No. 16-801

In the Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SF MARKETS, L.L.C., DBA SPROUTS FARMERS MARKET

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

EDWIN S. KNEEDLER
Deputy Solicitor General
Counsel of Record
CURTIS E. GANNON
Assistant to the Solicitor General

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

RICHARD F. GRIFFIN, JR.
General Counsel
JENNIFER ABRUZZO
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel
MEREDITH JASON
Deputy Assistant General Counsel
ELIZABETH HEANEY
Supervisory Attorney
DAVID CASSERLY
Attorney
National Labor Relations Board
Washington, D.C. 20570

QUESTION PRESENTED

Whether arbitration agreements with individual employees that bar them from pursuing work-related claims on a collective or class basis in any forum are prohibited as an unfair labor practice under 29 U.S.C. 158(a)(1), because they limit the employees' right under the National Labor Relations Act to engage in "concerted activities" in pursuit of their "mutual aid or protection," 29 U.S.C. 157, and are therefore unenforceable under the saving clause of the Federal Arbitration Act, 9 U.S.C. 2.

TABLE OF CONTENTS

Page

Opinions below ... 1
Jurisdiction ... 1
Statutory provisions involved ... 2
Statement ... 2
Reasons for granting the petition ... 7
Conclusion ... 8
Appendix A — Court of appeals order granting summary disposition (July 26, 2016) ... 1a
Appendix B — National Labor Relations Board decision and order (Mar. 24, 2016) ... 4a
Appendix C — Court of appeals opinion in *Murphy Oil USA, Inc.* v. *NLRB* (Oct. 26, 2015) ... 55a
Appendix D — Statutory provisions ... 70a

TABLE OF AUTHORITIES

Cases:

Cellular Sales of Mo., LLC v. *NLRB*, 824 F.3d 772 (8th Cir. 2016) ... 7

D.R. Horton, Inc., 357 N.L.R.B. 2277 (2012), enforcement denied in relevant part, 737 F.3d 344 (5th Cir. 2013) ... 3

D.R. Horton, Inc. v. *NLRB*, 737 F.3d 344 (5th Cir. 2013) ... 7

Eastex, Inc. v. *NLRB*, 437 U.S. 556 (1978) ... 2

Lewis v. *Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016), petition for cert. pending, No. 16-285 (filed Sept. 2, 2016) ... 6

Morris v. *Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), petition for cert. pending, No. 16-300 (filed Sept. 8, 2016) ... 6

Cases—Continued: Page

Murphy Oil USA, Inc., 361 N.L.R.B. No. 72 (2014), enforcement denied in relevant part, 808 F.3d 1013 (5th Cir. 2015), petition for cert. pending, No. 16-307 (filed Sept. 9, 2016) 3

Murphy Oil USA, Inc. v. *NLRB*, 808 F.3d 1013 (5th Cir. 2015), petition for cert. pending, No. 16-307 (filed Sept. 9, 2016) 7

Patterson v. *Raymours Furniture Co.*, No. 15-2820, 2016 WL 4598542 (2d Cir. Sept. 14, 2016), petition for cert. pending, No. 16-388 (filed Sept. 22, 2016) 6

Statutes:

Federal Arbitration Act, 9 U.S.C. 1 *et seq.* 2

9 U.S.C. 2 3

Federal Vacancies Reform Act of 1988, 5 U.S.C. 3345 *et seq.* 4

National Labor Relations Act, 29 U.S.C. 151 *et seq.* 2

29 U.S.C. 157 .... 2, 4, 5

29 U.S.C. 158(a)(1) 2, 4

29 U.S.C. 160(a) 2

29 U.S.C. 160(f) 5

Miscellaneous:

Br. for Resp. in Support of Granting Pet., *NLRB* v. *Murphy Oil USA, Inc.*, No. 16-307 (filed Nov. 10, 2016) 6

Pet., *Epic Sys. Corp.* v. *Lewis*, No. 16-285 (filed Sept. 2, 2016) 8

Pet., *Ernst & Young, LLP* v. *Morris*, No. 16-300 (filed Sept. 8, 2016) 8

Pet., *NLRB* v. *24 Hour Fitness USA, Inc.*, No. 16-689 (filed Nov. 23, 2016) 7

Miscellaneous—Continued: Page

Pet., *NLRB* v. *Murphy Oil USA, Inc.*, No. 16-307 (filed Sept. 9, 2016) 6

Pet., *Patterson* v. *Raymours Furniture Co.*, No. 16-388 (filed Sept. 22, 2016) 8

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NATIONAL LABOR RELATIONS BOARD, PETITIONER

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SF MARKETS, L.L.C., DBA SPROUTS FARMERS MARKET

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The National Labor Relations Board respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals granting summary reversal of the National Labor Relations Board's decision (App., *infra*, 1a-3a) is not published in the *Federal Reporter* but is available at 2016 WL 6804352. The decision and order of the Board (App., *infra*, 4a-54a) are reported at 363 N.L.R.B. No. 146.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 2016. On October 19, 2016, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including November 23, 2016. On November 14, 2016, Justice Thomas further ex-

tended the time to December 23, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in the appendix to this petition. App., *infra*, 70a-73a.

STATEMENT

1. a. The National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," and "to refrain from any or all of such activities." 29 U.S.C. 157. This Court has described the rights under Section 157 as including employees' efforts "to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship," including "through resort to administrative and judicial forums." *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 565-566 (1978). An employer that "interfere[s] with, restrain[s], or coerce[s] employees in the exercise of the rights guaranteed in section 157" commits an unfair labor practice. 29 U.S.C. 158(a)(1). The National Labor Relations Board (Board) "is empowered * * * to prevent any person from engaging in any unfair labor practice * * * affecting commerce." 29 U.S.C. 160(a).

b. The Federal Arbitration Act (FAA), 9 U.S.C. 1 *et seq.*, provides that any written contract "evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction * * * shall be valid, irrevocable, and en-

forceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2.

c. In decisions issued in 2012 and 2014, the Board held that an employer could not, as a condition of employment, require its employees to limit the resolution of employment-related claims to individual arbitration and thereby prevent them from pursuing class or collective actions about such claims in any forum. See *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012), enforcement denied in relevant part, 737 F.3d 344 (5th Cir. 2013); *Murphy Oil USA, Inc.*, 361 N.L.R.B. No. 72 (2014), enforcement denied in relevant part, 808 F.3d 1013 (5th Cir. 2015), petition for cert. pending, No. 16-307 (filed Sept. 9, 2016).

In both of those cases, the Fifth Circuit denied enforcement of the Board's orders in relevant part, holding that the NLRA does not override the FAA and that the use of class-action or collective procedures is not a substantive right under the NLRA. See App., *infra*, 55a-69a (reprinting the Fifth Circuit's decision in *Murphy Oil*); *id.* at 55a-56a, 58a-59a, 61a-62a (describing, and treating as controlling, the Fifth Circuit's prior holding in *D.R. Horton*).

2. The material facts in this case are similar to those in *Murphy Oil*. Since 2013, respondent has required its employees, as a condition of hiring and continued employment, to agree to a Mutual Binding Arbitration Agreement, which provides, as relevant here, that employment-related disputes are to be submitted exclusively to binding arbitration and that employees cannot "assert any class action, collective action, or representative action claims * * * in arbitration or otherwise." App., *infra*, 7a-8a, 39a. A prior version of the agreement required employees to agree

to use binding arbitration, but did not expressly waive class-action or collective procedures in arbitration. *Id.* at 8a n.4, 33a-35a. In response to a class-action complaint filed by one employee, respondent sought to compel the employee to arbitrate her claim on an individual basis. *Id.* at 35a-36a. And respondent threatened to terminate, and then terminated, another employee who refused to acknowledge receipt of the revised agreement with the express waiver of the right to proceed on a class or collective basis. *Id.* at 39a-40a.

a. In July 2013, the Board's Acting General Counsel issued an administrative complaint alleging that respondent's maintenance of its arbitration agreements, threat to terminate and termination of an employee based on her refusal to acknowledge receipt of the revised agreement, and effort to compel individual arbitration constituted unfair labor practices in violation of Section 158(a)(1) because they interfered with its employees' Section 157 right to engage in concerted legal activity.[1] App., *infra*, 28a-30a.

b. In March 2016, the Board held that respondent's class-action ban is invalid in light of the Board's own

[1] In *NLRB* v. *SW General, Inc.*, No. 15-1251 (argued Nov. 7, 2016), the Court is currently considering whether the Acting General Counsel's service in that capacity was consistent with the Federal Vacancies Reform Act of 1988 (FVRA), 5 U.S.C. 3345 *et seq*. Although respondent objected to the Board's unfair-labor-practice proceeding on FVRA grounds, the Board explained that respondent did not raise the argument at issue in *SW General*, and that any such argument would have been rendered moot by the November 2015 ratification of the issuance of the complaint and continued prosecution in this case by a General Counsel whose appointment has not been challenged. App., *infra*, 5a-7a n.2. Respondent did not raise an FVRA issue in its motion for summary disposition in the court of appeals.

decisions in *D.R. Horton* and *Murphy Oil*. App., *infra*, 7a-8a. The Board also held that respondent's effort to enforce its earlier agreement by compelling individual arbitration was an unlawful restriction on Section 157 rights. *Id.* at 10a-11a. It further held that respondent's threat to terminate, and subsequent termination of, an employee for failure to sign the revised arbitration agreement were unfair labor practices. *Id.* at 11a-12a.

c. As he had done in *Murphy Oil*, Member Miscimarra dissented, adhering to his view that the Board's decision in *Murphy Oil* was incorrect. App., *infra*, 16a-24a.

3. Respondent elected to file its petition for review of the Board's decision in the Fifth Circuit. See 29 U.S.C. 160(f). The Board moved to stay proceedings pending resolution of its petition for rehearing en banc in *Murphy Oil*, but the court of appeals denied that motion. On May 20, 2016, respondent filed a motion for summary disposition of its petition for review and for reversal of the Board's decision in light of the court of appeals' decisions in *D.R. Horton* and *Murphy Oil*. The Board opposed summary disposition on the ground that *Murphy Oil* was still subject to potential review by this Court. On June 7, 2016, the court of appeals denied the motion without prejudice. On June 8, 2016, respondent renewed its motion, noting that the court had granted summary disposition in other similar cases.

On July 26, 2016, the court of appeals granted the renewed motion for summary disposition. App., *infra*, 1a. Judge Dennis filed a concurring opinion, urging the en banc court to reconsider the question, in light of a circuit conflict. *Id.* at 1a-3a.

4. On September 9, 2016, this Office filed, on behalf of the Board, a petition for a writ of certiorari to review the Fifth Circuit's decision in *Murphy Oil*. See *NLRB* v. *Murphy Oil USA, Inc.*, No. 16-307. As that petition explains (at 19-24), there is an acknowledged conflict in the courts of appeals about the invalidity of arbitration agreements that would preclude employees from pursuing class or collective actions that assert employment-related claims. The respondent in *Murphy Oil* agrees with the Fifth Circuit's decision on the merits but supports the Board's petition for a writ of certiorari and agrees that "the Board's petition provides an appropriate vehicle for the Court to resolve the issue that has caused the courts of appeals to issue conflicting opinions." Br. for Resp. in Support of Granting Pet. at 11, *Murphy Oil*, *supra* (No. 16-307).

Several additional petitions for writs of certiorari—arising from other cases in the circuit split—are also pending in this Court. The Seventh and Ninth Circuits have expressly rejected the Fifth Circuit's analysis in *Murphy Oil*, and the employers in those two cases are seeking this Court's review. See *Morris* v. *Ernst & Young, LLP*, 834 F.3d 975, 990 n.16 (9th Cir. 2016), petition for cert. pending, No. 16-300 (filed Sept. 8, 2016); *Lewis* v. *Epic Sys. Corp.*, 823 F.3d 1147, 1157 & n.† (7th Cir. 2016), petition for cert. pending, No. 16-285 (filed Sept. 2, 2016). Meanwhile, the Second Circuit has reaffirmed an earlier decision that declined to follow the Board's approach in *D.R. Horton*, and the employees in that case are seeking this Court's review. See *Patterson* v. *Raymours Furniture Co.*, No. 15-2820, 2016 WL 4598542, at *2-*3 (Sept. 14, 2016), petition for cert. pending, No. 16-388 (filed Sept. 22,

2016).[2] The petitions in *Murphy Oil* and the other three cases have all been distributed for consideration at this Court's conference of January 6, 2017.[3]

REASONS FOR GRANTING THE PETITION

In this case, the court of appeals granted a motion for summary reversal of the Board's decision in light of its earlier decisions in *D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344 (5th Cir. 2013); and *Murphy Oil USA, Inc.* v. *NLRB*, 808 F.3d 1013 (5th Cir. 2015), petition for cert. pending, No. 16-307 (filed Sept. 9, 2016). App., *infra*, 1a. There is a clear conflict in the courts of appeals regarding the validity, in light of the NLRA, of arbitration agreements that would preclude employees from pursuing class or collective actions that assert employment-related claims. See p. 6, *supra*. The Board has already filed an unopposed petition for a writ of certiorari seeking this Court's review of the decision in *Murphy Oil*, on which the decision below relies.

The Court should hold the petition in this case pending its disposition of *Murphy Oil* and the other petitions presenting variants of the same question

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[2] After *Murphy Oil*, the Eighth Circuit also reaffirmed an earlier decision rejecting the Board's position. See *Cellular Sales of Mo., LLC* v. *NLRB*, 824 F.3d 772, 776 (2016). The Board did not seek further review of that decision.

[3] The Board recently filed another petition for a writ of certiorari presenting the same question as in *Murphy Oil* and in this case. See *NLRB* v. *24 Hour Fitness USA, Inc.*, No. 16-689 (filed Nov. 23, 2016). The Board suggested that the Court hold the petition in *24 Hour Fitness* pending its disposition of *Murphy Oil* and the other three petitions that were filed in September. It is making the same suggestion in another petition for a writ of certiorari that is being filed concurrently with this one. See *NLRB* v. *PJ Cheese, Inc.*, No. 16-____ (filed Dec. 22, 2016).

presented (*i.e.*, *Patterson* v. *Raymours Furniture Co.*, No. 16-388; *Ernst & Young, LLP* v. *Morris*, No. 16-300; and *Epic Systems Corp.* v. *Lewis*, No. 16-285) and then dispose of this case accordingly.

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's disposition of the petition for a writ of certiorari in *NLRB* v. *Murphy Oil USA, Inc.*, No. 16-307, as well as those in *Patterson* v. *Raymours Furniture Co.*, No. 16-388; *Ernst & Young, LLP* v. *Morris*, No. 16-300; and *Epic Systems Corp.* v. *Lewis*, No. 16-285, and then be disposed of as appropriate.

Respectfully submitted.

EDWIN S. KNEEDLER*
Deputy Solicitor General
CURTIS E. GANNON
Assistant to the Solicitor General

RICHARD F. GRIFFIN, JR.
General Counsel
JENNIFER ABRUZZO
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
LINDA DREEBEN
Deputy Associate General Counsel
MEREDITH JASON
Deputy Assistant General Counsel
ELIZABETH HEANEY
Supervisory Attorney
DAVID CASSERLY
Attorney
National Labor Relations Board

DECEMBER 2016

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* The Acting Solicitor General is recused in this case.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-60186

SF MARKETS, L.L.C., DOING BUSINESS AS SPROUTS FARMERS MARKET, PETITIONER CROSS-RESPONDENT

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT CROSS-PETITIONER

July 26, 2016

Petitions for Review of an Order of the National Labor Relations Board

Before: JOLLY, DENNIS, and PRADO, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the opposed renewed motion of the petitioner cross-respondent for summary disposition is GRANTED.

JAMES L. DENNIS, Circuit Judge, concurring.

I must concur with my colleagues to the extent *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), and *D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013), control this panel's disposition. *See, e.g., Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008) ("[O]ne panel of our court may not overturn another panel's decision, absent an intervening

change in the law. . . ." (citation omitted)). However, I write separately to urge the full court to reconsider the question presented by this case in light of the Seventh Circuit's recent opinion in *Lewis v. Epic Systems Corp.*, ___ F.3d ___, No. 15-2997, 2016 WL 3029464 (7th Cir. May 26, 2016).

A panel of this court has held that the National Labor Relations Board did not give "proper weight" to the Federal Arbitration Act ("FAA") in determining that employment contracts prohibiting collective actions in any arbitral or judicial forum violate the National Labor Relations Act ("NLRA"). *D.R. Horton*, 737 F.3d at 348. In so doing, the panel relied heavily on the Supreme Court's holding in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011). *See D.R. Horton*, 737 F.3d at 359. *Concepcion*, however, held that the FAA preempts state laws that interfere with arbitration agreements. 563 U.S. at 352. As the inquiry here involves two potentially conflicting federal statutes, extensive reliance on *Concepcion* was unwarranted. I believe that Chief Judge Wood's opinion in *Lewis* frames the issue more appropriately by analyzing the FAA and the NLRA pursuant to a strong presumption of reconcilability. 2016 WL 3029464, at *7; *accord In re Mirant Corp.*, 378 F.3d 511, 517 (5th Cir. 2004) ("When faced with a conflict between two statutes, courts must attempt to interpret them so as to give effect to both statutes." (citing *Morton v. Mancari*, 417 U.S. 535, 551 (1974))). In light of this presumption, the saving clause of the FAA, 9 U.S.C. § 2, which states an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract[,]" should more than suffice to reconcile the FAA

with the Board's interpretation of the NLRA. *See Lewis*, 2016 WL 3029464, at *6.

Given the inter-circuit conflict generated by the well-reasoned opinion in *Lewis*, I urge our court to reconsider this issue en banc.

APPENDIX B

NATIONAL LABOR RELATIONS BOARD

Cases 21-CA-099065 and 21-CA-104677

SF MARKETS, LLC D/B/A/ SPROUTS FARMERS MARKET AND LAURA CHRISTENSEN AND JANA MESTANEK

Mar. 24, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On February 18, 2014, Administrative Law Ira Sandron issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as

[1] In addition, pursuant to *Reliant Energy*, 339 NLRB 66 (2003), the Respondent filed two postbrief letters calling the Board's attention to recent case authority.

modified,[2] and to adopt the recommended Order as modified and set forth in full below.[3]

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[2] Citing *Hooks v. Kitsap Tenant Support Services*., No. C13-5470 BHS, 2013 WL 4094344 (W.D. Wash. Aug. 13, 2013), the Respondent argues that the complaint should be dismissed because it was issued pursuant to authority delegated by Acting General Counsel Lafe Solomon, whose appointment the Respondent argues violated the Federal Vacancies Reform Act of 1998 (FVRA), 5 U.S.C. § 3345 et seq. For the reasons set forth below, we find no merit in the Respondent's argument that the Acting General Counsel was improperly or invalidly "appointed."

At the outset, we note that under the FVRA, a person is not "appointed" to serve in an acting capacity in a vacant office that otherwise would be filled by appointment by the President, by and with the advice and consent of the Senate. Rather, either the first assistant to the vacant office performs the functions and duties of the office in an acting capacity by operation of law pursuant to 5 U.S.C. § 3345(a)(1), or the President directs another person to perform the functions and duties of the vacant office in an acting capacity pursuant to 5 U.S.C. § 3345(a)(2) or (3).

On June 18, 2010, the President directed Lafe Solomon, then-Director of the NLRB's Office of Representation Appeals, to serve as Acting General Counsel pursuant to subsection (a)(3), the senior agency employee provision. Under the strictures of that provision, Solomon was eligible to serve as Acting General Counsel at the time the President directed him to do so. See *SW General, Inc. v. NLRB*, 796 F.3d 67 (D.C. Cir. 2015). Thus, Solomon properly assumed the duties of Acting General Counsel, and we find no merit in the Respondent's argument that the Acting General Counsel was improperly or invalidly "appointed."

We acknowledge that the decision in *SW General* also held that Solomon lost his authority as Acting General Counsel on January 5, 2011, when the President nominated him to be General Counsel. While that question is still in litigation, the Respondent has never raised that argument in this proceeding, and we find that the Respondent thereby has waived the right to do so.

Finally, on November 23, 2015, General Counsel Richard F. Griffin, Jr., issued a Notice of Ratification in this case. The Re-

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spondent subsequently filed a response. The Notice of Ratification states, in relevant part:

> The prosecution of this case commenced under the authority of Acting General Counsel Lafe E. Solomon during the period after his nomination on January 5, 2011, while his nomination was pending with the Senate, and before my confirmation on November 4, 2013.
>
> The United States Court of Appeals for District of Columbia Circuit recently held that Acting General Counsel Solomon's authority under the Federal Vacancies Reform Act (FVRA), 5 U.S.C. §§ 3345 et seq., ceased on January 5, 2011, when the President nominated Mr. Solomon for the position of General Counsel. *SW General, Inc. v. NLRB*, ___ F.3d ___, 2015 WL 4666487 (D.C. Cir. Aug. 7, 2015). The Court found that complaints issued while Mr. Solomon's nomination was pending were unauthorized and that it was uncertain whether a lawfully-serving General Counsel or Acting General Counsel would have exercised discretion to prosecute the cases. Id. at *10.
>
> I was confirmed as General Counsel on November 4, 2013. After appropriate review and consultation with my staff, I have decided that the issuance of the complaint in this case and its continued prosecution are a proper exercise of the General Counsel's broad and unreviewable discretion under Section 3(d) of the Act.
>
> My action does not reflect an agreement with the appellate court ruling in *SW General*. Rather, my decision is a practical response aimed at facilitating the timely resolution of the charges that I have found to be meritorious while the issues raised by *SW General* are being resolved. Congress provided the option of ratification by expressly exempting "the General Counsel of the National Labor Relations Board" from the FVRA provisions that would otherwise preclude the ratification of certain actions of other persons found to have served in violation of the FVRA. Id. at *9 (citing 5 U.S.C. § 3348(e)(1)).
>
> For the foregoing reasons, I hereby ratify the issuance and continued prosecution of the complaint.

Thus, even assuming that the Respondent had not previously waived its right to challenge the continued authority of the Acting

1. The judge found, applying the Board's decision in *D. R. Horton*, 357 NLRB 2277 (2014), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2015), that the Respondent violated Section 8(a)(1) of the Act by maintaining its revised Mutual Binding Arbitration Agreement (MBAA) since January 1, 2013, which requires employ-

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General Counsel following his nomination by the President, this ratification renders moot any argument that *SW General* precludes further litigation of this matter.

[3] In accordance with our decision in *Advoserv of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall modify the judge's recommended tax compensation and Social Security reporting remedy. We shall modify the judge's recommended Order and substitute a new notice to reflect this remedial change.

Consistent with our decision in *Murphy Oil USA, Inc.*, 361 NLRB No. 71 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), we amend the judge's remedy and shall order the Respondent to reimburse Jana Mestanek and all other plaintiffs, if any, for all reasonable expenses and legal fees, with interest, incurred in opposing the Respondent's unlawful motions in State court to compel individual arbitration of her, or their, class or collective claims. See *Bill Johnson's Restaurants v. NLRB*, 461 U. S. 731, 747 (1983) ("If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorneys' fees and other expenses" as well as "any other proper relief that would effectuate the policies of the Act."). Interest shall be computed in the manner prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). See *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 835 fn. 10 (1991) ("[I]n make-whole orders for suits maintained in violation of the Act, it is appropriate and necessary to award interest on litigation expenses."), enfd. 973 F.2d 230 (3d Cir. 1992). We shall modify the judge's recommended Order to conform to the violations found and to the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified and in accordance with *Durham School Services, L.P.*, 360 NLRB No. 85 (2014).

ees, as a condition of hiring and continued employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial.[4] In *Murphy Oil USA, Inc.*, supra, the Board reaffirmed the relevant holdings of *D. R. Horton*, supra. Based on the judge's application of *D. R. Horton*, and on our subsequent decision in *Murphy Oil*, we affirm the judge's finding that the Respondent's maintenance of the revised MBAA violated Section 8(a)(1).

The Respondent argues that *D. R. Horton* is invalid because it was issued by a panel that included Member Becker, whose appointment the Respondent argues was invalid. The appointment of Member Becker was constitutionally valid, however, and thus the Board had a quorum at the time it issued that decision. See *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014); *Mathew Enterprise, Inc. v. NLRB*, 771 F.3d 812, 814 (D.C. Cir. 2014); *Gestamp South Carolina, L.L.C. v. NLRB*, 769 F.3d 254, 257-258 (4th Cir. 2014); *Entergy Mississippi, Inc.*, 361 NLRB No. 89 (2014). The Respondent further argues that even if former Member Becker's appointment was valid, his term nevertheless expired prior to the issuance of *D. R. Horton*, supra. We reject this contention for the reasons stated in *Murphy Oil*, supra, slip op. at 2 fn. 16.

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[4] Prior to January 1, 2013, the Respondent maintained a Mutual Binding Arbitration Agreement that did not, on its face, expressly prohibit class and collective arbitration and thus did not explicitly restrict activities protected by Sec. 7. As discussed below, we affirm the judge's finding that the Respondent nevertheless unlawfully enforced the original MBAA by filing a motion to compel individual arbitration of the claims in a class action wage-and-hour lawsuit filed in State court.

See also *Dodge of Naperville, Inc. v. NLRB*, 796 F.3d 31, 41 (D.C. Cir. 2015); *D. R. Horton, Inc. v. NLRB*, 737 F.3d at 352-353.[5]

The Respondent additionally argues that its MBAA includes an exemption allowing employees to file charges with administrative agencies, including with the Board, and thus does not, as in *D. R. Horton*, unlawfully prohibit employees from collectively pursuing litigation of employment claims in all forums. We reject the Respondent's argument for the reasons stated in *SolarCity Corp.*, 363 NLRB No. 83 (2015).[6]

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[5] The Respondent also contends that Regional Director Olivia Garcia was without authority to issue the complaint in this case because the Board appointed her as Regional Director for Region 21 on January 6, 2012, when the Board lacked a quorum after the expiration of former Board Member Becker's term. This contention is without merit. Although Regional Director Garcia's appointment was announced on January 6, 2012, the Board approved the appointment on December 22, 2011, at which time it had a valid quorum. See, e.g., *Covenant Care California, LLC*, 363 NLRB No. 80, slip op. at 1 fn. 2 (2015).

[6] Our dissenting colleague, relying on his dissenting position in *Murphy Oil*, 361 NLRB No. 72, slip op. at 22-35, would find that the Respondent's MBAA does not violate Sec. 8(a)(1). He observes that the Act does not "dictate" any particular procedures for the litigation of non-NLRA claims, and "creates no substantive right for employees to insist on class-type treatment of non-NLRA claims." This is all surely correct, as the Board has previously explained in *Murphy Oil*, supra, slip op. at 2, 16, and *Bristol Farms*, 363 NLRB No. 45, slip op. at 2 fn. 2 (2015). But what our colleague ignores is that the Act "does create a right to *pursue* joint, class, or collective claims if and as available without the interference of an employer-imposed restraint." *Murphy Oil*, above, slip op. at 2 (emphasis in original). The Respondent's MBAA is just such an unlawful restraint.

2. We further agree with the judge that the Respondent unlawfully enforced the original MBAA by moving to compel individual arbitration of Charging Party Jana Mestanek's employment-related claims after Mestanek filed a class action wage-and-hour lawsuit in Los Angeles County Superior Court.[7] Although the original MBAA did not expressly prohibit class and collective arbitration, by arguing that the original MBAA barred collective legal action, the Respondent unlawfully applied the original MBAA to restrict the exercise of Section 7 rights. See *Countrywide Financial Corp.*, 362 NLRB No. 165, slip op. at 3-5 (2015); see also *Employers Resource*, 363 NLRB No. 59, slip op. at 1 fn. 2 (2015).[8]

Likewise, for the reasons explained in *Murphy Oil* and *Bristol Farms*, there is no merit to our colleague's view that finding the MBAA unlawful runs afoul of employees' Sec. 7 right to "refrain from" engaging in protected activity. See *Murphy Oil*, slip op. at 18; *Bristol Farms*, slip op. at 3. Nor is he correct in insisting that Sec. 9(a) of the Act requires the Board to permit individual employees to prospectively waive their Sec. 7 right to engage in concerted legal activity. *Murphy Oil*, slip op. at 17-18; *Bristol Farms*, slip op. at 2.

[7] We reverse the judge's finding that the Respondent violated Sec. 8(a)(1) by maintaining the original MBAA prior to January 1, 2013. The parties litigated this case on a stipulated record, and this was not identified as an issue to be litigated in the complaint, the stipulations, or the briefs to the judge. We therefore find that this issue was not fully litigated. See *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990).

[8] We reject our dissenting colleague's argument that Mestanek was not engaged in concerted activity in filing the class action wage-and-hour lawsuit in State superior court. As the Board made clear in *Beyoglu*, 362 NLRB No. 152 (2015), "the filing of an employment-related class or collective action by an individual employee is an attempt to initiate, to induce, or to prepare for

We reject the position of the Respondent and our dissenting colleague that the Respondent's motion to compel arbitration was protected by the First Amendment's Petition Clause. In *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 747 (1983), the Court identified two situations in which a lawsuit enjoys no such protection: where the action is beyond a State court's jurisdiction because of Federal preemption, and where "a suit . . . has an objective that is illegal under federal law." 461 U.S. at 737 fn. 5. Thus, the Board may properly restrain litigation efforts such as the Respondent's motion to compel arbitration that have the illegal objective of limiting employees' Section 7 rights and enforcing an unlawful contractual provision, even if the litigation was otherwise meritorious or reasonable. See *Murphy Oil*, supra, slip op. at 20-21; *Convergys Corp.*, 363 NLRB No. 51, slip op. at 2 fn. 5 (2015).

3. Finally, the judge found that the Respondent violated Section 8(a)(1) by threatening to terminate, and subsequently actually terminating, Charging Party Laura Christensen for refusing to sign the revised MBAA. We agree. Because maintaining the revised MBAA as a condition of employment was unlawful, threatening to discharge and/or discharging an employee for refusing to agree to the unlawful revised MBAA also violated Section 8(a)(1). See *Denson Electric Co.*, 133 NLRB 122, 129, 131 (1961). See also *Keiser University*, 363 NLRB No. 73, slip op. at 1, 7 (2015) (affirming judge's finding that discharging employee for refusing to sign unlawful arbitration agreement was unlawful); *Kol-*

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group action and is therefore conduct protected by Section 7." Id., slip op. at 2. See also *D. R. Horton*, supra, at 2279.

kka Tables & Finnish- American Saunas, 335 NLRB 844, 849 (2001) (finding that respondent unlawfully suspended employee who refused unlawful order).

ORDER

The National Labor Relations Board orders that the Respondent, SF Markets, LLC d/b/a Sprouts Farmers Market, Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a revised Mutual Binding Arbitration Agreement (MBAA) that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(b) Enforcing a mandatory arbitration agreement (the original MBAA) in a manner that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(c) Threatening to discharge and discharging or otherwise discriminating against an employee for failing or refusing to sign a mandatory arbitration agreement (the revised MBAA) that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the revised Mutual Binding Arbitration Agreement (MBAA) in all its forms, or revise it in all its forms to make clear to employees that the MBAA does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums.

(b) Notify all current and former employees who were required to sign or otherwise become bound to the revised MBAA in any form that it has been rescinded or revised and, if revised, provide them a copy of the newly revised MBAA.

(c) Within 14 days from the date of this Order, offer Laura Christensen full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(d) Make Laura Christensen whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the judge's decision.

(e) Compensate Laura Christensen for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 21 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful dis-

charge of Laura Christensen, and within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) In the manner set forth in this decision, reimburse Jana Mestanek and any other plaintiffs for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing the Respondent's motions to compel arbitration filed in Los Angeles County and Orange County Superior Courts.

(i) Within 14 days after service by the Region, post at its Tustin and Yorba Linda facilities copies of the attached notice marked "Appendix A," and at all other California facilities where the unlawful arbitration agreement is or has been in effect, copies of the attached notice marked "Appendix B."[9] Copies of the notices, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and

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[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix A" to all current employees and former employees employed by the Respondent at any time since December 17, 2012, and any former employees against whom the Respondent has enforced its mandatory arbitration agreement since December 17, 2012. If the Respondent has gone out of business or closed any facilities other than the one involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix B" to all current employees and former employees employed by the Respondent at those facilities at any time since December 17, 2012.

(j) Within 21 days after service by the Region, file with the Regional Director for Region 21 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. Mar. 24, 2016

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Mark Gaston Pearce, Chairman

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Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part.[1]

In this case, my colleagues find that the Respondent's revised Mutual Binding Arbitration Agreement (MBAA) violates Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) because the revised MBAA waives the right to participate in class or collective actions regarding non-NLRA employment claims. In addition, before implementing its revised MBAA, the Respondent required its employees to sign its original MBAA, which provided for the arbitration of non-NLRA employment-related claims. The Agreement was silent regarding class arbitration. Charging Party Jana Mestanek signed the original MBAA and later filed a class action lawsuit against the Respondent in Los Angeles County Superior Court alleging that the Respondent had committed various violations of California wage-and-hour laws. In reliance on the original MBAA, the Respondent filed a petition to compel arbitration in Orange County Superior Court and a motion to compel arbitra-

[1] I agree with my colleagues that the complaint is properly before the Board for decision and that the term of former Member Becker did not expire prior to the issuance of the Board's decision in *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013).

tion in Los Angeles County Superior Court.[2] My colleagues find that the Respondent violated NLRA Section 8(a)(1) under *Lutheran Heritage Village-Livonia*[3] on the basis that the Respondent applied the original MBAA to require individual arbitration. In other words, it applied the original MBAA as a waiver of class-type treatment of non-NLRA claims.[4] I respectfully dissent from these

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[2] In response to the Respondent's petition to compel arbitration filed in Orange County Superior Court, Mestanek filed a motion to abate action. On March 6, 2013, the Orange County Superior Court issued a tentative ruling, which it thereafter affirmed in a Minute Order, granting Mestanek's motion to abate action and staying the Respondent's petition to compel arbitration on the grounds that the Los Angeles County Superior Court had jurisdiction over the matter. On June 7, 2013, the Los Angeles County Superior Court denied Mestanek's request to defer ruling on the Respondent's motion to compel arbitration "pending completion of the NLRB's investigation" and granted in relevant part the Respondent's motion to compel arbitration of Mestanek's individual claims. The court declined to find *D. R. Horton* "persuasive authority," as Mestanek had argued. Indeed, the court agreed with the Respondent "that *D. R. Horton* is an 'outlier.'"

[3] 343 NLRB 646 (2004).

[4] My colleagues cite *Countrywide Financial Corp.*, 362 NLRB No. 165, slip op. at 3-5 (2015), and *Employers Resource*, 363 NLRB No. 59, slip op. at 1 fn. 2 (2015), in which the majority relied on the Board's holding in *Lutheran Heritage* that a policy, work rule or handbook provision will be unlawful if it "has been applied to restrict the exercise of Section 7 rights." 343 NLRB at 647. This differs from another holding in *Lutheran Heritage*, sometimes referred to as *Lutheran Heritage* "prong one," under which a policy, work rule or handbook provision is invalidated if "employees would reasonably construe the language to prohibit Section 7 activity." Id. I have expressed disagreement with *Lutheran Heritage* prong one, and I advocate that the Board formulate a different standard in an appropriate future case regarding facially neutral policies, work rules, and handbook provisions. See, e.g.,

findings for the reasons explained in my partial dissenting opinion in *Murphy Oil USA, Inc*.[5]

I agree that an employee may engage in "concerted" activities for "mutual aid or protection" in relation to a claim asserted under a statute other than NLRA.[6] However, Section 8(a)(1) of the Act does not vest author-

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Lily Transportation Corp., 362 NLRB No. 54, slip op. at 1 fn. 3 (2015); *Conagra Foods, Inc*., 361 NLRB No. 113, slip op. at 8 fn. 2 (2014); *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 10 fn. 3 (2014), affd. sub nom. *Three D, LLC v. NLRB*, Nos. 14-3284, -3814, 2015 WL 6161477 (2d Cir. Oct. 21, 2015). In the instant case, for the reasons noted in the text, I disagree with my colleagues' finding in reliance on the "as applied" prong of the *Lutheran Heritage* standard that the Agreement has been unlawfully applied to restrict the exercise of Section 7 rights.

[5] 361 NLRB No. 72, slip op. at 22-35 (2014) (Member Miscimarra, dissenting in part); see also *Philmar Care, LLC d/b/a San Fernando Post Acute Hospital*, 363 NLRB No. 57, slip op. at 3-5 (2015) (Member Miscimarra, dissenting). The Board majority's holding in *Murphy Oil* invalidating class-action waiver agreements was denied enforcement by the Court of Appeals for the Fifth Circuit. *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015).

[6] I agree that non-NLRA claims can give rise to "concerted" activities engaged in by two or more employees for the "purpose" of "mutual aid or protection," which would come within the protection of NLRA Sec. 7. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 23-25 (Member Miscimarra, dissenting in part). However, the existence or absence of Sec. 7 protection does not depend on whether non-NLRA claims are pursued as a class or collective action, but on whether Sec. 7's statutory requirements are met—an issue separate and distinct from whether an individual employee chooses to pursue a claim as a class or collective action. Id.; see also *Beyoglu*, 362 NLRB No. 152, slip op. at 4-5 (2015) (Member Miscimarra, dissenting). Here, Charging Party Mestanek was not engaged in concerted activity when, acting individually, she filed a class action lawsuit in Los Angeles County Superior Court. See my dissent in *Beyoglu*, above.

ity in the Board to dictate any particular procedures pertaining to the litigation of non-NLRA claims, nor does the Act render unlawful agreements in which employees waive class-type treatment of non-NLRA claims. To the contrary, as discussed in my partial dissenting opinion in *Murphy Oil*, NLRA Section 9(a) protects the right of every employee as an "individual" to "present" and "adjust" grievances "at any time."[7] This aspect of Section 9(a) is reinforced by Section 7 of the Act, which protects each employee's right to "refrain from" exercising the collective rights enumerated in Section 7. Thus, I believe it is clear that (i) the NLRA creates no substantive right for employees to insist on class-type treatment of non-NLRA claims;[8] (ii) a class-waiver agreement per-

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[7] *Murphy Oil*, above, slip op. at 30-34 (Member Miscimarra, dissenting in part). Sec. 9(a) states: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That *any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted*, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment" (emphasis added). The Act's legislative history shows that Congress intended to preserve every individual employee's right to "adjust" any employment-related dispute with his or her employer. See *Murphy Oil*, above, slip op. at 31-32 (Member Miscimarra, dissenting in part).

[8] When courts have jurisdiction over non-NLRA claims that are potentially subject to class treatment, the availability of class-type procedures does not rise to the level of a substantive right. See *D.*

taining to non-NLRA claims does not infringe on any NLRA rights or obligations, which has prompted the overwhelming majority of courts to reject the Board's position regarding class-waiver agreements;[9] and (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA).[10] Although questions may arise

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R. Horton, Inc. v. NLRB, 737 F.3d 344, 362 (5th Cir. 2013) ("The use of class action procedures . . . is not a substantive right.") (citations omitted), petition for rehearing en banc denied No. 12-60031 (5th Cir. 2014); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.").

[9] The Fifth Circuit has twice denied enforcement of Board orders invalidating a mandatory arbitration agreement that waived class-type treatment of non-NLRA claims. See *Murphy Oil, Inc., USA v. NLRB*, above; *D. R. Horton, Inc. v. NLRB*, above. The overwhelming majority of courts considering the Board's position have likewise rejected it. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 36 fn. 5 (Member Johnson, dissenting) (collecting cases); see also *Patterson v. Raymours Furniture Co.*, 96 F.Supp. 3d 71 (S.D.N.Y. 2015); *Nanavati v. Adecco USA, Inc.*, 99 F. Supp. 3d 1072 (N.D. Cal. 2015), motion to certify for interlocutory appeal denied 2015 WL 4035072 (N.D. Cal. June 30, 2015); *Brown v. Citicorp Credit Services*, No. 1:12-CV-00062-BLW, 2015 WL 1401604 (D. Idaho Mar. 25, 2015) (granting reconsideration of prior determination that class waiver in arbitration agreement violated NLRA); but see *Totten v. Kellogg Brown & Root, LLC*, No. ED CV 14-1766 DMG (DTBx), 2016 WL 316019 (C.D. Cal. Jan. 22, 2016).

[10] For the reasons expressed in my *Murphy Oil* partial dissent and those thoroughly explained in former Member Johnson's dissent in *Murphy Oil*, the FAA requires that the arbitration agreement be enforced according to its terms. *Murphy Oil*, above, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 49-58 (Member Johnson, dissenting).

regarding the enforceability of particular agreements that waive class or collective litigation of non-NLRA claims, I believe these questions are exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims.[11]

Because I believe the Respondent's original MBAA was lawful under the NLRA, I would find it was similarly lawful for the Respondent to file a motion in state court seeking to enforce that agreement.[12] It is relevant that

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[11] Because I disagree with the Board's decisions in *Murphy Oil*, above, and *D. R. Horton*, above, and I believe the NLRA does not render unlawful arbitration agreements that provide for the waiver of class-type litigation of non-NLRA claims, I find it unnecessary to reach whether such agreements should independently be deemed lawful to the extent they "leave[] open a judicial forum for class and collective claims," *D. R. Horton*, 357 NLRB at 2288, by permitting the filing of complaints with administrative agencies that, in turn, may file class- or collective-action lawsuits. See *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013)

[12] The Agreement is silent as to whether arbitration may be conducted on a class or collective basis. In finding the Respondent's motion to compel individual arbitration was nevertheless unlawful, my colleagues rely on *Countrywide Financial Corp.*, above. In *Countrywide Financial*, a Board majority decided that the employer violated the Act by moving to compel individual arbitration based on an arbitration agreement that, like the Respondent's, was silent regarding the arbitrability of class and collective claims. For the reasons stated in Member Johnson's dissent in *Countrywide Financial*, however, id., slip op. at 8-10, the Board's decision in that case is in conflict with the FAA and Supreme Court precedent construing that statute. The Court has held that a "party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Stolt-Nielsen S.A. v. Animal Feeds International Corp.*, 559 U.S. 662, 684-685 (2010) (emphasis in original). Obviously, where an arbitration agreement is silent regarding class ar-

the state court that had jurisdiction over the non-NLRA claims *granted* the Respondent's motion to compel arbitration. That the Respondent's motion was reasonably based is also supported by court decisions that have enforced similar agreements.[13] As the Fifth Circuit recently observed after rejecting (for the second time) the Board's position regarding the legality of class-waiver agreements: "[I]t is a bit bold for [the Board] to hold that an employer who followed the reasoning of our *D. R. Horton* decision had no basis in fact or law or an 'illegal objective' in doing so. The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders."[14] I also believe that any Board finding of a violation based on the Respondent's meritorious state court motion to compel arbitration would improperly risk infringing on the Respondent's rights under the First Amendment's Petition Clause. See *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983); *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002); see also my partial dissent in *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 33-35. Finally,

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bitration, there is no such contractual basis. Thus, Respondent's motion to compel individual arbitration was "well-founded in the FAA as authoritatively interpreted by the Supreme Court." *Philmar Care, LLC d/b/a San Fernando Post Acute Hospital*, above, slip op. at 4 fn. 11 (Member Miscimarra, dissenting); see also *Employers Resource*, 363 NLRB No. 59, slip op. at 3 fn. 9 (2015) (Member Miscimarra, dissenting); *Countrywide Financial*, above, slip op. at 9 (Member Johnson, dissenting).

[13] See, e.g., *Murphy Oil, Inc., USA v. NLRB*, above; *Johnmohammadi v. Bloomingdale's*, 755 F.3d 1072 (9th Cir. 2014); *D. R. Horton, Inc. v. NLRB*, above; *Owen v. Bristol Care, Inc.*, above; *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013).

[14] *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d at 1021.

for similar reasons, I believe the Board cannot properly require the Respondent to reimburse Charging Party Mestanek or any other plaintiffs for their attorneys' fees in the circumstances presented here. *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 35.

Finally, my colleagues find that the Respondent violated the Act by threatening to discharge Charging Party Laura Christensen if she refused to sign the revised MBAA and by discharging her when she refused to sign it. I disagree. The Respondent lawfully insisted that its employees execute the revised MBAA as a condition of their employment. Every agreement sets forth terms upon which each party may insist as a condition of entering into the relationship governed by the agreement. Thus, conditioning employment on the execution of a lawful class-action waiver agreement does not make the agreement involuntary or unlawful. Because I believe the revised MBAA was lawful under the NLRA, and because parties may lawfully choose whether or not to accept or continue employment subject to this type of agreement, I believe the Act did not require the Respondent to continue Christensen's employment when it determined that she was unwilling to enter into the revised MBAA.[15]

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[15] *Everglades College, Inc. d/b/a Keiser University*, 363 NLRB No. 73 (2015), cited by my colleagues, is distinguishable. Although I found that the employer in that case lawfully conditioned employment on the execution of a class-action waiver, I agreed with the majority that the agreement at issue there violated Sec. 8(a)(1) by interfering with the filing of charges with the Board. On that basis, I found that the employer additionally violated Sec. 8(a)(1) when it discharged an employee for refusing to sign the agreement.

Accordingly, for the foregoing reasons, I respectfully dissent in part.

Dated, Washington, D.C. Mar. 24, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration agreement that requires our employees, as a condition of

Here, by contrast, the revised MBAA was lawful under the NLRA in all respects, and the Respondent lawfully enforced it.

employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT enforce a mandatory arbitration agreement in a manner that requires our employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT threaten to discharge, discharge, or otherwise discriminate against you for failing or refusing to sign a mandatory arbitration agreement that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind our revised Mutual Binding Arbitration Agreement (MBAA) in all its forms, or revise it in all its forms to make clear that the MBAA does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the revised MBAA in any of its forms that the MBAA has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement.

WE WILL, within 14 days from the date of the Board's Order, offer Laura Christensen full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her sen-

iority or any other rights or privileges previously enjoyed.

WE WILL make Laura Christensen whole for any loss of earnings and other benefits resulting from the discrimination against her, less any net interim earnings, plus interest.

WE WILL compensate Laura Christensen for the adverse tax consequences, if any, of receiving a lump- sum backpay award, and WE WILL file with the Regional Director for Region 21, within 21 days of the date of the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Laura Christensen, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

WE WILL reimburse Jana Mestanek and any other plaintiffs for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing our petition to compel arbitration filed in Orange County Superior Court and our motion to compel arbitration and stay proceedings filed in Los Angeles County Superior Court.

SF MARKETS, LLC D/B/A SPROUTS FARMERS MARKET

The Board's decision can be found at www.nlrb.gov/case/21-CA-099065 or by using the QR code below. Alternatively, you can obtain a copy of the decision from

the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration agreement that requires our employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind our revised Mutual Binding Arbitration Agreement (MBAA) in all its forms, or revise it in all

its forms to make clear that the MBAA does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the revised MBAA in any of its forms that the MBAA has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement.

SF MARKETS, LLC D/B/A SPROUTS FARMERS MARKET

The Board's decision can be found at www.nlrb.gov/case/21-CA-099065 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

[QR CODE OMITTED]

Ami Silverman, Esq., for the General Counsel.

Daniel B. Pasternak, Esq. (Squire Sanders (US) LLP), for the Respondent.

John Glugoski, Esq. (Righetti Glugoski, P.C.), for Charging Party Christensen.

Alison M. Miceli, Esq. (Aegis Law Firm, PC), for Charging Party Mestanek.

DECISION

STATEMENT OF THE CASE

IRA SANDRON, Administrative Law Judge. This case is before me on an order consolidating cases, consolidated

complaint, and notice of hearing issued on July 31, 2013 (the complaint). The General Counsel alleges that SF Markets, LLC d/b/a Sprouts Farmers Market (the Respondent) committed various violations of Section 8(a)(1) of the National Labor Relations Act (the Act) in connection with the mutual binding arbitration agreements (MAAs) that it has required as a condition of hiring and continued employment.

On December 12, 2013, the parties filed a joint motion to submit the case on stipulation, stipulation of facts, and request to forgo submission of short position statements. They requested that, pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations, I approve in full their stipulation of facts (along with attached exhibits), grant their request to waive a hearing in this consolidated proceeding, and issue a decision.

The joint motion and stipulation of facts were made without prejudice to any objection that any party might have as to the materiality or relevance of any stipulated facts. The Respondent did not waive any objections or defenses, including any affirmative defenses and avoidances that it asserted in its first amended answer to the complaint.

On December 23, 2013, I issued an order granting the motion and setting January 27, 2014, as the due date for the parties' briefs.

On January 6, 2014, the Respondent filed a motion to dismiss, and the Respondent and the General Counsel later filed briefs, all of which I have considered.

Stipulated Issues

(1) Should the Respondent's maintenance of its MAAs as a condition of employment and continued employment be held to violate employees' Section 7 rights pursuant to *D.R. Horton, Inc.* (*Horton*), 357 NLRB No. 184 [2277] (2012), enfd. in part, denied in part 737 F.3d 344(5th Cir. 2013)? The answer to this question is pivotal to deciding all of the allegations in this case.

(2) Did the Respondent unlawfully file a petition to compel arbitration in Orange County Superior Court, on December 17, 2012, and a motion to compel arbitration in Los Angeles County Superior Court, on April 22, 2013, to enforce its MAA with Jana Mestanek, so as to preclude her from pursuing, on a class or collective-action basis, wage-hour claims under California law that she filed in Los Angeles Superior Court on November 7, 2012?

(3) Did the Respondent, through Managers Frank Lopez and Don Robertson, unlawfully tell Laura Christensen, on about January 18, 2013, that if she did not sign the acknowledgement of the California team member handbook supplement, and thereby agree to the terms of a revised MAA, she would be considered to have resigned her employment?

(4) Did the Respondent unlawfully terminate Christensen's employment on January 30, 2013, based on her refusal to sign the acknowledgement described above?

In the joint motion, the Respondent also requested that I consider several issues, including:

(1) Whether the complaint is barred, in whole in part, because (a) the Board lacked a quorum at the time it issued its decision in *Horton*; (b) the consolidated complaint was issued on the authority of a regional director appointed to that position by a Board that lacked a quorum at the time of her appointment; and/or (c) the complaint was issued pursuant to a delegation of authority from the Acting General Counsel who was appointed to that position in violation of the Vacancies Reform Act, 5 U.S.C.§ 3345 et seq., and who therefore lacked authority to so delegate.

The Board has addressed these issues, and I will discuss them in the analysis and conclusions section. I simply state here that I recognize the Respondent's need to raise them before me in order to preserve them on the record should the Board or the courts later consider this case.

(2) Whether requiring the Respondent to withdraw its motion to compel arbitration violates its Constitutional right to seek redress.

(3) Whether the Board possesses the authority to order the Respondent to reimburse Mestanek for all reasonable litigation expenses directly related to opposing the Respondent's efforts to enforce its MAA with her.

My role is not to interpret the United States Constitution as a first-level judge, or to define the Board's authority to issue appropriate remedies for *Horton* violations. Therefore, I find it beyond my jurisdiction to decide these questions, both of which relate to the remedy that the General Counsel requests. I note that the

Respondent has cited no precedent directly on point on either subject.

(4) Whether any issues regarding its motion to compel should be dismissed on mootness grounds.

The Respondent does not address this in either its motion to dismiss or its brief. Accordingly, I consider it to have been withdrawn.

Facts

Based on the stipulated facts and documents, the thoughtful posttrial briefs that the General Counsel and the Respondent filed, and the Respondent's motion to dismiss, I find the following.

PERTINENT STIPULATED FACTS

At all times material, the Respondent has been a Delaware limited liability company with a principal office located in Phoenix, Arizona, and has operated retail stores in various States, including locations in Irvine, Seal Beach, Tustin, and Yorba Linda, California. The Respondent has admitted Board jurisdiction as alleged in the complaint, and I so find.

At all times material, Frank Lopez has held the position of regional human resources manager, and Don Robertson has held the position of store manager, and both have been Section 2(11) supervisors, and the Respondent's agents.

Since at least January 1, 2012, the Respondent has required that employees agree to MAAs as a condition of employment. Since about January 2013, the Respondent has required employees at its California retail stores, including the locations listed above, as a condition of

employment or continued employment, to agree to be bound by a revised MAA[1] The revised MAA requires that the Respondent and employees resolve employment-related disputes, except for certain specifically excluded claims, through individual arbitration proceedings, and to waive any rights that they may have to resolve covered disputes through collective and/or class action. Additionally, the Respondent has required employees at its California stores, including the locations listed above, to execute an "acknowledgment of receipt of California team member handbook supplement" (handbook supplement),[2] which incorporates by reference said MAA.

Jana Mestanek

On about January 23, 2012, the Respondent hired Mestanek to work at its Yorba Linda store and, as a condition of employment, required her to sign an MAA that required in relevant part:[3]

> The Employee agrees and acknowledges that the Company and Employee will utilize binding arbitration to resolve all disputes that may arise out of the employment context. Both the Company and Employee agree that any claim, dispute, and/or controversy that either the Employee may have against the Company . . . or the Company may have against the Employee, arising from, related to, or having any relationship or connection whatsoever with my seek-

[1] Jt. Exh. 29. Jt. Exh. 7 is the version in effect in January 2012. None of the parties contend that any differences in the language of the two versions dictate a different outcome under *Horton*.

[2] Jt. Exh. 30.

[3] Jt. Exh. 7.

ing employment by, or other association with the Company, shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act, and following the procedures of the applicable state arbitration act, if any.

To the extent permitted by applicable law, the arbitration procedures stated below shall constitute the sole and exclusive method for the resolution of *any claim* between the Company and Employee arising out of "or related to" the employment relationship. *The parties hereto_EXPRESSLY WAIVE their rights. if any, to have such a matter heard by a court or a jury*. By waiving such rights, the parties are not waiving any remedy or relief due them under applicable law.

Included Claims

Included within the scope of this agreement are all disputes, whether they be based on the state employment statutes, Title VII of the Civil Rights Act of 1964, as amended, or any other state or federal law or regulation, equitable law, or otherwise, with the exception of claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims brought pursuant to state workers compensation statutes, or as otherwise required by state or federal law.

Excluded Claims

Nothing herein shall prevent, prohibit, or discourage an employee from filing a charge with or participating in an investigation of the National Labor Relations Board (NLRB), the Equal Employment Opportunity Commission (EEOC), or any other state or

> *federal agency* (although if such a claim is pursued following the exhaustion of such remedies, that claim would be subject to these provisions). Nothing in this Agreement is intended to interfere with the Employee's rights under the National Labor Relations Act. . . . [Emphases in original.]

On November 7, 2012, Mestanek filed a class-action complaint in Los Angeles County Superior Court, alleging that the Respondent had committed various violations of California wage and hour laws.[4]

On December 17, 2012, the Respondent filed a petition in Orange County Superior Court to compel arbitration.[5] Subsequently, the following occurred.

In Los Angeles County Superior Court

In response to Mestanek's complaint, the Respondent, on April 22, 2013, filed a notice of motion, a motion to compel arbitration and stay proceedings, a supporting declaration, and a request for judicial notice.[6]

On May 13, 2013, Mestanek filed a memorandum of points and authorities in opposition to the Respondent's motion to compel arbitration.[7]

On May 20, 2013, the Respondent filed a reply to Mestanek's opposition to its motion to compel arbitration and stay a proceedings, a declaration in support thereof, and evidentiary objections to Mestanek's evidence in

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[4] Jt. Exh. 8. On December 14, 2012, she amended the complaint to include the Respondent as a named defendant. Jt. Exh. 9.

[5] Jt. Exh. 10.

[6] Jt. Exhs. 21-23.

[7] Jt. Exh. 24.

opposition to the motion to compel arbitration and stay proceedings.[8]

On June 7, 2013, the Los Angeles County Superior Court granted in relevant part the Respondent's motion to compel arbitration, ordering Mestanek to arbitrate, on an individual, nonclass basis, the claims alleged in her complaint, and denying her motion to stay proceedings pending resolution of the appeal of the Board's *Horton* decision.[9] The court declined to find *Horton* "persuasive authority," as Mestanek had argued.[10]

In Orange County Superior Court

On February 4, 2013, Mestanek filed an opposition to compel arbitration, and a supporting declaration.[11] On February 6, 2013, Mestanek filed a notice of motion and motion to abate action, and a declaration in support thereof.[12] On February 21, 2013, the Respondent filed an opposition to that motion.[13] Mestanek filed a reply thereto on February 27, 2013.[14]

On February 6, 2013, the Respondent filed a request for judicial notice, and a motion to abate.[15] On February 27, 2013, Mestanek filed a reply thereto, along with a supporting declaration.[16] Also on February 27, 2013, the

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[8] Jt. Exhs. 25-27.

[9] Jt. Exh. 28.

[10] Id. at 20.

[11] Jt. Exhs. 11, 12.

[12] Jt. Exhs. 15, 16.

[13] Jt. Exh. 17.

[14] Jt. Exh. 18.

[15] Jt. Exhs. 14-15.

[16] Jt. Exhs. 18-19.

Respondent filed a response to Mestanek's opposition to compel arbitration.[17] On April 22, 2013, the Respondent filed an opposition in response to Mestanek's motion to abate.[18]

On March 6, 2013, the Orange County Superior Court issued a tentative ruling granting Mestanek's motion to abate action and staying the Respondent's petition to compel arbitration.[19]

Laura Christensen

On about January 16, 2013, the Respondent presented certain employees, including Christensen, at its Tustin store, with a revised MAA and acknowledgement of receipt of the handbook supplement.[20] The agreement provided, in relevant part:[21]

> The Company and Employee agree that, except as specifically provided in this Agreement, any claim, complaint, grievance, cause of action, and/or controversy (collectively referred to as a "Dispute") that the Employee may have against the Company . . . or that the Company may have against the Employee, that arises from, relates to, or has any relationship or connection whatsoever with the Employee's employment with the Company, shall be submitted to and determined exclusively by final, binding, private arbitration pursuant to the terms of this Agreement, the

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[17] Jt. Exh. 13.
[18] Jt. Exh. 17.
[19] Jt. Exh. 20.
[20] Jt. Exh. 30.
[21] Jt. Exh. 29.

Federal Arbitration Act, and all other applicable state and federal law.

To the extent permitted by applicable law, the arbitration procedures in this Agreement shall constitute the sole and exclusive method for the resolution of *any of the Arbitrable Claims discussed below. The Company and the Employee EXPRESSLY WAIVE their rights, if any, to have such claims heard by a court or a jury.* By waiving such rights, however, neither the Company nor the Employee are waiving any remedy or relief that may be due to either of them under applicable law . . . .

Included Claims

To the fullest extent permitted by Jaw, any Dispute between the Employee . . . and the Company . . . that arise out of, relate in any manner, or have any relationship whatsoever to the employment or the termination of employment of Employee, including, without limitation, any Dispute arising out of or related to this Agreement ("*Arbitrable Claims*"), shall be resolved by final and binding arbitration . . .

Excluded Claims

Nothing herein shall prevent, prohibit or discourage an employee from filing a charge with, or participating in an investigation by, the National Labor Relations Board (NLRB), the Equal Employment Opportunity Commission (EEOC), any state or local fair employment practices or civil rights agency (including, but not limited to, the California Department of Fair Employment and Housing and the California Labor Commissioner, and similar agencies in other states, or any other administrative agency or gov-

ernmental body possessing jurisdiction over employment-related claims (although if such a claim is pursued following the exhaustion of such administrative remedies, that claim would be subject to these provisions). Nothing in this Agreement is intended to interfere with the Employee's rights to act collectively for mutual aid and protection under the National Labor Relations Act . . . .

Waiver of Class, Collective, and Representative Action Claims

Except as otherwise required under applicable law, the Company and Employee expressly intend and agree that (1) class action, collective action, and representative action procedures shall not be asserted, nor will they apply, in any arbitration proceeding pursuant to this Agreement; (2) neither the Company nor the Employee will assert any class action, collective action, or representative action claims against the other in arbitration or otherwise; and (3) the Company and the Employee shall only submit their own respective, individual claims in arbitration and will not seek to represent the interests of any other person . . . . [Emphases in original.]

On about January 18, 2013, Managers Lopez, by telephone, and Robertson, in person, told Christensen that she would be considered to have resigned if she did not sign the acknowledgment of receipt of the handbook supplement.

On January 30, 2013, Christensen refused to execute said acknowledgment, and her employment was terminated. If she received a termination notice, it is not in the record. The parties stipulate that her refusal to

execute the acknowledgment was the sole basis that her employment ended.

Analysis and Conclusions

The application of *Horton* is at the core of all of the issues in this case. In *Horton*, the Board held that an employer violates Section 8(a)(1) of the Act by "requiring employees to waive their right to collectively pursue employment-related claims in all forums, arbitral and judicial," because "The right to engage in collective action—including collective *legal* action—is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest." 357 at 2286 (emphasis in original).

The Board further concluded that finding the MAA unlawful was "consistent with the well-established interpretation of the NLRA and with core principles of Federal labor policy" and did not "conflict with the letter or interfere with, the policies underlying the Federal Arbitration Act (FAA) [9 U.S.C., § 1 et seq.] . . . ." Id. at 10.

The Respondents argues, on both procedural and substantive grounds, that the holding in *Horton* should not be applied.

Procedural Grounds

The Respondent contends that (a) the Board lacked a quorum at the time it issued the decision; (b) the consolidated complaint was issued on the authority of a Regional Director appointed to that position by a Board that lacked a quorum at the time of her appointment; and/or (c) the complaint was issued pursuant to a delegation of authority from the Acting General Counsel who was appointed to that position in violation of the Vacancies

Reform Act, and who therefore lacked authority to so delegate.

The Respondent relies on *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), for its proposition that *Horton* was invalidly issued because the Board lacked a quorum at that time, inasmuch as Members Sharon Block and Richard Griffin were recess appointments and hence invalidly appointed. The Respondent further contends that this invalidated their appointment of the Regional Director who issued the complaint. However, the Board has rejected the position that it could not validly issue decisions when two of the three Board Members were recess appointments. See *G4S Regulated Security Solutions*, 359 NLRB No. 101, slip op. at 1 fn. 1 (2013), citing *Belgrove Post Acute Center*, 359 NLRB No. 77, slip op. at 1 fn. 1 (2013). The Board noted that other courts of appeals have reached decisions contrary to *Canning* and that "pending a definitive resolution, the Board is charged to fulfill its responsibilities under the Act." Ibid.

If the Board was properly constituted, ergo it had the authority to appoint the Regional Director who issued the complaint in this matter.

Finally, the Board has explicitly held that the Acting General Counsel was properly appointed under the Vacancies Reform Act, and rejected the argument that he lacked authority to issue complaints. *Corona Regional Medical Center*, 2014 WL 101770, at 1 fn. 1 (Jan. 9, 2014), citing *Muffley v. Massey Energy Co.*, 547 F. Supp. 2d 536, 542-543 (S.D. W. Va. 2008), affd. 570 F.3d 534, 536 at fn. 1 (4th Cir. 2009) (upholding authorization of 10(j) injunction proceeding by Acting General Counsel).

Substantive Grounds

The Respondent argues that the Fifth Circuit Court of Appeals and other courts have rejected *Horton* to the extent that it found it to be afoul of the Act a MAA prohibiting class action. Thus, the Fifth Circuit concluded that neither the NLRA's statutory text nor its legislative history contained a congressional command against application of the FAA and that, in the absence of an inherent conflict between the FAA and the NLRA's purpose, a MAA should be enforced according to its terms. 737 F.3d at 361-363. Accordingly, the court denied enforcement of the Board's order invalidating the MAA.[22]

However, I am constrained to follow Board precedent that has not been reversed by the Supreme Court or by the Board itself. See *Pathmark Stores*, 342 NLRB 378, 378 fn. 1 (2004); *Hebert Industrial Insulation Corp.*, 312 NLRB 602, 608 (1993).

In this regard, the Board generally applies a "nonacquiescence policy" to appellate court decisions that conflict with Board law, *D. L. Baker, Inc.*, 351 NLRB 515, 529 at fn. 42 (2007); *Arvin Industries*, 285 NLRB 753, 757 (1987), and instructs its administrative law judges to follow Board precedent, not court of appeals precedent. *Gas Spring Co.*, 296 NLRB 84, 97 (1989) (citing, inter alia, *Insurance Agents (Prudential Insurance)*, 119 NLRB 768 (1957), revd. 260 F.2d 736 (D.C. Cir. 1958), affd. 361 U.S. 477 (1960), enfd. 908 F.2d 966 (4th Cir. 1990), cert. denied 498 U.S. 1084 (1991).

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[22] The court did enforce the Board's order that Sec. 8(a)(1) had been violated because an employee would reasonably interpret the MAA as prohibiting the filing of a claim with the Board, a violation not alleged here.

The Board has explained that it is not required, on either legal or pragmatic grounds, to automatically follow an adverse court decision but will instead respectfully regard such ruling solely as the law of that particular case. See *Manor West, Inc.*, 311 NLRB 655, 667 fn. 43 (1993), revd. 60 F.3d 1195 (6th Cir. 1995).

The Supreme Court has upheld the enforcement of individual MAAs in various contexts, enunciating the general principal that the FAA was designed to promote arbitration. See, e.g., *AT & T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011). Moreover, the Court in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), held that a MAA signed by an employee waived his right to bring a Federal court action under the Age Discrimination in Employment Act. However, as the Board noted in *Horton*, *Gilmer* dealt with an individual claim, and the MAA therein contained no language specifically waiving class or collective claims; ergo, the Court in *Gilmer* addressed neither Section 7 nor the validity of a class-action waiver. 357 NLRB at 2286. Since the Supreme Court has not specifically addressed the issue of mandatory arbitration provisions that cover class and/or collective actions vis-à-vis the Act, it follows that the Court has not overruled *Horton*, which remains controlling law.

Therefore, I must analyze this case under the *Horton* standards to determine whether the Respondent's MAA, and its concomitant conduct, violated Section 8(a)(1) of the Act.

The Respondent contends that if, indeed, *Horton* applies, its MAAs do not contravene *Horton*; rather, that

they come under the following "exception" posited in *Horton*:

> [N]othing in our holding here requires the Respondent or any other employer to permit, participate in, or be bound by a class-wide or collective action proceeding. . . . We need not and do not mandate class arbitration in order to protect employees' rights under the NLRA. Rather, we hold only that employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in all forums, arbitral and judicial. So long as the employer leaves open a *judicial* forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of class-wide arbitration. Employers remain free to insist that arbitral proceedings be conducted on an individual basis. 357 NLRB at 2288 (emphasis added).

The Respondent's argument is misplaced. As I earlier stated, the Board in *Horton* emphasized the importance of employees not being prohibited from pursuing collective legal action: "The right to engage in collective action—including collective *legal* action—is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest." 357 NLRB at 2286 (emphasis in original). The "exception" to which the Respondent refers indicates that an employer may require arbitration on an individual basis *if* it does not foreclose employees from class or collective judicial recourse.

Such is not the case here. Both MAAs in question provide that the sole venue for disputes is *individual* arbitration. The MAA relating to Christensen expressly

prohibits her from asserting any class or concerted action "in arbitration or otherwise," thus precluding collective action in both arbitral and judicial settings. The MAA pertinent to Mestanek contains an express waiver of the right to have an employment- related matter "heard by a court or a jury." Although that MAA is silent on the matter of class arbitration, the Respondent argued, in both Los Angeles and Orange County Superior Courts, that the language and intent of the MAA was that Mestanek could pursue only her own individual claims in arbitration,[23] and the Respondent continues to adhere to that position.

Thus, the Respondent's MAAs have barred employees from pursuing, on a collective basis, *either in court or in arbitration*, matters relating to their employment, placing them squarely within the parameters of the MAAs prohibited by *Horton*.

The fact that both MAAs specifically provide that employees may file charges with administrative agencies, including the NLRB, does not cure this defect. Rather, this obviates the finding of a separate violation that employees could reasonable believe that the MAAs bar or restrict their right to file NLRB charges.

The Respondent further contends that its opposition to Mestanek's class-action lawsuit did not violate the Act because (1) the Respondent has a constitutional right to petition the Government for redress under Amendment I; (2) the Respondent's petition and motion to compel arbitration were "objectionably reasonable under *BE & K Constr. v. NLRB*, 536 U.S. 516 (2002); and (3) the peti-

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[23] See, e.g., Jt. Exh. 10 at 17-20; Jt. Exh. 21 at 19-21.

tion and motion were not advanced for any "unlawful objective."

The Respondent cites no cases that have held lawful on any of these grounds an employer's seeking to enjoin an employee's lawsuit based on an unlawful MAA (as *Horton* dictates). I decline to be the first judge to do so.

Based on the above, I conclude that the Respondent has violated Section 8(a)(1) by maintaining MAAs that unlawfully restrict employees from engaging in collective activity through filing either class or collective lawsuits or arbitrations, as a condition of employment and continued employment. Using the analogy of fruit flowing from a poisoned tree, it follows that the Respondent also violated Section 8(a)(1) by filing motions in California Superior Court to compel Mestanek to arbitrate her wage-hour claims rather than have them heard as a classaction lawsuit, by telling Christensen that she had to agree to sign a MAA or face termination, and by terminating Christensen because she refused to do so.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By the following conduct, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and violated Section 8(a)((1) of the Act.

(a) Maintained, as a condition of employment and continued employment, mandatory arbitration agreements (MAAs) prohibiting employees from pursuing collective or class lawsuits and arbitrations.

((b) Filed a petition to compel arbitration in one State court, and a motion to compel arbitration in another State court, to enforce its MAA with an employee, to preclude her from pursuing, on a collective or class basis, wage-hour disputes with the Respondent.

(c) Told an employee, in essence, that if she did not agree to the terms of a MAA, which precluded her from pursuing collective or class lawsuits and arbitrations, she would be terminated.

(d) Terminated an employee's employment based solely on her refusal to sign such an MAA.

REMEDY

Because I have found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, the Respondent shall make Laura Christensen whole for any losses, earnings, and other benefits that she suffered as a result of the unlawful discipline imposed on her. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

Further, the Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters and, if it becomes applicable, shall compensate Christensen for any adverse tax consequences of receiving a lump-sum backpay award. *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[24]

ORDER

The Respondent, SF Markets, LLC d/b/a Sprouts Farmers Market, Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining, as a condition of employment and continued employment, mandatory arbitration agreements (MAAs) prohibiting employees from pursuing collective or class lawsuits and arbitrations.

(b) Filing court petitions or motions to compel individual arbitration to enforce its MAAs with employees, to preclude them from pursuing, on a collective or class basis, employment-related disputes with the Respondent.

(c) Telling employees that if they do not agree to the terms of an MAA that precludes them from pursuing collective or class lawsuits and arbitrations, they will be terminated or otherwise subjected to adverse action.

(d) Terminating or otherwise taking adverse action against employees because of their refusal to sign such a MAA.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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[24] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Laura Christensen full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Laura Christensen whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful termination of Laura Christensen, and within 3 days thereafter notify her in writing that this has been done and that the termination will not be used against her in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Reimburse Jana Mestanek for any litigation expenses directly related to opposing Respondent's petition and motion to compel arbitration (or any other legal action taken to enforce the arbitration agreement).

(f) Withdraw its notice of motion and motion to compel arbitration filed in Los Angeles County Superior Court; or if the court issues an adverse order/judgment against Jana Mestanek based thereon, move together with her, upon her request, to vacate the order/judgment, provided that said motion can still be timely filed.

(g) Rescind the requirement that employees enter into or sign the MAAs that are currently in effect, or sign acknowledgements relating to them, as a condition of employment, and expunge all such agreements and acknowledgements at any of the Respondent's California facilities where the Respondent has required employees to sign such agreements or acknowledgements.

(h) Rescind or revise the MAAs to make it clear that the agreements do not constitute a waiver of the employees' right to initiate or maintain employment- related collective or class actions in arbitrations and in the courts.

(i) Notify employees that the MAAs have been rescinded or revised to comport with subparagraph (h), and provide them with any revised agreement.

(j) Within 14 days after service by the Region, post at its facilities in Irvine, Seal Beach, Tustin, and Yorba Linda, California, and any other facilities where MAAs have been maintained as a condition of employment, copies of the attached notice marked "Appendix."[25]

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[25] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet set, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 17, 2012.

(k) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. Feb. 18, 2014

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain, as a condition of employment and continued employment, mandatory arbitration agreements (MAAs) prohibiting employees from pursuing collective or class lawsuits and arbitrations.

WE WILL NOT file court petitions or motions to compel individual arbitration to enforce our MAAs with employees, to preclude them from pursuing, on a collective or class basis, employment-related disputes with us.

WE WILL NOT tell employees that if they do not agree to the terms of a MAA, which precludes them from pursuing collective or class lawsuits and arbitrations, they will be terminated or otherwise subjected to adverse action.

WE WILL NOT terminate or otherwise take adverse action against employees because of their refusal to sign such an MAA.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, offer Laura Christensen full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Laura Christensen whole for any loss of earnings and other benefits suffered as a result of our discrimination against her, with interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful termination of Laura Christensen, and within 3 days thereafter notify her in writing that this has been done and that the termination will not be used against her in any way.

WE WILL reimburse Jana Mestanek for any litigation expenses directly related to opposing our petition and motion to compel arbitration (or any other legal action taken to enforce the arbitration agreement).

WE WILL withdraw our notice of motion and motion to compel arbitration filed in Los Angeles County Superior Court; or if the court issues an adverse order/judgment against Jana Mestanek based thereon, move together with her, upon her request, to vacate the order/judgment, provided that said motion can still be timely filed.

WE WILL rescind the requirement that employees enter into or sign the MAAs that are currently in effect, or sign acknowledgements relating to them, as a condition of employment, and expunge all such agreements and acknowledgements at all of the Respondent's facilities where the Respondent has required employees to sign such agreements or acknowledgements.

WE WILL rescind or revise the MAAs to make it clear that the agreements do not constitute a waiver of the employees' right to initiate or maintain employment-related collective or class actions in arbitrations and in the courts.

WE WILL notify employees that the MAAs have been so rescinded or revised, and provide them with any revised agreement.

SF MARKETS, LLC D/B/A SPROUTS FARMERS MARKET

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-60800

MURPHY OIL USA, INCORPORATED,
PETITIONER/CROSS-RESPONDENT

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT/CROSS-PETITIONER

Oct. 26, 2015

On Petitions for Review of an Order of the
National Labor Relations Board

Before: JONES, SMITH, and SOUTHWICK, Circuit Judges.

LESLIE H. SOUTHWICK, Circuit Judge:

The National Labor Relations Board concluded that Murphy Oil USA, Inc., had unlawfully required employees at its Alabama facility to sign an arbitration agreement waiving their right to pursue class and collective actions. Murphy Oil, aware that this circuit had already held to the contrary, used the broad venue rights governing the review of Board orders to file its petition with this circuit. The Board, also aware, moved for en banc review in order to allow arguments that the prior decision should be overturned. Having failed in that motion

and having the case instead heard by a three-judge panel, the Board will not be surprised that we adhere, as we must, to our prior ruling. We GRANT Murphy Oil's petition, and hold that the corporation did not commit unfair labor practices by requiring employees to sign its arbitration agreement or seeking to enforce that agreement in federal district court.

We DENY Murphy Oil's petition insofar as the Board's order directed the corporation to clarify language in its arbitration agreement applicable to employees hired prior to March 2012 to ensure they understand they are not barred from filing charges with the Board.

FACTS AND PROCEDURAL BACKGROUND

Murphy Oil USA, Inc., operates retail gas stations in several states. Sheila Hobson, the charging party, began working for Murphy Oil at its Calera, Alabama facility in November 2008. She signed a "Binding Arbitration Agreement and Waiver of Jury Trial" (the "Arbitration Agreement"). The Arbitration Agreement provides that, "[e]xcluding claims which must, by . . . law, be resolved in other forums, [Murphy Oil] and Individual agree to resolve any and all disputes or claims . . . which relate . . . to Individual's employment . . . by binding arbitration." The Arbitration Agreement further requires employees to waive the right to pursue class or collective claims in an arbitral or judicial forum.

In June 2010, Hobson and three other employees filed a collective action against Murphy Oil in the United States District Court for the Northern District of Alabama alleging violations of the Fair Labor Standards Act ("FLSA"). Murphy Oil moved to dismiss the collective action and compel individual arbitration pursuant to the

Arbitration Agreement. The employees opposed the motion, contending that the FLSA prevented enforcement of the Arbitration Agreement because that statute grants a substantive right to collective action that cannot be waived. The employees also argued that the Arbitration Agreement interfered with their right under the National Labor Relations Act ("NLRA") to engage in Section 7 protected concerted activity.

While Murphy Oil's motion to dismiss was pending, Hobson filed an unfair labor charge with the Board in January 2011 based on the claim that the Arbitration Agreement interfered with her Section 7 rights under the NLRA. The General Counsel for the Board issued a complaint and notice of hearing to Murphy Oil in March 2011.

In a separate case of first impression, the Board held in January 2012 that an employer violates Section 8(a)(1) of the NLRA by requiring employees to sign an arbitration agreement waiving their right to pursue class and collective claims in all forums. *D.R. Horton, Inc.,* 357 N.L.R.B. 184 (2012). The Board concluded that such agreements restrict employees' Section 7 right to engage in protected concerted activity in violation of Section 8(a)(1). *Id.* The Board also held that employees could reasonably construe the language in the *D.R. Horton* arbitration agreement to preclude employees from filing an unfair labor practice charge, which also violates Section 8(a)(1). *Id.* at *2, *18.

Following the Board's decision in *D.R. Horton,* Murphy Oil implemented a "Revised Arbitration Agreement" for all employees hired after March 2012. The revision provided that employees were not barred from "participating in proceedings to adjudicate unfair labor practice[]

charges before the" Board. Because Hobson and the other employees involved in the Alabama lawsuit were hired before March 2012, the revision did not apply to them.

In September 2012, the Alabama district court stayed the FLSA collective action and compelled the employees to submit their claims to arbitration pursuant to the Arbitration Agreement.[1] One month later, the General Counsel amended the complaint before the Board stemming from Hobson's charge to allege that Murphy Oil's motion to dismiss and compel arbitration in the Alabama lawsuit violated Section 8(a)(1) of the NLRA.

Meanwhile, the petition for review of the Board's decision in *D.R. Horton* was making its way to this court. In December 2013, we rejected the Board's analysis of arbitration agreements. *D.R. Horton, Inc. v. NLRB,* 737 F.3d 344 (5th Cir. 2013). We held: (1) the NLRA does not contain a "congressional command overriding" the Federal Arbitration Act ("FAA");[2] and (2) "use of class action procedures . . . is not a substantive right" under Section 7 of the NLRA. *Id.* at 357, 360-

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[1] The employees never submitted their claims to arbitration. In February 2015, the employees moved for reconsideration of the Alabama district court's order compelling arbitration. The district court denied their motion and ordered the employees to show cause why their case should not be dismissed with prejudice for failing to adhere to the court's order compelling arbitration. The district court ultimately dismissed the case with prejudice for "willful disregard" of its instructions in order to "gain [a] strategic advantage." *Hobson v. Murphy Oil USA, Inc.,* No. CV-10-S-1486-S, 2015 WL 4111661, at *3 (N.D. Ala. July 8, 2015), *appeal docketed,* No. 15-13507 (11th Cir. Aug. 5, 2015). The employees timely appealed. The case is pending before the Eleventh Circuit.

[2] 9 U.S.C. § 1 *et seq.*

62. This holding means an employer does not engage in unfair labor practices by maintaining and enforcing an arbitration agreement prohibiting employee class or collective actions and requiring employment-related claims to be resolved through individual arbitration. *Id.* at 362.

In analyzing the specific arbitration agreement at issue in *D.R. Horton,* however, we held that its language could be "misconstrued" as prohibiting employees from filing an unfair labor practice charge, which would violate Section 8(a)(1). *Id.* at 364. We enforced the Board's order requiring the employer to clarify the agreement. *Id.* The Board petitioned for rehearing en banc, which was denied without a poll in April 2014.

The Board's decision as to Murphy Oil was issued in October 2014, ten months after our initial *D.R. Horton* decision and six months after rehearing was denied. The Board, unpersuaded by our analysis, reaffirmed its *D.R. Horton* decision. It held that Murphy Oil violated Section 8(a)(1) by "requiring its employees to agree to resolve all employment-related claims through individual arbitration, and by taking steps to enforce the unlawful agreements in [f]ederal district court." The Board also held that both the Arbitration Agreement and Revised Arbitration Agreement were unlawful because employees would reasonably construe them to prohibit filing Board charges.

The Board ordered numerous remedies. Murphy Oil was required to rescind or revise the Arbitration and Revised Arbitration agreements, send notification of the rescission or revision to signatories and to the Alabama district court, post a notice regarding the violation at its facilities, reimburse the employees' attorneys' fees in-

curred in opposing the company's motion to dismiss and compel arbitration in the Alabama litigation, and file a sworn declaration outlining the steps it had taken to comply with the Board order.

Murphy Oil timely petitioned this court for review of the Board decision.

DISCUSSION

Board decisions that are "reasonable and supported by substantial evidence on the record considered as a whole" are upheld. *Strand Theatre of Shreveport Corp. v. NLRB,* 493 F.3d 515, 518 (5th Cir. 2007) (citation and quotation marks omitted); *see also* 29 U.S.C. § 160(e). "Substantial evidence is such relevant evidence as a reasonable mind would accept to support a conclusion." *J. Vallery Elec., Inc. v. NLRB,* 337 F.3d 446, 450 (5th Cir. 2003) (citation and quotation marks omitted). This court reviews the Board's legal conclusions *de novo,* but "[w]e will enforce the Board's order if its construction of the statute is reasonably defensible." *Strand Theatre,* 493 F.3d at 518 (citation and quotation marks omitted).

I. Statute of Limitations and Collateral Estoppel

Murphy Oil asserts that Hobson filed her charge too late after the execution of the Arbitration Agreement and the submission of Murphy Oil's motion to compel in the Alabama litigation. By statute, "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." 29 U.S.C. § 160(b). Murphy Oil also contends that the Board is collaterally estopped from considering whether it was lawful to enforce the Arbitration Agreement because the district court had already decided that issue in the Alabama litigation.

Both of these arguments were raised in Murphy Oil's answer to the Board's complaint. They were not, though, discussed in its brief before the Board. "No objection that has not been urged before the Board . . . shall be considered by the court. . . ." 29 U.S.C. § 160(e), (f). Similarly, we have held that "[a]ppellate preservation principles apply equally to petitions for enforcement or review of NLRB decisions." *NLRB v. Catalytic Indus. Maint. Co. (CIMCO),* 964 F.2d 513, 521 (5th Cir. 1992). While Murphy Oil may have properly pled its statute of limitations and collateral estoppel defenses, it did not sufficiently press those arguments before the Board. Thus, they are waived. *See* 29 U.S.C. § 160(e), (f).

II. D.R. Horton *and Board Nonacquiescence*

The Board, reaffirming its *D.R. Horton* analysis, held that Murphy Oil violated Section 8(a)(1) of the NLRA by enforcing agreements that "requir[ed] . . . employees to agree to resolve all employment-related claims through individual arbitration." In doing so, of course, the Board disregarded this court's contrary *D.R. Horton* ruling that such arbitration agreements are enforceable and not unlawful. *D.R. Horton,* 737 F.3d at 362.[3] Our

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[3] Several of our sister circuits have either indicated or expressly stated that they would agree with our holding in *D.R. Horton* if faced with the same question: whether an employer's maintenance and enforcement of a class or collective action waiver in an arbitration agreement violates the NLRA. *See Walthour v. Chipio Windshield Repair, LLC,* 745 F.3d 1326, 1336 (11th Cir. 2014), *cert. denied,* — U.S. —, 134 S. Ct. 2886, 189 L. Ed. 2d 836 (2014); *Richards v. Ernst & Young, LLP,* 744 F.3d 1072, 1075 n.3 (9th Cir. 2013), *cert. denied,* — U.S. —, 135 S. Ct. 355, 190 L. Ed. 2d 249 (2014); *Owen v. Bristol Care, Inc.,* 702 F.3d 1050, 1053-55 (8th Cir.

decision was issued not quite two years ago; we will not repeat its analysis here. Murphy Oil committed no unfair labor practice by requiring employees to relinquish their right to pursue class or collective claims in all forums by signing the arbitration agreements at issue here. *See id.*

Murphy Oil argues that the Board's explicit "defiance" of *D.R. Horton* warrants issuing a writ or holding the Board in contempt so as to "restrain [it] from continuing its nonacquiescence practice with respect to this [c]ourt's directive." The Board, as far as we know, has not failed to apply our ruling in *D.R. Horton* to the parties in that case. The concern here is the application of *D.R. Horton* to new parties and agreements.

An administrative agency's need to acquiesce to an earlier circuit court decision when deciding similar issues in later cases will be affected by whether the new decision will be reviewed in that same circuit. *See* Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 735-43 (1989). Murphy Oil could have sought review in (1) the circuit where the unfair labor practice allegedly took place, (2) any circuit in which Murphy Oil transacts business, or (3) the United States Court of Appeals for the District of Columbia. 29 U.S.C. § 160(f). The Board may well not know which circuit's law will be applied on a petition for review. We do not celebrate the Board's failure to follow our *D.R. Horton* reasoning, but neither do we condemn its nonacquiescence.

2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013).

III. The Agreements and NLRA Section 8(a)(1)

The Board also held that Murphy Oil's enforcement of the Arbitration Agreement and Revised Arbitration Agreement violated Section 8(a)(1) of the NLRA because employees could reasonably believe the contracts precluded the filing of Board charges. Hobson and the other employees involved in the Alabama litigation were subject to the Arbitration Agreement applicable to employees hired before March 2012. The Revised Arbitration Agreement contains language that sought to correct the possible ambiguity.

A. The Arbitration Agreement in Effect Before March 2012

Section 8(a) of the NLRA makes it unlawful for an employer to commit unfair labor practices. 29 U.S.C. § 158(a). For example, an employer is prohibited from interfering with employees' exercise of their Section 7 rights. *Id.* § 158(a)(1). Under Section 7, employees have the right to self-organize and "engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." *Id.* § 157.

The Board is empowered to prevent unfair labor practices. This power cannot be limited by an agreement between employees and the employer. *See id.* § 160(a). "Wherever private contracts conflict with [the Board's] functions, they . . . must yield or the [NLRA] would be reduced to a futility." *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337, 64 S. Ct. 576, 88 L. Ed. 762 (1944). Accordingly, as we held in *D.R. Horton*, an arbitration agreement violates the NLRA if employees would reasonably construe it as prohibiting filing unfair labor practice charges with the Board. 737 F.3d at 363.

Murphy Oil argues that Hobson's choice to file a charge with the Board proves that the pre-March 2012 Arbitration Agreement did not state or suggest such charges could not be filed. The argument misconstrues the question. "[T]he actual practice of employees is not determinative" of whether an employer has committed an unfair labor practice. *See Flex Frac Logistics, L.L.C. v. NLRB,* 746 F.3d 205, 209 (5th Cir. 2014). The Board has said that the test is whether the employer action is "likely to have a chilling effect" on employees' exercise of their rights. *Id.* (citing *Lafayette Park Hotel,* 326 N.L.R.B. 824, 825 (1998)). The possibility that employees will misunderstand their rights was a reason we upheld the Board's rejection of a similar provision of the arbitration agreement in *D.R. Horton.* We explained that the FAA and NLRA have "equal importance in our review" of employment arbitration contracts. *D.R. Horton,* 737 F.3d. at 357. We held that even though requiring arbitration of class or collective claims in all forums does not "deny a party any statutory right," an agreement reasonably interpreted as prohibiting the filing of unfair labor charges would unlawfully deny employees their rights under the NLRA. *Id.* at 357-58, 363-64.

Murphy Oil's Arbitration Agreement provided that "any and all disputes or claims [employees] may have . . . which relate in any manner . . . to . . . employment" must be resolved by individual arbitration. Signatories further "waive their right to . . . be a party to any group, class or collective action claim in . . . any other forum." The problem is that broad "any claims" language can create "[t]he reasonable impression . . . that an employee is waiving not just [her] trial rights, but [her] administrative rights as well."

D.R. Horton, 737 F.3d at 363-64 (citing *Bill's Electric, Inc.,* 350 N.L.R.B. 292, 295-96 (2007)).

We do not hold that an express statement must be made that an employee's right to file Board charges remains intact before an employment arbitration agreement is lawful. Such a provision would assist, though, if incompatible or confusing language appears in the contract. *See id.* at 364.

We conclude that the Arbitration Agreement in effect for employees hired before March 2012, including Hobson and the others involved in the Alabama case, violates the NLRA. The Board's order that Murphy Oil take corrective action as to any employees that remain subject to that version of the contract is valid.

B. The Revised Arbitration Agreement in Effect After March 2012

In March 2012, following the Board's decision in *D.R. Horton,* Murphy Oil added the following clause in the Revised Arbitration Agreement: "[N]othing in this Agreement precludes [employees] . . . from participating in proceedings to adjudicate unfair labor practice[] charges before the [Board]." The Board contends that Murphy Oil's modification is also unlawful because it "leaves intact the entirety of the original Agreement" including employees' waiver of their right "to commence or be a party to any group, class or collective action claim in . . . any other forum." This provision, the Board said, could be reasonably interpreted as prohibiting employees from pursuing an administrative remedy "since such a claim could be construed as having 'commence[d]' a class action in the event that the [Board] decides to seek classwide relief."

We disagree with the Board. Reading the Murphy Oil contract as a whole, it would be unreasonable for an employee to construe the Revised Arbitration Agreement as prohibiting the filing of Board charges when the agreement says the opposite. The other clauses of the agreement do not negate that language. We decline to enforce the Board's order as to the Revised Arbitration Agreement.

IV. Murphy Oil's Motion to Dismiss and NLRA Section 8(a)(1)

Finally, the Board held that Murphy Oil violated Section 8(a)(1) by filing its motion to dismiss and compel arbitration in the Alabama litigation. As noted above, Section 8(a) prohibits employers from engaging in unfair labor practices. 29 U.S.C. § 158(a). Section 8(a)(1) provides that an employer commits an unfair labor practice by "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise" of their Section 7 rights, including engaging in protected concerted activity. *Id.* §§ 157, 158(a)(1).

The Board said that in filing its dispositive motion and "eight separate court pleadings and related [documents] . . . between September 2010 and February 2012," Murphy Oil "acted with an illegal objective [in]. . . . 'seeking to enforce an unlawful contract provision'" that would chill employees' Section 7 rights, and awarded attorneys' fees and expenses incurred in "opposing the . . . unlawful motion." We disagree and decline to enforce the fees award.

The Board rooted its analysis in part in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 103 S. Ct. 2161, 76 L. Ed. 2d 277 (1983). That decision discussed the balance between an employer's First Amend-

ment right to litigate and an employee's Section 7 right to engage in concerted activity. In that case, a waitress filed a charge with the Board after a restaurant terminated her employment; she believed she was fired because she attempted to organize a union. *Id.* at 733, 103 S. Ct. 2161. After the Board's General Counsel issued a complaint, the waitress and several others picketed the restaurant, handing out leaflets and asking customers to boycott eating there. *Id.* In response, the restaurant filed a lawsuit in state court against the demonstrators alleging that they had blocked access to the restaurant, created a threat to public safety, and made libelous statements about the business and its management. *Id.* at 734, 103 S. Ct. 2161. The waitress filed a second charge with the Board alleging that the restaurant initiated the civil suit in retaliation for employees' engaging in Section 7 protected concerted activity, which violated Section 8(a)(1) and (4) of the NLRA. *Id.* at 734-35, 103 S. Ct. 2161.

The Board held that the restaurant's lawsuit constituted an unfair labor practice because it was filed for the purpose of discouraging employees from seeking relief with the Board. *Id.* at 735-37, 103 S. Ct. 2161. The Supreme Court remanded the case for further consideration, stating: "The right to litigate is an important one," but it can be "used by an employer as a powerful instrument of coercion or retaliation." *Id.* at 740, 744, 103 S. Ct. 2161. To be enjoinable, the Court said the lawsuit prosecuted by the employer must (1) be "baseless" or "lack[ing] a reasonable basis in fact or law," and be filed "with the intent of retaliating against an employee for the exercise of rights protected by" Section 7, or (2) have "an objective that is illegal under federal law." *Id.* at 737 n.5, 744, 748, 103 S. Ct. 2161.

We start by distinguishing this dispute from that in *Bill Johnson's.* The current controversy began when three Murphy Oil employees filed suit in Alabama. Murphy Oil defended itself against the employees' claims by seeking to enforce the Arbitration Agreement. Murphy Oil was not retaliating as Bill Johnson's may have been. Moreover, the Board's holding is based solely on Murphy Oil's enforcement of an agreement that the Board deemed unlawful because it required employees to individually arbitrate employment-related disputes. Our decision in *D.R. Horton* forecloses that argument in this circuit. 737 F.3d at 362. Though the Board might not need to acquiesce in our decisions, it is a bit bold for it to hold that an employer who followed the reasoning of our *D.R. Horton* decision had no basis in fact or law or an "illegal objective" in doing so. The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders.

Moreover, the timing of Murphy Oil's motion to dismiss when compared to the timing of the *D.R. Horton* decisions counsels against finding a violation of Section 8(a)(1). The relevant timeline of events is as follows:

(1) July 2010: Murphy Oil filed its motion to dismiss and sought to compel arbitration in the Alabama litigation;

(2) January 2012: the Board in *D.R. Horton* held it to be unlawful to require employees to arbitrate employment-related claims individually, and the D.R. Horton agreement violated the NLRA because it could be reasonably construed as prohibiting the filing of Board charges;

(3) October 2012: the Board's General Counsel amended the complaint against Murphy Oil to allege that Murphy Oil's motion in the Alabama litigation violated Section 8(a)(1); and

(4) December 2013: this court granted D.R. Horton's petition for review of the Board's order and held that agreements requiring individual arbitration of employment-related claims are lawful but that the specific agreement was unlawful because it could be reasonably interpreted as prohibiting the filing of Board charges.

In summary, Murphy Oil's motion was filed a year and a half before the Board had even spoken on the lawfulness of such agreements in light of the NLRA. This court later held that such agreements were generally lawful. Murphy Oil had at least a colorable argument that the Arbitration Agreement was valid when its defensive motion was made, as its response to the lawsuit was not "lack[ing] a reasonable basis in fact or law," and was not filed with an illegal objective under federal law. *See Bill Johnson's,* 461 U.S. at 737 n.5, 744, 748, 103 S. Ct. 2161. Murphy Oil's motion to dismiss and compel arbitration did not constitute an unfair labor practice because it was not "baseless." We decline to enforce the Board's order awarding attorneys' fees and expenses.

* * *

The Board's order that Section 8(a)(1) has been violated because an employee would reasonably interpret the Arbitration Agreement in effect for employees hired before March 2012 as prohibiting the filing of an unfair labor practice charge is ENFORCED. Murphy Oil's petition for review of the Board's decision is otherwise GRANTED.

APPENDIX D

1. 9 U.S.C. 2 provides:

Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

2. 29 U.S.C. 151 provides:

Findings and declaration of policy

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the

market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

3. 29 U.S.C. 157 provides:

Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

4. 29 U.S.C. 158(a)(1) provides:

Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;