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 REPLY BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE SUPPLEMENTAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION

Pfizer Inc. ("Pfizer" or "the Company") submits this Reply Brief in response to Charging Party Martin's Answering Brief in Opposition to Pfizer's Exceptions to the Administrative Law Judge's Supplemental Decision. In her Answering Brief ("CP Answering Brief "), Charging Party Martin (the "Charging Party") invokes inapplicable case law, relies on unreasonable interpretations of the Arbitration Agreement, and attacks straw man arguments that mischaracterize Pfizer's position in this case. As discussed more fully below, Pfizer respectfully submits that the Charging Party's arguments should be rejected and – consistent with the General Counsel's position – the Board should dismiss the remaining Complaint allegation regarding the Arbitration Agreement's confidentiality provision.

II. ARGUMENT

A. The Confidentiality Provision Is Enforceable as Part and Parcel of the Arbitration Agreement under *Epic Systems*.

Contrary to the Charging Party's arguments, the Arbitration Agreement's confidentiality provision should be enforced under the Federal Arbitration Act ("FAA") because it is one of the "rules under which th[e] arbitration will be conducted." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1621 (2018) (internal quotations and citations omitted).

The Supreme Court's decision in *Epic Systems* was premised on the general principle that arbitration agreements must be enforced according to their terms under the FAA. *See id.* ("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.'" (quoting *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 233 (2013))); *id.* at 1621-22 ("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.").

In her effort to overcome these clear holdings of *Epic Systems* and prior Supreme Court precedent on the enforceability of arbitration agreements under the FAA, the Charging Party makes a straw man argument about a hypothetical arbitration agreement that purports to waive an employee's right to strike or picket over a dispute that is subject to arbitration under the agreement. *See* CP Answering Brief at 14.

There are two obvious and dispositive responses to this argument. First, there is no such provision in the Arbitration Agreement in this case. In fact, the Arbitration Agreement explicitly recognizes that employees have the right to engage in protected discussions or activity relating to the terms or conditions of employment at issue in the arbitration proceeding. *See* Stipulation of Facts ("SOF") at 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.") (emphasis added). The Charging Party is making this straw man argument because her argument with respect to the actual provision at issue in this case – the confidentiality provision – is weak. Many courts have held that confidentiality provisions in arbitration agreements are lawful and enforceable aspects of arbitration agreements. *See* Pfizer's Brief in Support of Its Exceptions at 13-14 (citing cases).

Second, the hypothetical no-strike provision imagined by the Charging Party is *not* a "rule[] under which th[e] arbitration will be conducted." *Epic Sys.*, 138 S. Ct. at 1321. By contrast, the confidentiality provision in Pfizer's Arbitration Agreement is explicitly tied to the arbitration proceeding. (SOF at 7) ("The parties shall maintain the confidential nature of the arbitration proceeding and the award…."). Like a confidentiality or protective order that a court

would typically issue in litigation, this provision protects the confidentiality of information submitted *in the arbitration proceeding*. It does *not* seek to prevent employees from engaging in other conduct outside of the arbitration proceeding, such as communicating with lawyers or potential witnesses. Indeed, the confidentiality provision in Pfizer's Arbitration Agreement *specifically disclaims* any intention to prevent employees from communicating with witnesses or seeking evidence in support of their claim. (SOF at 7) ("This provision shall not prevent either party from communicating with witnesses or seeking evidence to assist in arbitrating the proceeding."). Given these clear limitations on the scope of the confidentiality provision, the Board should reject the Charging Party's straw man argument as a gross exaggeration of the issue presented in this case.

B. The Charging Party's Reliance on *Prime Healthcare* Is Also Misplaced.

The Charging Party relies on *Prime Healthcare Paradise Valley*, 368 NLRB No. 10 (2019) to argue that *Epic Systems* does not control this case and, instead, the Arbitration Agreement's confidentiality provision should be analyzed under *The Boeing Company*, 365 NLRB No. 154 (2017). CP Answering Brief at 6-7. This argument is also misplaced because *Prime Healthcare* involved a different issue not presented here.

In *Prime Healthcare*, the Board found that an arbitration agreement was unlawful insofar as it limited employees' ability to file unfair labor practice charges with the Board. The Board acknowledged *Epic Systems*' holding that an arbitration agreement's terms can only be "overridden by a contrary Congressional command," but found that Section 10 of the NLRA sets forth a sufficiently clear congressional command to justify overriding the FAA's mandate. *Prime Healthcare,* slip op. at 5 ("Under Section 10(b) of the Act, the Board has no power to issue complaint unless an unfair labor practice charge is filed, and Section 10(a) of the Act relevantly provides that the Board's power to prevent unfair labor practices 'shall not be affected

by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise.' Consistent with this clear congressional command, we hold that the FAA does not authorize the maintenance or enforcement of agreements that interfere with an employee's right to file charges with the Board.") (citations omitted).

Prime Healthcare is inapposite because there is no allegation that Pfizer's Arbitration Agreement unlawfully restricts employees from filing charges with the Board. That is because Pfizer's Arbitration Agreement explicitly provides that it does *not* prohibit employees from filing charges with the Board or other government agencies. (J. Ex. 3, at § 2.c). Furthermore, the issue of whether an arbitration agreement is unlawful because it restricts employees from filing charges with the Board (or other agencies) is entirely different from the issue of whether an arbitration agreement can lawfully provide for confidentiality.

As noted above, the Board in *Prime Healthcare* found that Section 10(a) of the NLRA provides the type of clear congressional command that the Supreme Court found lacking in *Epic Systems*. *Prime Healthcare,* slip op. at 5. There is no such clear congressional command with respect to the confidentiality of arbitration proceedings, just as the Supreme Court in *Epic Systems* found no clear congressional command as to "what rules should govern the adjudication of class or collective actions in court or arbitration." *Epic Sys.*, 138 S. Ct. at 1617. The Supreme Court held that the NLRA does *not* contain a clear congressional command to supersede the FAA with respect to "the procedures judges or arbitrators must apply in disputes that leave the workplace and enter the courtroom or arbitral forum." *Id.* at 1625.

Because the confidentiality provision in Pfizer's Arbitration Agreement is exactly the type of procedural rule that is, by its terms, limited to the arbitration proceeding, it falls squarely

within the rationale of *Epic Systems*. The NLRA contains no clear congressional command to override the confidentiality provision.

C. Even If the Confidentiality Provision Is Analyzed under the *Boeing* Standard, Rather Than *Epic Systems*, It Is Lawful.

1. <u>The Charging Party Waived the Argument that the *Lutheran Heritage* Standard Applies.</u>

The Charging Party erroneously claims that the confidentiality provision "is not 'facially neutral' and thus is unlawful under that portion of *Lutheran Heritage* left standing by *Boeing*" – specifically, the portion which renders a rule unlawful if it *explicitly* restricts Section 7 activity. CP Answering Brief at 7. As an initial matter, the Charging Party waived any argument that the *Lutheran Heritage* standard for rules that explicitly restrict Section 7 activity is the correct standard because the Charging Party did not file exceptions to the Administrative Law Judge's application of the *Boeing* standard for facially-neutral policies.[1] *See* Board Rules and Regulations, § 102.46(a)(1)(ii) ("Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged will be deemed to have been waived."); *id.* § 102.46(f) ("Matters not included in exceptions or cross-exceptions may not thereafter be urged before the Board, or in any further proceeding.").

2. <u>The *Lutheran Heritage* Standard Does Not Apply Because the Confidentiality Provision Does Not Explicitly Restrict Section 7 Activity.</u>

In any event, the Charging Party is incorrect that the confidentiality provision explicitly restricts Section 7 activity because "the only possible subject of covered disputes is terms and conditions of employment," "the only communications barred by the confidentiality clause concern terms and conditions of employment," and "*every* disclosure concerning an arbitration

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[1] The ALJ clearly applied the *Boeing* standard for facially neutral rules – *not* the *Lutheran Heritage* standard for rules that explicitly restrict Section 7 activity. *See* ALJ's Supplemental Decision at 36 (applying the *Boeing* standard for "determining whether a facially-neutral rule or employment policy violated the Act").

conducted under the agreement will relate to terms and conditions of employment, a dispute about terms and conditions of employment, the mandated process for resolving such disputes, or the outcome of that process – all of which 'implicate . . . NLRA rights." CP Answering Brief at 7-8 (emphasis in original).

The Charging Party's argument that "[t]he confidentiality clause bars communications that are protected activity and nothing else" (CP Answering Brief at 7) ignores the reality that not all claims covered by the Arbitration Agreement involve protected, concerted activity under the NLRA. The mere fact that claims may relate to terms and conditions of employment does not render them protected. Claims subject to arbitration may be purely individual claims that do not seek to advance the interests of other employees. *See Alstate Maintenance*, 367 NLRB No. 68, slip op. at 8 (2019) ("To warrant protection under Section 7, activity must be both concerted *and* undertaken for the purpose of mutual aid or protection."); *Quicken Loans, Inc.*, 367 NLRB No. 112, slip op. at 2 (2019) ("to qualify as [protected, concerted activity], it must appear at the very least it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of employees") (citation omitted). Moreover, the Arbitration Agreement applies to claims brought by supervisors and managers, who are not even covered by the NLRA.

Further, the Charging Party erroneously assumes that if an arbitration proceeding pertains to terms and conditions of employment, any disclosure of information submitted in the arbitration proceeding necessarily involves protected concerted activity. That is not the case. Motions, briefs, and other submissions in arbitration, just like motions, briefs, and other submissions to a court, may *pertain to* terms and conditions of employment, but that does not mean that employees have a Section 7 right to disclose every such submission. *See IBM*, 265

NLRB 638 (1982) (employer lawfully terminated employee who disclosed confidential wage information in violation of employer's confidentiality policy); *Texas Instruments Inc. v. NLRB*, 637 F.2d 822 (1st Cir. 1981), *denying enf. of* 247 NLRB 253 (1980) (same). As such, the Charging Party's contention that the confidentiality provision explicitly restricts communications that are protected concerted activity "and nothing else" is – like many of the other arguments in her Answering Brief – a gross exaggeration of the issue presented in this case.

3. The Charging Party's Reading of the Confidentiality Provision is Unreasonable.

The Charging Party's reading of the confidentiality provision and its purported impact on Section 7 rights is patently unreasonable. 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).

Despite the limited scope of the confidentiality provision, the Charging Party spills much ink claiming that the provision bars employees from discussing their wages or other terms and conditions of employment with co-workers or a lawyer. CP Answering Brief at 8-10, 16-19. This is a patently unreasonable reading of the confidentiality provision because, as discussed above, the provision explicitly recognizes employees' right to discuss wages, hours, or other terms and conditions of employment that may be at issue in an arbitration proceeding. (SOF at 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.”).

Given these explicit disclaimers, the confidentiality provision cannot be reasonably interpreted to interfere with employees’ Section 7 rights. It does *not* prohibit employees from discussing the underlying terms and conditions of employment at issue in the arbitration proceeding, engaging a common attorney to present claims in arbitration, or speaking with witnesses or marshalling evidence in support of their claims. Likewise, the confidentiality provision does *not* prohibit employees from concertedly complaining about, or challenging, the Arbitration Agreement itself or its procedures. (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.”).

Because the confidentiality provision cannot be reasonably interpreted to prohibit or interfere with the exercise of Section 7 rights, it should be found lawful as a Category 1 or 2 rule under prong (i) of the *Boeing* standard. Therefore, it is unnecessary to proceed to prong (ii) of the *Boeing* standard, which asks whether “the potential adverse impact on protected rights is outweighed by justifications associated with the rule.” *Boeing*, 365 NLRB No. 154, slip op. at 3-4. The confidentiality provision is lawful under prong (i).

4. There Are Legitimate Justifications for the Confidentiality Provision.

If the Board proceeds to prong (ii) of the *Boeing* standard, the confidentiality provision is lawful on that basis as well. The Charging Party incorrectly asserts that Pfizer has advanced no “legitimate justifications” for the confidentiality provision and suggests that, “[a]t most, Pfizer asserts that confidentiality is an essential attribute of arbitration.” CP Answering Brief at 12.

The legitimate justifications for the confidentiality provision are well-established in case law. For example, the Fifth Circuit in *Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159 (5th Cir. 2004), equated an attack on the confidentiality provision in an arbitration agreement as, at least in part, "an attack on the character of arbitration itself." *Id.* at 175. The Fifth Circuit explained why the confidentiality of the arbitration proceeding, and the resulting award, is essential the character of the arbitration proceeding:

> If every arbitration were required to produce a publicly available, "precedential" decision on par with a judicial decision, one would expect that parties contemplating arbitration would demand discovery similar to that permitted under Rule 26, adherence to formal rules of evidence, more extensive appellate review, and so forth—in short, all of the procedural accoutrements that accompany a judicial proceeding. But part of the point of arbitration is that one "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration."

Id. at 175-76 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614, 628 (1985)).

One of the "fundamental attributes of arbitration" which the Supreme Court emphasized in *Epic Systems* is the "individualized" nature of the proceedings and the parties' ability to "depart from [existing rules] in favor of individualized arbitration" and have "the parties' chosen arbitration procedures" respected and enforced. *Epic Sys.*, 138 S. Ct. at 1621-23, 1626.

Because arbitration is an alternative dispute resolution procedure, the Board need look no further than its own alternative dispute resolution program to find that confidentiality is an essential attribute of those procedures. *See* Alternative Dispute Resolution Program, at https://www.nlrb.gov/about-nlrb/what-we-do/decide-cases (last visited July 9, 2019) ("The Board will provide the parties with an experienced mediator, either a mediator with the Federal Mediation and Conciliation Service or the ADR program director, to facilitate *confidential*

settlement discussions and explore resolution options that serve the parties' interests.")
(emphasis added).

In arbitration as in other alternative dispute resolution procedures, confidentiality is a mutual obligation that can benefit both parties in the proceeding, especially in a sensitive employment case. *See Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 7 n.4 (1st Cir. 1999).

All of these are legitimate justifications for finding that the confidentiality provision is lawful even if some potential adverse impact on Section 7 rights is found.

III. CONCLUSION

For the foregoing reasons, Pfizer respectfully submits that the Board should find that the Arbitration Agreement's confidentiality provision is lawful and dismiss this remaining allegation of the Consolidated Complaint.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of Pfizer Inc.'s Reply Brief In Support Of Its Exceptions To The Supplemental Decision Of The Administrative Law Judge have been served upon the following this 12th day of July 2019 by e-mail:

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