the confidentiality clause itself "does not state that an employee would be subject to discharge or discipline if he or she revealed something about the arbitration" and (b) the explanatory material, including FAQ's, likewise "does not raise the possibility of disciplinary action for failure to abide by the confidentiality clause," "other factors reasonably would lead employees to reach the opposite conclusion, that they could be disciplined for disobeying the confidentiality clause."

39. The Respondent excepts to the ALJ's conclusion, on p. 18, lines 33-38, that an employee "reasonably would conclude that if continued employment is conditioned on agreeing to the terms of the Agreement, then disclaiming the Agreement – informing management that the employee decided not to be bound by it – would lead to the employee's discharge" and that an employee "reasonably would conclude that disobeying the policy thus carried at least some adverse consequences."

40. The Respondent excepts to the ALJ's conclusion, on p. 19, lines 9-12, that considering the totality of the circumstances, "the coercive effect of the confidentiality clause would not be blunted by the fact that it appears as part of a document titled 'Mutual Arbitration and Class Waiver Agreement' and under the subtitle 'Confidentiality.'"

41. The Respondent excepts to the ALJ's conclusion, on p. 19, lines 17-21, that employees "reasonably would believe that they could be subject to disciplinary action for disclosing to the public information about how an arbitrator treated grievants" or "if they disclosed to the public the contents of the arbitrator's award, even though the award clearly would affect terms and conditions of employment."

42. The Respondent excepts to the ALJ's conclusion, on p. 19, lines 23-25, that in these circumstances, "employees reasonably would understand the confidentiality clause to state a 'work rule,' as that term is used in the *Boeing* decision."

43. The Respondent excepts to the ALJ's conclusion, on p. 19, lines 27-29, that the confidentiality clause "aptly could be characterized as an 'employment policy'" because "[t]he record indicates that the Respondent alone made the decision to prohibit employees from revealing to the public information about an arbitration."

44. The Respondent excepts to the ALJ's conclusion, on p. 19, lines 34-38, that the confidentiality clause "constitutes a work rule" and employment policy as those terms are used in *Boeing*" and "does not exist solely as part of an Arbitration Agreement but also serves a separate function, communicating to employees that they are prohibited from disclosing information about arbitration to the public." The Respondent further excepts to the ALJ's conclusion that the confidentiality clause has a "dual identity."

45. The Respondent excepts to the ALJ's conclusion, on p. 20, lines 1-14, that the confidentiality clause "existed as a statement of employment policy and work rule well before it existed as a contract clause" and that, even though the clause is not binding as a contract during the first 60 days after an employee receives the Agreement, "it does exist as a statement of the Respondent's employment policy and as a work rule."

46. The Respondent excepts to the ALJ's conclusion, on p. 20, lines 14-16, that employees "clearly know about this work rule because each received a copy of it" and "reasonably would believe that disobeying the rule could result in discipline."

47. The Respondent excepts to the ALJ's conclusion, on p. 20, lines 16-19, that "[t]herefore, if the message reasonably communicated by the clause's text violates Section 8(a)(1), the

violation begins *before* the formation of any contract. It starts when the employee receives the rule and learns that he may not discuss or disclose information about an arbitration or an arbitrator's award."

48. The Respondent excepts to the ALJ's conclusion, on p. 20, lines 24-32, that "[e]ven assuming, for the sake of analysis, the correctness of the Respondent's argument that the clause's status as part of an arbitration agreement insulates it from Board scrutiny, that reasoning could not apply to the 60-day period during which no contract was in effect. Thus, nothing precludes the Board from exercising its authority during this 2-month period. Likewise, during this period before the Arbitration Agreement, by its own terms, becomes effective, no impediment exists which even arguably would preclude the Board from applying labor law standards to judge the lawfulness of the prohibition expressed by the clause."

49. The Respondent excepts to the ALJ's conclusion, on p. 20, lines 34-41 that "[s]hould the Board determine that the message reasonably communicated by the language of the confidentiality clause violates Section 8(a)(1), the Board certainly can order the Respondent to undo the harm caused when the clause was promulgated by rescinding the clause as a statement of employment policy and work rule. Similarly, nothing prevents the Board from including in its remedial order the customary requirement that a respondent not commit 'like or related' violations in the future. Thus barred from re-promulgating the message, the Respondent incorporate it into an arbitration agreement and require an employee to be bound by it."

50. The Respondent excepts to the ALJ's conclusion, on p. 21, lines 4-7, that "even assuming the correctness of the Respondent's argument – that the Board may not apply labor law

standards to judge a cause clothed in an arbitration agreement – that premise does not prevent the Board from examining the clause when it stands naked, before the formation of such an agreement."

51. The Respondent excepts to the ALJ's conclusion on p. 21, lines 32-36, that "the Respondent placed its employees under considerable coercion and duress by telling them, in effect, that they could not continue to work without thereby agreeing to the terms of the Arbitration Agreement. This implied threat of job loss created an environment in which an employee could not make a truly voluntary choice."
52. The Respondent excepts to the ALJ's conclusion, on p. 21, lines 39-45, that employees would not have known that they "possessed the right to discuss and disclose working conditions" and that "such an understanding cannot be imputed to employees" who do not have training as a labor lawyer.
53. The Respondent excepts to the ALJ's findings and conclusion, on p. 22, lines 1-10, that the record "does not establish that employees even were aware they possessed the Section 7 right to discuss and disclose their conditions of employment, including information about work-related arbitrations. Neither the Arbitration Agreement itself nor the explanatory material which Respondent provided informed employees about this Section 7 right. Likewise, neither the Arbitration Agreement nor the explanatory material informed employees that they were free to discuss and disclose information about an arbitration and arbitral award and that they would not be disciplined for doing so. The record does not indicate that the Respondent otherwise communicated to employees that they would not be subjected to discharge or discipline for discussing or disclosing

information about work-related arbitrations and I conclude that the Respondent did not do so."

54. The Respondent excepts to the ALJ's conclusion, on p. 22, lines 19-21, that "when the Board decides whether a right granted by the NLRA has been waived, it acts exclusively within its own area of expertise."

55. The Respondent excepts to the ALJ's finding, on p. 23, lines 22-25, that "[t]here is no assurance that an employee who received the Respondent's Arbitration Agreement even read its paragraph 7(h), which provided that continuing to work for 60 days resulted in the Agreement taking effect."

56. The Respondent excepts to the ALJ's conclusion, on p. 23, lines 34-38, that "[b]ecause no employee waived the right to engage in activity protected by Section 7 of the Act, all employees retained the right to discuss and disclose information about arbitrations and arbitral awards. Yet employees reasonably would understand the language in the confidentiality clause to mean that they did not possess this right. Thus, the confidentiality clause would lead employees to believe something that was untrue."

57. The Respondent excepts to the ALJ's efforts to distinguish this case from *Epic Systems* on p. 25, line 42 through p. 26, line 7.

58. The Respondent excepts to the ALJ's characterization and conclusion, on p. 27, lines 6-12, that the Respondent communicated to employees that if they continued working, their rights would be gone, and this was sufficiently coercive to offend public policy and negate any argument that the waiver was voluntary.

59. The Respondent excepts to the ALJ's conclusion, on p. 27, lines 39-40, that the Board's *Boeing* framework should be followed.

60. The Respondent excepts to the ALJ's conclusion, on p. 27, lines 40-43, that Respondent's argument assumes that confidentiality is a "fundamental attribute" of arbitration but the record lacks evidence to support such a conclusion.

61. The Respondent excepts to the ALJ's conclusion, on p. 28, lines 2-8, that the extent to which confidentiality is a fundamental attribute of arbitration is not settled and is not an appropriate fact of which to take judicial notice.

62. The Respondent excepts to the ALJ's conclusion, on p. 28, lines 17-35, and p. 29, lines 1-2, that the Court's statement in *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175 (5th Cir. 2004) that "the plaintiffs' attack on the confidentiality provision is, in part, an attack on the character of arbitration itself" should be treated as dicta rather than precedent.

63. The Respondent excepts to the ALJ's statement, on p. 29, lines 7-8, that "it is not quite accurate to say that Rule 408 protects statements made during settlement negotiations from disclosure. Rather, the rule makes such evidence inadmissible."

64. The Respondent excepts to the ALJ's conclusion, on p. 29, lines 21-23, that "by conflating arbitration with mediation, the Respondent's argument misses the mark. Although both can be categorized as means of alternate dispute resolution, arbitration differs materially from mediation both in goals and methods."

65. The Respondent excepts to the ALJ's conclusion, on p. 30, lines 1-3, that because an arbitrator "functions as a substitute for a judge and acts in the judge's place, the amount of confidentiality necessary to perform this function is the same whether the case is being presented to an arbitrator or a judge."

66. The Respondent excepts to the ALJ's conclusion, on p. 30, lines 9-10, that "[t]he reasons why the parties to commercial arbitration may need confidentiality do not exist in employment arbitration."

67. The Respondent excepts to the ALJ's conclusion, on p. 31, lines 9-14, that "[t]he fact that courts ordinarily resolve employment-related cases in open trials, using protective orders sparingly but when necessary, strongly suggests that a broad confidentiality provision blanketing the entire arbitration process is not essential to the arbitration of employment-related disputes" and the ALJ's failure to find that confidentiality is a "fundamental attribute" of arbitration.

68. The Respondent excepts to the ALJ's conclusion, on p. 31, lines 21-24, that "[t]he prohibition of discussion and disclosure which the confidentiality clause communicates to employees directly affects their willingness to exercise the rights granted by Section 7."

69. The Respondent excepts to the ALJ's conclusion, on p. 31, lines 30-40, that common law contract law standards should not be applied to the confidentiality clause.

70. The Respondent excepts to the ALJ's conclusion, on p. 32, lines 36-41, that the common law standards used by courts to judge contract validity do not address the enforcement of public law, the purposes which Congress intended the law to serve, or the potential injury to employee rights.

71. The Respondent excepts to the ALJ's efforts, on p. 32, lines 5-21, to analogize the confidentiality clause to radium and his conclusion that the confidentiality clause can only be assessed based on precedent under the NLRA.

72. The Respondent excepts to the ALJ's characterization, on p. 33, lines 19-21, that "the Respondent argues that common law standards intended for another purpose provide the

only appropriate way to determine whether there is a violation of a statute which Congress enacted to address a problem *ignored* by the common law."

73. The Respondent excepts to the ALJ's characterization, on p. 33, lines 35-36, that "the Respondent's argument mistakenly assumes that, in *Epic Systems*, the FAA did kayo [sic] Section 7."
74. The Respondent excepts to the ALJ's conclusion, on p. 34, lines 10-12, that "[t]he issue to be decided here does not depend on whether the words in the Arbitration Agreement constitute an enforceable contract any more than it depends on whether those words rhyme."
75. The Respondent excepts to the ALJ's conclusion, on p. 34, lines 32-39, that "it makes no difference whether the Respondent expresses this policy as a clause in an arbitration agreement or publishes it to employees some other way" and his conclusion that the Arbitration Agreement in this case interferes with employees' Section 7 rights.
76. The Respondent excepts to the ALJ's conclusion, on p. 35, lines 9-11, that "the Respondent's argument puts both the [FAA] and the [NLRA] in the ring and orders them to come out fighting."
77. The Respondent excepts to the ALJ's characterization, on p. 35, lines 13-15, that the Respondent argues for "an interpretation allowing arbitration agreements to be used as safe havens for the expression of employment policies and work rules which, if communicated in some other manner, would be subject to labor law."
78. The Respondent excepts to the ALJ's conclusion, on p. 35, lines 23-26, that the rights arising under Section 7 are substantive rather procedural, thereby distinguishing the

present case from *Epic Systems* and precluding the Respondent from requiring employees to waive them as a condition of keeping their jobs.

79. The Respondent excepts to the ALJ's conclusion, on p. 35, lines 32-36, that the Board may, consistent with *Epic Systems* and other Supreme Court precedent, judge whether the confidentiality clause interferes with or restrains employees' Section 7 rights and apply the standards promulgated in *Boeing* to do so.
80. The Respondent excepts to the ALJ's reading of the confidentiality clause on page 35, lines 40-46, and his treatment of it as a statement of policy or a work rule subject to the *Boeing* standard.
81. The Respondent excepts to the ALJ's conclusion, on page 36, lines 1 – 6, that the confidentiality clause would have violated the standards in effect before *Boeing.*
82. The Respondent excepts to the ALJ's conclusion, on p. 38, lines 22-27, that employees reasonably would believe that they could be disciplined for discussing or disclosing the arbitral award or other information about the arbitration.
83. The Respondent excepts to the ALJ's conclusion, on p. 39, lines 6-8, that "[b]ecause the Respondent has made arbitration a condition of employment, and because the confidentiality clause prohibits employees from discussing what happened during an arbitration, the clause clearly interferes with employees' Section 7 rights."
84. The Respondent excepts to the ALJ's conclusion, on p. 39, lines 30-34, that at least in the absence of the disclaimer, the confidentiality clause restricts activity clearly protected by Section 7 and interferes with the exercise of the substantive rights granted by that provision.

85. The Respondent excepts to the ALJ's conclusion, on p. 40, lines 8 -14, that employees reasonably would not understand the disclaimer to allow them to discuss an arbitration proceeding or award or to present information about an arbitration to the public as part of a concerted protest of that condition of employment.

86. The Respondent excepts to the ALJ's conclusion, on p. 40, lines 27-37, that employees would not know what constitutes a "protected discussion or activity," would depend on the remainder of the disclaimer to explain what is meant by that, and would not understand the listed examples of protected activity as including matters related to the arbitration.

87. The Respondent excepts to the ALJ's conclusion, on p. 41, lines 13-16, that the disclaimer "makes no exception for *any* part of the arbitration process, not even to allow employees to discuss the outcome" and that an employee "reasonably would believe that he was not permitted to discuss any aspect of the arbitration."

88. The Respondent excepts to the ALJ's conclusion, on p. 41, lines 34-38, that the confidentiality clause "clearly communicates that employees may *not* disclose information about how the arbitrator conducted the hearing or about the arbitrator's award" and the disclaimer "does not make an exception which would allow employees to publicize their dissatisfaction with this condition of employment."

89. The Respondent excepts to the ALJ's conclusions, on p. 42, lines 12-31, with respect to the interpretation of the confidentiality clause.

90. The Respondent excepts to the ALJ's conclusions, on p. 43, lines 6-23, with respect to the interpretation of the provisions of the Arbitration Agreement permitting employees to challenge the Agreement or a resulting award.

91. The Respondent excepts to the ALJ's conclusion, on p. 43, lines 31-37, that "under the totality of circumstances, employees reasonably would understand the confidentiality clause to prohibit them from discussing arbitrations and arbitrators' awards among themselves, and they also reasonably would understand the clause to forbid disclosing such information to the public. However, Section 7 grants employees the right both to discuss these terms and conditions of employment and to disclose them to the public. Therefore, I conclude that the confidentiality clause, and the employment policy it communicates, interferes with the exercise of rights guaranteed by Section 7 of the Act."
92. The Respondent excepts to the ALJ's conclusion, on p. 44, lines 19-21, that in this case, unlike *Boeing*, "the affected right is not on the margins of Section 7 but close to the center, because it prohibits employees from discussing a condition of employment."
93. The Respondent excepts to the ALJ's conclusion, on p. 44, lines 34-37, that "[w]hen that condition of employment involves Respondent's arbitration procedure, any explanation of employee dissatisfaction would entail informing the public about what happened during an arbitration or why an arbitral award is unfair."
94. The Respondent excepts to the ALJ's failure to find, on p. 45, lines 8-23, that confidentiality benefits the arbitration process.
95. The Respondent excepts to the ALJ's failure to find, on p. 46, lines 1 -5, that there are legitimate interests furthered by confidentiality in an arbitration process.
96. The Respondent excepts to the ALJ's finding, on p. 47, lines 21-31, that the Arbitration Agreement prohibits employees from discussing claims of sexual harassment in the workplace.

97. The Respondent excepts to the ALJ's statements, on p. 47, lines 33-38, with respect to the fairness of the arbitration procedure in the Agreement.

98. The Respondent excepts to the ALJ's suggestion, on p. 48, lines 1-7, that the confidentiality clause would prevent employees from discussing the Arbitration Agreement and/or the fairness of the arbitration process generally.

99. The Respondent excepts to the ALJ's findings, on p. 48, lines 23-32, with respect to the selection and diversity of arbitrators under the Arbitration Agreement.

100. The Respondent excepts to the ALJ's suggestions, on p. 48, lines 34-46, that the arbitrators selected under the Arbitration Agreement will be biased or unqualified.

101. The Respondent excepts to the ALJ's suggestion, on p. 49, lines 16-20, that the Respondent desires to prevent employees from discussing sexual harassment in the workplace.

102. The Respondent excepts to the ALJ's conclusion, on p. 49, lines 27-35, that the confidentiality requirement also interferes with employees' exercise of the Section 7 right to join or assist labor organizations.

103. The Respondent excepts to the ALJ's finding, on p. 49, lines 37-43, that the Arbitration Agreement's confidentiality clause interferes with "rights at the core of Section 7."

104. The Respondent excepts to the ALJ's conclusion, on p. 49, line 46 through p. 50, line 3, that the Respondent has not demonstrated that the confidentiality clause is "necessary for any legitimate business purpose" and that the Respondent's reasons for the confidentiality clause "do not outweigh the harm inflicted upon the employees' Section 7 rights" and therefore violates Section 8(a)(1).

105. The Respondent excepts to the ALJ's conclusion, on p. 50, lines 5-23, that the confidentiality clause is a Category 3 rule under *Boeing*, rather than a Category 1 or Category 2 rule.

106. The Respondent excepts to the ALJ's recommended Remedy on p. 50, line 27 through p. 51, line 13.

107. The Respondent excepts to the ALJ's recommended Conclusions of Law on p. 51, lines 17-29.

108. The Respondent excepts to the ALJ's recommended Order on p. 51, line 33 through p. 53, line 15 and Appendix A.

Date: May 16, 2019

Respectfully submitted,

By: /s/ Jonathan C. Fritts

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of Pfizer Inc.'s Exceptions to the Supplemental Decision of the Administrative Law Judge have been served upon the following this 16th day of May 2019 by e-mail:

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