

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

PFIZER INC.

AND

**REBECCA LYNN OLVEY MARTIN,
an individual**

AND

**JEFFREY J. REBENSTORF, an
individual**

**Cases 10-CA-175850
07-CA-176035**

**PFIZER INC.'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE
SUPPLEMENTAL DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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INTRODUCTION AND PROCEDURAL BACKGROUND

This case involves a challenge to two provisions of the Pfizer’s Mutual Arbitration and Class Waiver Agreement (“Arbitration Agreement”), the Class Action Waiver Provision and the Confidentiality Provision. Both provisions are lawful. The allegation concerning the Class Action Waiver provision has been dismissed based on the Supreme Court’s decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018). The General Counsel agrees that the Confidentiality Provision is lawful.

In his original decision on January 18, 2017, the Administrative Law Judge (“ALJ”) held that the Class Action Waiver and Confidentiality Provisions both violated the Act (the “Jan. 18, 2017 ALJ Decision”). The case was subsequently held in abeyance pending the Supreme Court’s May 21, 2018 decision in *Epic Systems*, which held that arbitration agreements with class/collective action waivers must be enforced according to their terms under the Federal Arbitration Act (“FAA”). The Supreme Court also held that the National Labor Relations Act (“NLRA” or “Act”) does not address the procedures for dispute resolution in court or arbitration and therefore does not override the commands of the FAA.

Following the Supreme Court’s decision, on October 18, 2018, the Board dismissed the allegation regarding the Arbitration Agreement’s Class Action Waiver provision pursuant to *Epic Systems* and remanded the allegation concerning the Confidentiality Provision to the ALJ. 367 NLRB No. 23. The ALJ requested that the parties submit supplemental briefs regarding the Confidentiality Provision in light of the Supreme Court’s decision in *Epic Systems* and the Board’s new standard for analyzing employer policies or work rules in *The Boeing Company*, 365 NLRB No. 154 (2017).

The parties submitted supplemental briefs on December 21, 2018. Notably, *both* Pfizer and Counsel for the General Counsel (“GC”) argued that the Confidentiality Provision is lawful.

Counsel for the GC argued that the ALJ “should find that arbitral confidentiality agreements that confine themselves to the matters disclosed in the course of arbitration proceedings generally do not adversely impact Section 7 rights because they do not prevent employees from discussing matters protected under Section 7 such as their terms and conditions of employment, the fact of their arbitration, and their claims.” (Counsel for GC Post-Hearing Brief to ALJ, at 9-10).

Further, Counsel for the GC asserted that the Confidentiality Provision is lawful because it is limited to “the information and documents that are disclosed pursuant to the arbitral process,” “contains no unlawful limitation on employees’ Section 7 rights,” and “does not limit an employee’s ability to discuss terms and conditions of employment.” (*Id.* at 14, 17).

The ALJ rejected both Pfizer and the Counsel for the GC’s positions in a supplemental decision on March 21, 2019 (“Supplemental Decision”), which erroneously found that the Confidentiality Provision violates Section 8(a)(1) of the Act as a Category 3 rule under the *Boeing* standard.

SUMMARY OF PFIZER’S EXCEPTIONS AND ARGUMENTS

The ALJ’s decision contains many errors, both legal and factual, and is filled with hyperbolic rhetoric which reveals the ALJ’s personal dislike for all forms of arbitration agreements, whether in a commercial agreement (such as a cell phone contract) or in an employment agreement. The ALJ’s strong personal views skewed his reasoning and produced a flawed and exaggerated interpretation of the carefully tailored Confidentiality Provision in Pfizer’s Arbitration Agreement. The Confidentiality Provision states as follows:

e. Confidentiality: The parties shall maintain the confidential nature of the arbitration proceeding and the award, including all disclosures in discovery, submissions to the arbitrator, the hearing, and the contents of the arbitrator’s award, except as may be necessary in connection with a court application for a temporary or preliminary injunction in aid of arbitration or for the maintenance of the status quo pending arbitration, a judicial action to review the award on the grounds set forth in the FAA, or unless otherwise required or protected by law or allowed by prior written consent of both parties. This provision

shall not prevent either party from communicating with witnesses or seeking evidence to assist in arbitrating the proceeding. [Nothing in this Confidentiality provision shall prohibit employees from engaging in protected discussions or activity relating to the workplace, such as discussions of wages, hours, or other terms and conditions of employment.] In all proceedings to confirm or vacate an award, the parties will cooperate in preserving the confidentiality of the arbitration proceeding and the award to the greatest extent allowed by applicable law.

Stipulation of Facts (“SOF”) 7.¹

As a threshold matter, the ALJ erred in finding that *Epic Systems* is inapposite because that case involved class action *procedures* whereas the instant case involves, in ALJ’s view, “a rule creating or affecting a *substantive* right.” (Supplemental Decision, 5 & 8-9) (emphasis in original). Neither *Epic Systems* nor the Supreme Court precedent cited by the ALJ supports drawing that distinction here. The Confidentiality Provision plainly relates to “the procedures judges or arbitrators must apply in disputes that leave the workplace and enter the courtroom or arbitral forum,” which the Supreme Court held the NLRA does not regulate. *Epic Sys. Corp.*, 138 S. Ct. at 1625; *see also id.* at 1629 (“this dicta about the holdings of other bodies does not purport to discuss what procedures an employee might be entitled to in litigation or arbitration”).

The Confidentiality Provision, by its very terms, is limited to “the arbitration *proceeding* and the award.” SOF 7 (emphasis added). Because the Confidentiality Provision, like the Class Action Waiver Provision, is clearly limited to the arbitration proceeding itself, it must be enforced under the FAA. As the Supreme Court held in *Epic Systems*, the FAA “requires courts ‘rigorously’ to ‘enforce arbitration agreements according to their terms, including . . . *the rules* under which that arbitration will be conducted.’” *Epic Sys. Corp.*, 138 S. Ct. at 1621 (quoting *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013)). And the FAA’s saving

¹ Prior to the November 4, 2016 hearing in this case, Pfizer and the GC agreed to several stipulations of fact, which were memorialized and admitted into evidence as Joint Exhibit 1.

clause “permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability” but “offers no refuge for defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” *Id.* at 1622 (internal citations and quotations omitted).

In light of the above, the Board should conclude that the *Boeing* framework does not apply because the NLRA is not a generally accepted contract defense recognized by the FAA and, in any event, the Confidentiality Provision does not satisfy the normal definition of a work rule. It does not pertain to work standards or what conduct is required in the performance of employees’ duties; rather, it relates to “legal disputes that leave the workplace and enter the courtroom or arbitral forum.” *Id.* at 1619. Courts have recognized that similar confidentiality provisions are a lawful and enforceable aspect of an arbitration agreement under the FAA. *See, e.g., Kilgore v. KeyBank Nat’l Ass’n*, 718 F.3d 1052, 1059 n.9 (9th Cir. 2013) (finding that arbitration agreement was conscionable and enforceable under the FAA’s saving clause and confirming that “the enforceability of the confidentiality clause is a matter distinct from the enforceability of the arbitration clause in general. Plaintiffs are free to argue during arbitration that the confidentiality clause is not enforceable.”); *Sanchez v. Carmax Auto Superstores Cal., LLC*, 224 Cal. App. 4th 398, 408 (2014) (“The second provision requiring confidentiality is not unconscionable. In regard to ‘the fairness or desirability of a secrecy provision with respect to the parties themselves, . . . we see nothing unreasonable or prejudicial about it,’ and it is not substantively unconscionable.”) (citation omitted).

To the extent the Board nevertheless applies the *Boeing* framework rather than the FAA, the Confidentiality Provision is lawful under either Category 1 or Category 2 of the *Boeing* standard. The ALJ erroneously concluded that the Confidentiality Provision is an unlawful

Category 3 rule. (Supplemental Decision, 50). The ALJ's decision is based on two critically flawed interpretations of the Confidentiality Provision.

First, the ALJ erroneously found that the Confidentiality Provision restricts employees' Section 7 right to discuss terms and conditions of employment (including the conditions giving rise to a claim in arbitration), as opposed to the evidence produced in an arbitration proceeding or the resulting award. The Confidentiality Provision is carefully tailored to maintain the confidentiality of the arbitration proceeding and the award. Indeed, the GC recognizes that the Confidentiality Provision "is devoid of any language limiting an employee's ability to discuss his or her terms and conditions of employment, the circumstances and reasons for discipline and any facts or materials of which the employee became aware outside of the arbitral process." (Counsel for GC Post-Hearing Brief, at 17).

Not only is the Confidentiality Provision devoid of any such restriction; it *expressly disclaims* any intention to prohibit employees from "communicating with witnesses or seeking evidence to assist in arbitrating the proceeding" or from "engaging in protected discussions or activity relating to the workplace, such as discussions of wages, hours, or other terms and conditions of employment." (SOF 7). Thus, employees are free to discuss the terms and conditions of employment that may give rise to claims in arbitration, and they are free to marshal witnesses and evidence in support of those claims. The Confidentiality Provision only applies to the arbitration proceeding itself, which is intended to benefit all parties to the arbitration proceeding – including witnesses who may provide sensitive testimony in the arbitration proceeding.

Second, the ALJ incorrectly concluded that the Confidentiality Provision would prevent employees from discussing the *arbitration agreement itself* as a term and condition of

employment – for instance by discussing or publicly expressing dissatisfaction with the mandatory nature of arbitration, the adequacy of the procedures mandated under the Agreement, the impartiality of arbitrators, or other aspects of the arbitration process generally with which they take issue. The ALJ’s finding is contrary to the express language of the Arbitration Agreement, which does not purport to make the Agreement itself confidential and also clearly states that employees have the right to challenge the Arbitration Agreement without fear of retaliation. (J. Ex. 3, at § 2.d). (“You have the right to challenge the validity of the terms and conditions of this Agreement on any grounds that may exist in law and equity, and the Company shall not discipline, discharge, or engage in any retaliatory actions against you in the event you choose to do so.”).

The ALJ’s distorted interpretation of the Confidentiality Provision led him to conclude, erroneously, that it “interferes with the exercise of rights guaranteed by Section 7 of the Act.” (Supplemental Decision, 43). In addition, the ALJ erred in his application of the balancing test under Category 1 or Category 2 of the *Boeing* standard. To the extent the Confidentiality Provision can be read to impact Section 7 rights at all, any potential adverse impact is outweighed by the legitimate justifications for the Confidentiality Provision, which benefit both the employer and the employee as part of the dispute resolution process set forth in the Arbitration Agreement.

STATEMENT OF FACTS

Pfizer is incorporated in the state of Delaware. (SOF 1). Pfizer employs approximately 32,000 employees in the United States, who are based at facilities located in 17 states and who work and transact business in all fifty states and the District of Columbia. (SOF 2). On May 5, 2016, Pfizer sent an e-mail to employees informing them of the Arbitration Agreement, and instructing employees to read and acknowledge the Agreement. (SOF 4; J. Ex. 2). The

Arbitration Agreement applies to all Pfizer employees in the United States (except those who are covered by a collective bargaining agreement and those employed by a small subsidiary). (SOF 8-9). Employees are not allowed to “opt out” of the Arbitration Agreement. To the extent they continue their employment for sixty days after receiving the Agreement, they are bound to the Agreement as a condition of employment. (SOF 10).

The Arbitration Agreement specifically provides that it “shall be governed and interpreted in accordance with the FAA.” (J. Ex. 3 at § 6.f.).

ARGUMENT

I. The Confidentiality Provision Is Enforceable as Part and Parcel of the Arbitration Agreement under the FAA (Exceptions 1-35, 51-52, 59, 64-79, 83-84, 88-90, 92, 98, 102-103).

A. The FAA Mandates That Arbitration Agreements Be Enforced According to Their Terms.

The FAA establishes “a liberal federal policy favoring arbitration agreements” and there is a well-established framework for reviewing and enforcing such agreements through the courts. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983), *superseded on other grounds* (citing *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967) (discussing “the plain meaning of the statute” and “the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts”)).

Enacted in 1925 to combat the “judicial hostility to arbitration agreements,” the FAA “place[s] arbitration agreements upon the same footing as other contracts.” *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991).

B. Under the Supreme Court’s Decision in *Epic Systems*, the Confidentiality Provision Must Be Enforced According to Its Terms (Exceptions 1-16, 23-35, 51-52, 83-84, 88-90, 92, 98, 102-103).

The Supreme Court’s decision in *Epic Systems* makes clear that arbitration agreements, including “the rules under which that arbitration will be conducted,” *Epic Sys.*, 138 S. Ct. at 1621 (internal quotations and citations omitted), must be enforced according to their terms under the FAA and that the NLRA does not override the commands of the FAA:

The policy may be debatable but the law is clear: Congress has instructed that arbitration agreements like those before us must be enforced as written. While Congress is of course always free to amend this judgment, we see nothing suggesting it did so in the NLRA—much less that it manifested a clear intention to displace the Arbitration Act.

Id. at 1632. *Epic Systems* specifically found that the FAA requires enforcement of the parties’ chosen arbitration procedures: “Not only did Congress require courts to respect and enforce agreements to arbitrate; it also specifically directed them to respect and enforce the parties’ chosen arbitration procedures.” *Id.* at 1621 (citing 9 U.S.C. §§ 3, 4). “Indeed, we have often observed that the Arbitration Act requires courts ‘rigorously’ to ‘enforce arbitration agreements according to their terms, including . . . *the rules* under which that arbitration will be conducted.’” *Id.* (quoting *Am. Express Co.*, 570 U.S. at 233).

The Supreme Court’s decision in *Epic Systems* was *not* limited to class action waivers. Rather, the Court analyzed the connection between arbitration agreements and the NLRA more broadly. The Court concluded that when the rules and procedures applied to workplace disputes in labor arbitrations do not significantly implicate Section 7 rights, the Board may not supersede the FAA by applying the NLRA to strike down the terms and procedures set forth in arbitration agreements. *See id.* at 1627 (“Union organization and collective bargaining in the workplace are the bread and butter of the NLRA, while the particulars of dispute resolution procedures in Article III courts or arbitration proceedings are usually left to other statutes and rules—not least .

. . the Arbitration Act”); *id.* at 1619 (Section 7 of 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.”); *id.* at 1624 (Section 7 “does not even hint at a wish to displace the Arbitration Act—let alone accomplish that much clearly and manifestly, as our precedents demand.”).

In his Supplemental Decision, the ALJ erroneously concluded that *Epic Systems* does not govern the Confidentiality Provision because it affects a substantive right (the right to discuss terms and conditions of employment) rather than the procedural right (the right to pursue litigation collectively) at issue in *Epic Systems*. (Supplemental Decision, at 5-9, 11-12, 15-17.) This is a false distinction because the Confidentiality Provision, like the Class Action Waiver Provision, is limited to the arbitration process itself. By its terms, the Confidentiality Provision is limited to the “arbitration proceeding and the award, including all disclosures in discovery, submissions to the arbitrator, the hearing, and the contents of the arbitrator’s award.” (SOF 7).

Critically, the Confidentiality Provision does not prohibit employees from discussing the terms and conditions of employment that are at issue in the arbitration proceeding. That is made explicit in the disclaimer, which states clearly that “[n]othing in this Confidentiality provision shall prohibit employees from engaging in protected discussions or activity relating to the workplace, such as discussions of wages, hours, or other terms and conditions of employment.” (SOF 7).

The ALJ’s Supplemental Decision mistakenly conflates the procedural and substantive rights at issue in finding that “what happens at an arbitration, and the arbitrator’s award” are themselves terms and conditions of employment. (Supplemental Decision, at 13.) But in the same way that motions and rulings in employment litigation in court are not terms and conditions

of employment, evidence or argument submitted to an arbitrator, and the arbitrator's eventual award, are not terms or conditions of employment. The dispute in arbitration, just like employment litigation in court, may "pertain to" terms and conditions of employment, (Supplemental Decision, at 13), but that does not convert the proceeding into a term or conditions of employment regulated by the NLRA. The Confidentiality Provision is simply one aspect of the arbitration proceeding, just as a confidentiality or protective order may govern proceedings in court.

Contrary to the ALJ's findings, the Confidentiality Provision does *not* prohibit employees from discussing the terms and conditions of employment at issue in the proceeding. The Confidentiality Provision explicitly recognizes employees' right to do. (SOF 7) ("Nothing in this Confidentiality provision shall prohibit employees from engaging in protected discussions or activity relating to the workplace, such as discussions of wages, hours, or other terms and conditions of employment."). The Confidentiality Provision also makes clear that it does not restrict employees from communicating with witnesses or seeking evidence to support their claim in an arbitration proceeding. *Id.* ("This provision shall not prevent either party from communicating with witnesses or seeking evidence to assist in arbitrating the proceeding."). The ALJ's disregard for the plain meaning of the Confidentiality Provision was a clear error.

The ALJ's Supplemental Decision is further distorted by the false perception that the Confidentiality Provision restricts employees' right to challenge the Arbitration Agreement or the resulting award. (Supplemental Decision, at 9, 13.) This is plainly wrong because the Arbitration Agreement explicitly recognizes employees' right to challenge the Agreement and makes clear that employees will not suffer any form of retaliation if they choose to do so. (J. Ex. 3, at § 2.d) ("You have the right to challenge the validity of the terms and conditions of this

Agreement on any grounds that may exist in law and equity, and the Company shall not discipline, discharge, or engage in any retaliatory actions against you in the event you choose to do so.”). The Agreement also expressly states that nothing in the Agreement prohibits employees from filing a charge, complaint, or claim with the National Labor Relations Board or other government agencies, or participating in an investigation by those agencies. (J. Ex. 3, at § 2.c). Finally, the Confidentiality Provision contains a specific exception which permits employees to challenge the resulting arbitration award in court or to seek other judicial relief in connection with the arbitration proceeding. (SOF 7) (“The parties shall maintain the confidential nature of the arbitration proceeding and the award ... *except* as may be necessary in connection with a court application for a temporary or preliminary injunction in aid of arbitration or for the maintenance of the status quo pending arbitration, a judicial action to review the award on the grounds set forth in the FAA....”) (emphasis added).

Because the Confidentiality Provision is limited to the arbitration proceeding and does not restrict employees’ right to discuss the underlying terms and conditions of employment or their ability to challenge the Arbitration Agreement or the resulting award, the Confidentiality Provision is a procedural provision like class action waiver at issue in *Epic Systems*. The driving force behind the Supreme Court’s decision is the principle that the procedures and rules applied in employment litigation or arbitration (even though they pertain to terms and conditions of employment) do not generally implicate or interfere with Section 7 rights because those procedures are not the kinds of activities with which Section 7 was concerned. *See Epic Sys.*, 138 S. Ct. at 1625 (“None of the preceding and more specific terms speaks to the procedures judges or arbitrators must apply in disputes that leave the workplace and enter the courtroom or arbitral forum, and there is no textually sound reason to suppose the final catchall term should

bear such a radically different object than all its predecessors.”). In sum, the FAA controls absent a clear Congressional command to override, which the Supreme Court has already found the NLRA lacks.

The Confidentiality Provision must, therefore, be treated as part and parcel of the arbitration process that is governed by the FAA, just like the Class Action Waiver Provision. Indeed, the Arbitration Agreement specifically provides – in the section immediately following the Confidentiality Provision – that it “shall be governed and interpreted in accordance with the FAA.” (J. Ex. 3 at § 6.f.).

In light of the FAA’s mandate that arbitration agreements be enforced according to their terms, and *Epic Systems*’ holding that the NLRA does not override the FAA, the Confidentiality Provision must be enforced in accordance with its terms. *Epic Sys.*, 138 S. Ct. at 1632; *see also Inetianbor v. CashCall, Inc.*, 768 F.3d 1346, 1352 (11th Cir. 2014) (“The parties to the agreement we consider here have exercised their right to structure their arbitration agreements as they see fit It falls on courts and arbitrators to give effect to these contractual limitations, and when doing so, courts and arbitrators must not lose sight of the purpose of the exercise: to give effect to the intent of the parties.” (internal citations and quotations omitted)).

C. The Confidentiality Provision Must Be Construed Based on Common Law Contract Principles, Rather Than the NLRA (Exceptions 17-22, 59, 64-79).

Under the FAA’s saving clause, 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. As the Supreme Court held in *Epic Systems*, this is an “‘equal-treatment’ rule for arbitration agreements,” in that the saving clause “recognizes only defenses that apply to ‘any’ contract.” *Epic Sys.*, 138 S. Ct. at 1622 (citing *Kindred Nursing Ctrs. L.P. v. Clark*, 137 S. Ct. 1421, 1426 (2017)). The saving clause “permits agreements to arbitrate to be

invalidated by ‘generally applicable contract defenses, such as fraud, duress, or unconscionability.’” *Id.* (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)). “The clause offers no refuge for ‘defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.’” *Id.* (quoting *Concepcion*, 563 U.S. at 339).

For this reason, the Supreme Court held that even assuming that the arbitration agreements at issue in *Epic Systems* violated the NLRA, the agreements could not be invalidated under the saving clause because it would not be a defense that applies to “any” contract. *See Epic Sys. Corp.*, 138 S. Ct. at 1622. The Board may not import the NLRA’s standards into the FAA. *Epic Sys. Corp.*, 138 S. Ct. at 1629 (“Here, though, the Board hasn’t just sought to interpret its statute, the NLRA, in isolation; it has sought to interpret this statute in a way that limits the work of a second statute, the Arbitration Act. And on no account might we agree that Congress implicitly delegated to an agency authority to address the meaning of a second statute it does not administer.”).

Under the FAA’s saving clause, a confidentiality provision must be evaluated based on generally applicable defenses under contract law, such as the doctrine of unconscionability. Many courts have found that confidentiality provisions in arbitration agreements are valid and enforceable under general principles of contract law, and have rejected claims that such provisions are unconscionable. *See Asher v. E! Entm’t Television, LLC*, No. CV 16-8919-RSWL-SSx, 2017 WL 3578699, at *7–8 (C.D. Cal. Aug. 16, 2017) (finding that the Confidentiality Provision was not unconscionable under California law because it only required confidentiality of information “generated” and exchanged during arbitration, which would not “impede Plaintiff’s discovery and investigation capabilities or contact with witnesses during

litigation,” and was “bilateral and allow[ed] disclosure when permitted by law or ‘otherwise provided herein,’ thus not fully creating a gag order on the parties as Plaintiff would argue”); *Bell v. Ryan Transp. Serv., Inc.*, 176 F. Supp. 3d 1251, 1258 (D. Kan. 2016) (refusing to strike down a confidentiality clause as unenforceable because it would not impede the plaintiff’s ability to advise potential witnesses about the lawsuit or engage in other activities necessary to support his claim); *Sanchez*, 224 Cal. App. 4th at 408 (“The second provision requiring confidentiality is not unconscionable. In regard to ‘the fairness or desirability of a secrecy provision with respect to the parties themselves, . . . we see nothing unreasonable or prejudicial about it,’ and it is not substantively unconscionable.” (quoting *Woodside Homes of Cal., Inc. v. Superior Ct.*, 107 Cal. App. 4th 723, 732 (2003))); *Andrade v. P.F. Chang’s China Bistro, Inc.*, No. 12CV2724 JLS JMA, 2013 WL 5472589, at *9 (S.D. Cal. Aug. 9, 2013) (upholding a confidentiality clause that prevented disclosure of any content exchanged during arbitration unless otherwise allowed by the law because it was not as broad as in a prior case where the plaintiff was expressly prohibited from contacting other employees “to assist in litigating or (arbitrating) an employee’s case.” (internal quotations and citations omitted)); *Boatright v. Aegis Def. Servs., LLC*, 938 F. Supp. 2d 602, 610 (E.D. Va. Apr. 3, 2013) (“In the absence of Delaware precedent, in light of the existence of a similar, default confidentiality requirement in the standard AAA rules, and because the Court concludes that the requirement will not impede or burden Plaintiffs or future claimants such that they cannot pursue and obtain relief, the Court finds that the confidentiality requirement here is not unconscionable.”); *Bettencourt v. Brookdale Senior Living Cmtys. Inc.*, No. 09-CV-1200-BR, 2010 WL 274331, at *7–8 (D. Or. Jan. 14, 2010) (finding that confidentiality clause was enforceable under Oregon law and not void as against public policy).

Alternatively, courts may defer the interpretation of a confidentiality provision to the arbitrator who is charged with interpreting the agreement. *See, e.g., Kilgore*, 718 F.3d at 1059 n.9 (“In any event, the enforceability of the confidentiality clause is a matter distinct from the enforceability of the arbitration clause in general. Plaintiffs are free to argue during arbitration that the confidentiality clause is not enforceable.”); *CarMax Auto Superstores Cal. LLC v. Hernandez*, 94 F. Supp. 3d 1078, 1122 (C.D. Cal. 2015) (same).

Based on this precedent, the Confidentiality Provision in Pfizer’s Arbitration Agreement is lawful and enforceable under the FAA. To the extent there is any question concerning the enforceability of the confidentiality provision based on common law contract principles, that question should be answered by a court or an arbitrator under the Arbitration Agreement. *Epic Systems* makes clear that this is not an issue to be decided by the Board under the NLRA. *Epic Sys. Corp.*, 138 S. Ct. at 1627 (“It’s more than a little doubtful that Congress would have tucked into the mousehole of Section 7’s catchall term an elephant that tramples the work done by these other laws; flattens the parties’ contracted-for dispute resolution procedures; and seats the Board as supreme superintendent of claims arising under a statute it doesn’t even administer.”).

D. The Board Should Reject the ALJ’s Attempt to Circumvent *Epic Systems* and the Clear Mandate of the FAA Based on the 60-Day Period Before the Arbitration Agreement (Exceptions 45-50).

The ALJ erred, and reached well beyond the General Counsel’s theory of the case, in suggesting that the Board could treat the Confidentiality Provision as an independent statement of policy during the 60-day period before the Arbitration Agreement takes effect. The ALJ did so in order to circumvent the FAA and the Supreme Court’s decision in *Epic Systems*, stating 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 insulated it from Board scrutiny, that

reasoning could not apply to the 60-day period during which no contract was in effect.” (Supplemental Decision, at 20). Even though “no binding contract exists for the first 60 days after an employee received the Agreement,” the ALJ opined that “the text of the confidentiality clause . . . does exist as a statement of the Respondent’s employment policy and as a work rule” and, therefore, “nothing precludes the Board from exercising its authority during this 2-month period.” (*Id.*) The Board should reject the ALJ’s strained effort to avoid the mandate of the FAA and the holding of *Epic Systems*.

For one, there is no factual or evidentiary basis to treat the Confidentiality Provision as a separate statement of policy before the Arbitration Agreement actually becomes effective. By its own terms, the Arbitration Agreement does not become effective until 60 days after the employee begins or continues working after receipt of the Agreement. (J. Ex. 3, at § 7.h) (“If you begin or continue working for the Company sixty (60) days after receipt of this Agreement, even without acknowledging this Agreement, this Agreement will be effective, and you will be deemed to have consented to, ratified and accepted this Agreement through your acceptance of and/or continued employment with the Company.”).

Furthermore, the Confidentiality Provision is explicitly tied to the arbitration process that is governed by the Agreement. The Confidentiality Provision has no independent existence beyond the Agreement.

The Board should reject ALJ’s alternative theory as a naked attempt to circumvent the Supreme Court’s decision in *Epic Systems*. The Board cannot purport to strike down the terms of an arbitration agreement that is governed by the FAA before it becomes effective and then, as a remedy, seek to prohibit the employer from including the stricken provision in the arbitration agreement once it becomes effective. By the ALJ’s own admission, that would have the same

effect as striking it down the arbitration agreement itself. (Supplemental Decision, at 20) (“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 could not incorporate it into an arbitration agreement and require an employee to be bound by it.”). This is clearly contrary to the meaning and intent of the Supreme Court’s decision in *Epic Systems*. It should be rejected as such.

II. Although the *Boeing* Framework Does Not Apply In This Case, the Confidentiality Provision Would Nonetheless Pass Muster Under That Standard (Exceptions 1, 36-45, 51-68, 71-87, 91-105).

The *Boeing* framework does not apply to the Confidentiality Provision because it is not a work rule or employment policy. But even if the *Boeing* standard is applied, the Confidentiality Provision is lawful.

A. The Confidentiality Provision Is Not an Independent Work Rule or Employment Policy (Exceptions 36-45, 80).

The ALJ asserts in conclusory fashion that the Confidentiality Provision is a “work rule” or “employment policy” because “the message informs employees about what conduct is required or prohibited or sets work standards” and “a failure to comply with the message can subject an employee to discharge or other disciplinary action.” (Supplemental Decision, at 18). The ALJ’s conclusion is wrong on both counts.

First, the Confidentiality Provision does *not* set work standards or govern employees’ performance of their job duties. Instead, it is part and parcel of an agreement which defines the terms of an arbitration process that is an alternative to litigation. As discussed above, the Confidentiality Provision is explicitly tied to that arbitration process and has no existence independent of the Arbitration Agreement.

Second, the Arbitration Agreement expressly recognizes employees’ right to challenge the Agreement – including the Confidentiality Provision – without retaliation. (J. Ex. 3, at § 2.d.). In dismissing the allegation that Pfizer “threatened employees with discharge if they did not sign the mandatory arbitration agreement,” the ALJ in his earlier decision in this case credited the Company’s witness who denied the allegation and found that “the Respondent did not violate the Act in the manner alleged in complaint paragraphs 8(a) and (b).” (Jan. 18, 2017 ALJ Decision, Appendix A, at 9-10).

B. The Confidentiality Provision Is Lawful Under the *Boeing* Standard (Exceptions 1, 51-68, 71-87, 91-105).

Even if the Confidentiality Provision is treated as a work rule under the *Boeing* standard, it is lawful. A work rule is lawful under Category 1 of the *Boeing* standard if “(i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule.” *Boeing Co.*, 365 NLRB No. 154, slip op. at 3-4. Here, the Confidentiality Provision satisfies either prong of this standard.

With respect to the first prong, the Confidentiality Provision cannot be reasonably interpreted to prohibit or interfere with employees’ Section 7 rights. As discussed above, the Confidentiality Provision is limited to the arbitral proceeding and disclosures and submissions to the arbitrator during the proceeding. It specifically disclaims any interpretation that would prohibit employees from exercising their Section 7 right discuss their terms and conditions of employment:

[Nothing in this Confidentiality provision shall prohibit employees from engaging in protected discussions or activity relating to the workplace, such as discussions of wages, hours, or other terms and conditions of employment.]

(SOF 7).

Given this explicit disclaimer, the Confidentiality Provision cannot be reasonably interpreted to interfere with employees' Section 7 rights. It does *not* prohibit employees from discussing the facts and circumstances that led to the arbitration proceeding or from marshalling evidence in support of their claims. Likewise, it does *not* prohibit employees from concertedly complaining about, or challenging, the Arbitration Agreement itself or its procedures. Because the Confidentiality Provision cannot be reasonably interpreted to prohibit or interfere with the exercise of Section 7 rights, it is lawful as a Category 1 rule under the *Boeing* standard.

Alternatively, under the second prong of Category 1 of the *Boeing* standard, a work rule is lawful if the legitimate justification for the rule outweighs any potential adverse impact on Section 7 rights. *Boeing Co.*, 365 NLRB No. 154, slip op. at 4. The Confidentiality Provision is lawful based on the legitimate interest in making the arbitration process work effectively as an alternative dispute resolution mechanism, as well as fostering trust and confidence in the process. There is a well-established justification for confidentiality in alternative dispute resolution procedures. *See Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175 (5th Cir. 2004) (noting that “the plaintiffs’ attack on the confidentiality provision is, in part, an attack on the character of arbitration itself”). It is analogous to Federal Rule of Evidence 408, which protects from disclosure “[e]vidence of conduct or statements made in compromise negotiations.” *St. George Warehouse, Inc.*, 349 NLRB 870, 872-74 (2007) (holding that comments made during mediation of unfair labor practice charges and collective bargaining disputes were inadmissible under Federal Rule of Evidence 408).

Courts have recognized the legitimate justifications for treating arbitration proceedings as confidential, as well as the fact that confidentiality can benefit both parties – not just employers. *See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 7 n.4 (1st Cir. 1999)

(observing, in an employment case, that both sides might prefer the confidentiality of arbitration); *Asher*, 2017 WL 3578699, at *7–8 (finding that the confidentiality clause was not unconscionable under California law because, among other reasons, it was “designed to protect all parties in a dispute”); *see also Parilla v. IAP Worldwide Servs., VI, Inc.*, 368 F.3d 269, 280 (3d Cir. 2004) (holding that the district court erred in finding confidentiality provisions unconscionable because “[e]ach side has the same rights and restraints under those provisions and there is nothing inherent in confidentiality itself that favors or burdens one party vis-a-vis the other in the dispute resolution process,” “the confidentiality of the proceedings will not impede or burden in any way [the employee’s] ability to obtain any relief to which she may be entitled,” and confidentiality does not violate the public policy goals of either Title VII or the ADEA).

The Judicial Arbitration and Mediation Service (“JAMS”), the arbitration provider under Pfizer’s Arbitration Agreement, also recognizes the benefits of confidentiality in arbitration proceedings in its rules. Rule 26, entitled Confidentiality and Privacy, provides:

JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to or enforcement of an Award, or unless otherwise required by law or judicial decision.

Rule 26(a), JAMS Employment Arbitration Rules.²

The Board itself has recognized the value of confidentiality in its own alternative dispute resolution procedures. *See* Alternative Dispute Resolution Program, at <https://www.nlr.gov/what-we-do/decide-cases> (last visited May 13, 2019) (“The Board will provide the parties with an experienced mediator, either a mediator with the Federal Mediation

² Available at <https://www.jamsadr.com/rules-employment-arbitration/english#twenty-six> (last visited May 16, 2019).

and Conciliation Service or the ADR program director, to facilitate *confidential* settlement discussions and explore resolution options that serve the parties' interests." (emphasis added)).

Finally, even if the Board were to analyze the legality of the Confidentiality Provision under prong 2 of the *Boeing* standard, as suggested by Counsel for the GC, it is lawful. As Counsel for the General Counsel explained:

[A]n arbitration agreement requiring confidentiality of settlements and awards does not impact or unduly interfere with any Section 7 rights. Under the Category 2 analysis, such arbitration agreements should be considered lawful since "the risk of intruding on NLRA rights is 'comparatively slight.'" . . . Confidentiality provisions that provide that the arbitration shall be conducted on a confidential basis or that the arbitration proceedings shall be confidential do not, on their face, "when reasonably interpreted," interfere with Section 7 rights. Such provisions merely require that the content of the arbitration proceedings and their results not be publicized.

(Counsel for GC Post-Hearing Brief to ALJ, at 13-14 (citations omitted)).

Thus, in light of Confidentiality Provision's slight (if any) impact on Section 7 rights and its well-founded justifications, it is lawful under either prong of Category 2 of the *Boeing* standard. The legitimate justifications for the Confidentiality Provision outweigh any theoretical or minimal impact the confidentiality provision could have on the exercise of Section 7 rights even if some impact on Section 7 rights is found.

CONCLUSION

For all of the foregoing reasons, the Arbitration Agreement's Confidentiality Provision is lawful and the allegation of the Consolidated Complaint pertaining to the Confidentiality Provision should be dismissed.

Date: May 16, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of Pfizer Inc.'s Brief in Support of Its 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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