UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

THE NEIMAN MARCUS GROUP LLC,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

U.S. COURT OF APPEALS
RECEIVED
AUG 12 2015
FIFTH CIRCUIT

PETITION FOR REVIEW

Pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure, The Neiman Marcus Group LLC[1] (herein "Petitioner"), hereby petitions the United States Court of Appeals of the Fifth Circuit for review of an Order of the National Labor Relations Board (herein "Respondent" or "NLRB") in the matter styled The Neiman Marcus Group, Inc. and Sheila Monjazeb, NLRB Case No. 31-CA-074295, reported in an Order at 362 NLRB No. 157, dated August 4, 2015. See Attachment "A." This Court has jurisdiction in this matter pursuant to Section 10(f) of the National Labor Relations Act because the NLRB's "Decision and Order" is a final order. 29 U.S.C. § 160(f). Petitioner is a party aggrieved by said Decision and Order. Petitioner transacts business within this judicial circuit, as defined in 28 U.S.C. § 41, by operating retail stores in Texas.

[1] During the pendency of the action before the NLRB, Petitioner changed its name to The Neiman Marcus Group LLC.

The NLRB's Decision and Order against the Petitioner is not supported by substantial evidence and is contrary to law.

WHEREFORE, Petitioner respectfully prays that this Court review and set aside the Order of the NLRB (which found that Petitioner violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §158(a)(1)) and grant Petitioner any further relief to which it may be entitled.

Respectfully submitted,

By: _____

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ATTORNEYS FOR PETITIONER
THE NEIMAN MARCUS GROUP
LLC

UNITED STATES COURT OF APPEALS
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Respondent

CERTIFICATE OF SERVICE

I certify that the foregoing Petition for Review was served via Federal Express overnight mail on August 12, 2015, to the following:

Richard F. Griffin, Jr. General Counsel
Jennifer Abruzzo, Deputy General Counsel
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570

By: _____
Daniel D. Schudroff, Esq.

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

The Neiman Marcus Group, Inc. ***and*** **Sheila Monjazeb.** Case 31–CA–074295

August 4, 2015

DECISION AND ORDER

BY MEMBERS HIROZAWA, JOHNSON, AND MCFERRAN

On February 6, 2014, Administrative Law Judge Eleanor Laws issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

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

The judge found that the Respondent violated Section 8(a)(1) of the Act by maintaining a mandatory and binding arbitration program (MAP) that employees reasonably would believe bars or restricts their rights to file charges with the Board.[3] Applying the Board's decision in *D. R. Horton*, 357 NLRB No. 184 (2012), enf. denied in relevant part, 737 F.3d 344 (5th Cir. 2013), the judge also found that the Respondent violated Section 8(a)(1) by maintaining and enforcing the MAP because it requires employees, as a condition of employment, to waive their rights to pursue class or collective actions in employment-related claims in all forums, whether arbitral or judicial.

In *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), 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 findings and conclusions,[4] and

[1] The Respondent's exceptions that the Board, General Counsel, Regional Director of Region 31, and the Administrative Law Judge acted without authority in this case because the Board lacked a valid quorum when the complaint issued are without merit. See *Benjamin H. Realty Corp.*, 361 NLRB No. 103 (2014); *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10, slip op. at 1 fn. 1 (2014); *Barstow Community Hospital*, 31–CA–129445 (2015) (Regional Director for Region 31), citing *Pallet Companies, Inc.*, 361 NLRB No. 33, slip op. at 1–2 (2014).

In adopting the judge, we do not rely on *J. A. Croson Co.*, 359 NLRB No. 2 (2012) or *Bloomingdale's Inc.*, 359 NLRB No. 113 (2013), cited by the judge.

[2] We have modified the judge's recommended Order and substituted a new notice to conform to the Board's standard remedial language.

[3] Pursuant to longstanding Board precedent, the Board will find that a policy on which employment is conditioned, such as the MAP in this case, violates Sec. 8(a)(1) if employees would reasonably believe the policy interferes with their ability to file a Board charge or access to the Board's processes, even if the policy does not expressly prohibit access to the Board. See *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), slip op. at 13, 19 fn. 98, 39 fn. 15; *D. R. Horton*, 357 NLRB No. 184, slip op. at 2 fn. 2, 4 (2012), enfd. in relevant part, 737 F.3d 344 (5th Cir. 2013); *U-Haul Co. of California*, 347 NLRB 375, 377–378 (2006), enfd. 255 Fed.Appx. 527 (D.C. Cir. 2007); *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Here, the judge found that the MAP consisted of: (a) a mandatory arbitration agreement and mandatory arbitration agreement acknowledgement form requiring employees to individually arbitrate employment-related disputes; (b) a resolutions plan and a resolutions plan acknowledgement form requiring all employment-related disputes to be submitted to individual binding arbitration; and (c) an associate handbook and associate handbook acknowledgement form requiring all employment-related disputes to be submitted to individual binding arbitration. The judge found that the Respondent enforced the MAP by: (a) requiring the Charging Party job applicant to agree to the mandatory arbitration agreement, resolutions plan, and associate handbook; and (b) asserting the MAP in litigation that the Charging Party brought against the Respondent. We affirm the judge's conclusion that the Respondent's maintenance of the MAP violated Sec. 8(a)(1) for the reasons the judge stated, but base our finding that the Respondent unlawfully enforced the MAP solely on its efforts to compel individual arbitration of the Charging Party's wage-and-hour claims in its filings with the California Superior Court and the American Arbitration Association, which occurred within the 10(b) period.

[4] We reject the Respondent's assertion that the judge incorrectly concluded that the MAP violated Sec. 8(a)(1) because it would cause employees to reasonably believe that they would need to arbitrate employment-related claims rather than file charges with the Board. Although one page of the MAP, separate from the arbitration agreement itself, contains a statement that the agreement does not "keep you from filing a charge or complaint" with a government agency such as the Board, the judge found that other statements in the agreement and MAP documents encompassed by the complaint would lead employees to believe that claims covered by the MAP include matters within the Board's jurisdiction. Thus, she concluded that employees would reasonably construe the policy to restrict their access to the Board. The Respondent does not except to the judge's analysis, which we adopt in the absence of argument. Rather, the Respondent argues that the judge erred by basing her unfair labor practice findings on the arbitration agreement as it existed before its revision pursuant to a May 2010 settlement in Case 20–CA–33510, instead of analyzing what the Respondent contends is the agreement's current, revised form. Because the Respondent continued to maintain and admittedly enforce that presettlement agreement, at least against the Charging Party, we reject this argument. Thus, we find no merit in the Respondent's exception to the judge's finding that employees would reasonably believe that they were required to arbitrate NLRA-related claims. The Respondent also contends in its exceptions that this allegation was not specifically pleaded in the complaint, but it offers no argument contesting the judge's finding that the allegation was properly before her and fully litigated. We agree with the judge. We also note that the allegation is clearly encompassed by the complaint allegation that the MAP requires that "all employment-related disputes" be submitted to arbitration. Further, the complaint seeks a remedial order requiring the Respondent to cease and desist from maintaining or enforcing an arbitration agreement that employees reasonably could believe restricts their right to file Board charges. Finally, in the parties' joint motion, the Respondent stipulated to the statement of issues, which stated that "the central legal issue to be resolved" includes whether the MAP interferes with em-

Attachment "A"

adopt the recommended Order and notice, as modified and set forth in full below.[5]

As did the judge, we reject the Respondent's argument that the complaint is time-barred under Section 10(b) of the Act, assertedly because the initial unfair labor practice charge was filed and served more than 6 months after the Charging Party signed the MAP documents and more than 6 months after her employment with the Respondent ended. What matters, rather, is that the Respondent maintained and enforced the MAP with respect to the Charging Party during the Section 10(b) period. This time span includes, of course, the relevant 6-month period that preceded the filing of the charge on February 7, 2012, and its service on February 10, 2012. The Board has held repeatedly that the maintenance of an unlawful rule is a continuing violation, regardless of when the rule was promulgated.[6] It is equally well established that an employer's enforcement of an unlawful rule, including a mandatory arbitration policy like the one at issue here, independently violates Section 8(a)(1).[7] The complaint was timely in this respect, as well.

Finally, we decline to reconsider our December 20, 2013 Order denying the Respondent's motion to dismiss the complaint due to settlement bar and estoppel. The Respondent argues that the May 2010 settlement agreement reached in Case 20–CA–33510, which resulted in the Respondent revising several of the documents of its MAP, estops the General Counsel from pursuing the instant complaint. Essentially, the Respondent contends that any alleged violations regarding the presettlement version of the policy were settled, and the revised agreement was approved by the then-General Counsel. The Respondent nonetheless contends that the presettlement agreement remains binding on the Charging Party because it is the one she agreed to as a condition of employment, and she had left the company before the policy was revised. Consistent with that position, beginning in August 2011—more than a year after entering the settlement agreement and revising the arbitration program pursuant to the settlement—the Respondent enforced the original, *presettlement* arbitration program against the Charging Party by moving to compel individual arbitration in filings with the California Superior Court (and later the American Arbitration Association) in response to the Charging Party's class-action wage-and-hour complaint

The Respondent's argument is meritless. The Board has long held that "a settlement agreement disposes of all issues involving presettlement conduct unless prior violations of the Act were unknown to the General Counsel, not readily discoverable by investigation, or specifically reserved from the settlement by the mutual understanding of the parties." *Hollywood Roosevelt Hotel Co.*, 235 NLRB 1397, 1397 (1978). The instant complaint does

ployees' Sec. 7 rights "because several of the program's documents interfere with employees' access to the Board and its processes."

For the reasons set forth in detail in his dissent in *Murphy Oil*, supra, slip op. at 35–58, Member Johnson would not find that the Respondent's maintenance or enforcement of the arbitration agreement violates the Act insofar as it prevents employees from pursuing class and other collective actions. Because he does not find these violations, Member Johnson finds it unnecessary to consider here whether or under what circumstances the remedies related to the enforcement violation would be appropriate. See *Murphy Oil*, supra, slip op. at 39 fn. 15 (Member Johnson, dissenting); see generally *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002). Because he finds no merit to this allegation, he does not reach the Respondent's related argument that the Charging Party was not engaged in concerted activity when, as an individual plaintiff, she brought a collective wage-and-hour complaint in the California Superior Court and collective demand for arbitration with the American Arbitration Association. Nor does he pass on whether the enforcement violation was timely raised, or on his colleagues' broad assertion about the enforcement of unlawful rules in general.

[5] Consistent with our decision in *Murphy Oil*, we amend the judge's remedy and shall order the Respondent to reimburse the Charging Party for all reasonable expenses and legal fees, with interest, incurred in opposing the Respondent's unlawful motion to compel individual arbitration in the collective wage-and-hour litigation and collective demand for arbitration. Id. at 21; 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 also amend the judge's remedy to order the Respondent to notify the California Superior Court that it has rescinded or revised the MAP and to inform the court that it no longer opposes the plaintiff's claims on the basis of the arbitration agreement.

[6] See *Carney Hospital*, 350 NLRB 627, 627–628 (2007); *Eagle-Picher Industries*, 331 NLRB 169, 174 fn. 7 (2000); *Wire Products Mfg. Corp.*, 326 NLRB 625, 633 (1998), enfd. sub nom. *NLRB v. R. T. Blankenship & Associates, Inc.*, 210 F.3d 375 (7th Cir. 2000); see also *Murphy Oil*, supra, slip op. at 13 (the vice of maintaining a workplace rule that restricts Sec. 7 activity is that it reasonably tends to chill employees' exercise of their statutory rights); *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d. 52 (D.C. Cir. 1999) (same). Cf. *Teamsters Local 293 (Lipton Distributing)*, 311 NLRB 538, 539 (1993) (finding violation for maintenance of unlawful contractual provision executed outside 10(b) period).

[7] See *Murphy Oil*, supra, slip op. at 19–21 (citing *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16–17 (1962); *Republic Aviation Corp.*, 324 U.S. 793 (1945)); *Sahara Reno*, 262 NLRB 824, 824 fn. 2, 845 (1982), enfd. 722 F.2d 734 (3d Cir. 1983); *King Radio Corp.*, 166 NLRB 649, 649 fn. 2 (1966), enfd. 398 F.2d 14 (10th Cir. 1968). In adopting the judge's conclusion that the Respondent violated the Act by enforcing the MAP, we rely solely on the principle that the enforcement of an unlawful provision is, in itself, an independent violation of Sec. 8(a)(1).

not allege presettlement conduct, however. Nor is the postsettlement conduct alleged here grounded in a presettlement policy that would itself be settlement-barred from litigation as the Respondent claims, citing, e.g., *Ratliff Trucking Corp.*, 310 NLRB 1224 (1993). Rather, the current case involves postsettlement maintenance and enforcement of the presettlement version of the mandatory arbitration program signed by the Charging Party. The Respondent cannot claim that the revision and settlement extinguish its liability regarding the original arbitration program while still maintaining that the original mandatory arbitration documents remain binding on the Charging Party and similarly situated employees who signed only the original agreement.[8] Further, based on the exhibits in the record, it appears that the Respondent's 2010 revision of its arbitration program pursuant to the settlement was based on a legal analysis that the Board subsequently expressly disavowed in *D. R. Horton, Inc.*, above at slip op. at 6–7, and further clarified in *Murphy Oil,* decisions that are controlling here. Although the extent to which the Respondent's current policy may or may not comport with controlling law is not before us, nothing in the settlement or Board precedent exempts the Respondent, postsettlement, from a continuing obligation to comply with current law.[9]

ORDER

The National Labor Relations Board orders that the Respondent, The Neiman Marcus Group, Inc., Beverly Hills, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration program that employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board.

(b) Maintaining and/or enforcing a mandatory arbitration program 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) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

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

(a) Rescind the mandatory arbitration program in all of its forms, or revise it in all of its forms to make clear to employees that the arbitration program does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict employees' right to file charges with the National Labor Relations Board.

(b) Notify all current and former employees who were required to sign acknowledgements regarding the mandatory arbitration program in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised program.

(c) Notify the Superior Court of the State of California, San Francisco, in Case CGC–10–502877, that it has rescinded or revised the mandatory arbitration program upon which it based its motion to dismiss Sheila Monjazeb's collective action and to compel individual arbitration of her claim, and inform the court that it no longer opposes the action on the basis of the arbitration program.

(d) In the manner set forth in this decision, reimburse Sheila Monjazeb for any reasonable attorneys' fees and litigation expenses that she may have incurred in opposing the Respondent's motion to dismiss the wage claim and compel individual arbitration.

(e) Within 14 days after service by the Region, post at its Beverly Hills, California facility copies of the attached notice marked "Appendix A," and at all other facilities employing covered employees, copies of the attached notice marked "Appendix B."[10] Copies of the notice, on forms provided by the Regional Director for Region 31, 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 site, and/or other electronic means, if the Respondent customarily communicates with its employees by

[8] In addition, the settlement agreement includes standard settlement language stating that it:

> settles only the allegations in the above-captioned case(s), and does not constitute a settlement of any other case(s) or matters. It does not preclude persons from filing charges, the General Counsel from prosecuting complaints, or the Board and the courts from finding violations with respect to matters which precede the date of the approval of this Agreement regardless of whether such matters are known to the General Counsel or are readily discoverable.

See *B & K Builders*, 325 NLRB 693, 694 (1998) (finding identical language precluded settlement bar as to other presettlement conduct).

[9] Member Johnson adheres to his view in previously denying Respondent's motion to dismiss that if the Respondent's motion had been limited to the class-action waiver allegations in the complaint and its enforcement of the *revised* arbitration agreement, he would have granted the motion.

[10] 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."

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 August 3, 2011.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 31 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. August 4, 2015

Kent Y. Hirozawa, Member

Harry I. Johnson, III Member

Lauren McFerran, Member

(SEAL) 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 program that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT maintain and/or enforce a mandatory arbitration program 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 the mandatory arbitration program in all of its forms, or revise it in all of its forms to make clear that the arbitration program does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign acknowledgements regarding the mandatory arbitration program in all of its forms that the arbitration program has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised program.

WE WILL notify the court in which Sheila Monjazeb filed her collective wage claim that we have rescinded or revised the mandatory arbitration program upon which we based our motion to dismiss her collective wage claim and compel individual arbitration, and WE WILL inform the court that we no longer oppose Sheila Monjazeb's collective claim on the basis of that program.

WE WILL reimburse Sheila Monjazeb for any reasonable attorneys' fees and litigation expenses that she may have incurred in opposing our motion to dismiss her collective wage claim and compel individual arbitration.

THE NEIMAN MARCUS GROUP, INC.

The Board's decision can be found at www.nlrb.gov/case/31-CA-074295 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 program that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT maintain and/or enforce a mandatory arbitration program 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 the mandatory arbitration program in all of its forms, or revise it in all of its forms to make clear that the arbitration program does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign acknowledgements regarding the mandatory arbitration program in all of its forms that the arbitration program has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised program.

THE NEIMAN MARCUS GROUP, INC.

The Board's decision can be found at www.nlrb.gov/case/31-CA-074295 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.

Michelle Scannell, Esq., for the General Counsel.
David S. Bradshaw, Esq. (Jackson Lewis LLP), for the Respondent.
Raul Perez, Esq., Alexandria White, Esq. (Capstone Law, APC), for the Charging Party.

DECISION

STATEMENT OF THE CASE

ELEANOR LAWS, ADMINISTRATIVE LAW JUDGE. This is another case raising issues related to *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. granted in part and denied in part 737 F.3d 433 (5th Cir. 2013). It was tried based on a joint motion and stipulation of facts I approved on November 22, 2013. Sheila Monjazeb (Monjazeb or the Charging Party) filed the original charge on February 7, 2012, and an amended charge on April 4, 2012.[1] The General Counsel issued the complaint on November 30, 2012, and the Neiman Marcus Group (the Respondent, Company, or NMG) filed a timely answer denying all material allegations and setting forth affirmative defenses. On February 26, 2013, the Respondent filed a motion for judgment on the pleadings on timeliness grounds. This motion was referred to the National Labor Relations Board (the Board) on April 17, but no ruling has issued.[2] The Respondent filed a motion to dismiss on March 15, 2013, alleging the Board lacked a quorum when it issued the complaint. The Board denied this motion on May 10. The Respondent filed another motion to dismiss on June 14, 2013, asserting the General Counsel was "estopped, barred and/or otherwise foreclosed" from pursuing the instant matter based on the terms of a settlement agreement between the parties. The Board denied this motion on December 20, 2013.

On the entire record and after considering the briefs filed by the Acting General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and place of business in Beverly Hills, California, is engaged in retail sales of luxury clothing and other goods. The parties stipulate and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] All dates are in 2013 unless otherwise indicated.

[2] I denied the Respondent's motion to stay proceedings pending the Board's ruling on this motion and a motion to dismiss upon which the Board has since ruled. I will address the reasons for my ruling on the motion for judgment on the pleadings in the body of this decision.

II. ALLEGED UNFAIR LABOR PRACTICES

The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining and enforcing a mandatory arbitration program (MAP) consisting of: (1) a mandatory arbitration agreement and mandatory arbitration acknowledgment form requiring employees to individually arbitrate employment-related disputes; (2) a resolutions plan and a resolutions plan acknowledgment form requiring all employment-related disputes to be submitted to individual binding arbitration; and (3) an associate handbook and associate handbook acknowledgment form requiring all employment-related disputes to be submitted to individual binding arbitration. The complaint further asserts that the Respondent violated Section 8(a)(1) when it enforced its MAP by: (1) requiring the Charging Party to agree to the mandatory arbitration agreement, resolutions plan, and associate handbook; and (2) asserting the MAP in litigation the Charging Party brought against it.

III. BACKGROUND

A. The Application

On or about October 28, 2009, the Respondent required Monjazeb to agree to the terms set forth in its job application. Specifically, Monjazeb was required to agree to the following provision:

> I understand that if I accept or continue employment with NMG, I will automatically be deemed to have (1) accepted the terms of the mandatory Arbitration Agreement, (2) agreed to arbitrate such disputes, and (3) waived all rights to a judge or jury trial for all such disputes.

(Stip. at 4; GC Exh. 1(g) at Appx. A.)[3] Monjazeb was hired and worked as a sales associate at Neiman Marcus' Beverly Hills, California store from November 20, 2009, through May 10, 2010.

B. The Mandatory Arbitration Agreement

The Respondent has a mandatory arbitration agreement (Arbitration Agreement) that requires covered employees to submit most legal claims arising out of their employment to binding arbitration.[4] The agreement is more than 9 pages long and contains 23 numbered sections. (Stip. at 5, GC Exh. 1(g) at Appx. B.) Monjazeb was required to agree to the terms set forth in the Arbitration Agreement on November 23, 2009 (Stip. at 5, GC Exh. 1(g) at Appx. C.) Section 15 of the Arbitration Agreement precludes class and collective actions, stating:

> **Class Action Prohibition.** The arbitrator shall not consolidate claims of different employees into one (1) proceeding, nor shall the arbitrator have the authority to consider, certify, or hear an arbitration as a class action. While Section 22 hereof contains a severability clause, this provision that precludes class actions may not be severed from this Agreement for any reason.

(GC Exh. 1(g) at Appx. B.)

A separate page, not included as a section of the agreement, describes the Arbitration Agreement's scope, stating:

> THIS MANDATORY ARBITRATION AGREEMENT REQUIRES YOU TO SUBMIT ALL COMPLAINTS, DISPUTES, AND LEGAL CLAIMS ("DISPUTES") YOU HAVE AGAINST THE COMPANY, AND THE COMPANY TO SUBMIT ALL DISPUTES IT HAS AGAINST YOU, TO BINDING ARBITRATION. THE MANDATORY ARBITRATION AGREEMENT COVERS ALL DISPUTES, WHETHER THEY BE COMMON LAW, STATUTORY (SUCH AS STATE AND FEDERALDISCRIMINATION CLAIMS), OR OTHERWISE—IN SHORT ANY DISPUTE.
>
> THIS MANDATORY ARBITRATION AGREEMENTMEANS BOTH YOU AND THE COMPANY ARE WAIVING THE RIGHT TO A TRIAL BY JURY OR TO A TRIAL BEFORE A JUDGE IN A COURT OF LAW ON ALL DISPUTES. INSTEAD, ALL DISPUTES MUST BE SUBMITTED TO FINAL AND BINDING ARBITRATION.
>
> THIS AGREEMENT FOR MANDATORY ARBITRATION IS NOT OPTIONAL. IT IS MANDATORY AND A CONDITION AND TERM OF YOUR EMPLOYMENT. IF YOU ARE AN EMPLOYEE ON OR AFTER JULY 15, 2007, WHICH IS THE EFFECTIVE DATE OF THIS AGREEMENT (THE "EFFECTIVE DATE"), YOU ARE DEEMED TO HAVE ACCEPTED AND AGREED TO THE MANDATORY ARBITRATION GREEMENT BY COMING TO WORK AFTER THAT DATE. IF YOU ACCEPT EMPLOYMENT WITH TILE COMPANY AFTER THE EFFECTIVE DATE, YOU ARE DEEMED TO HAVE ACCEPTED AND AGREED TO THIS MANDATORY ARBITRATION AGREEMENT BY ACCEPTING A JOB AT THE COMPANY
>
> NOTHING IN THE MANDATORY ARBITRATION AGREEWNT KEEPS YOU FROM FILING A CHARGE OR COMPLAINT WITH THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, THE NATIONAL LABOR RELATIONS BOARD, OR LIKE STATE AGENCIES.

Id. [Emphasis in original.] Employees sign a separate form to acknowledge receipt and understanding of the Arbitration Agreement:

> By signing below, I acknowledge and affirm that:
>
> I have received and had an opportunity to review the NMG

[3] Abbreviations used in this decision are as follows: "Stip." for stipulated fact; "Jt. Exh." for joint exhibit; "GC Exh." for General Counsel's exhibit; "GC Br." for the General Counsel's brief; "R. Br." for the Respondents' brief. Although I have included several citations to the record to highlight particular exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited, but rather are based my review and consideration of the entire record.

[4] Employees who have signed separate employment agreements and employees who are covered by a collective-bargaining agreement are not covered by the Arbitration Agreement.

> Mandatory Arbitration Agreement (the "Arbitration Agreement");
>
> I understand that the Arbitration Agreement is an important legal document that requires me to submit all complaints, disputes, and legal claims ("Disputes") I have against the Company, and the Company to submit all Disputes it has against me, to binding arbitration;
>
> I understand that the Arbitration Agreement mans both I and the Company are waiving the right to a trial by jury or to a trial before a Judge in a court of law an[sic] all Disputes. Instead, all Disputes must be submitted to final and binding arbitration;

I understand that the Arbitration Agreement is not optional. Rather, it is mandatory and a condition and term of my employment if I am employed or continue employment on or after July 15, 2007.

(GC Exh. 1(g) at Appx. C.)

C. The Associate Handbook and NMG Resolutions

The Respondent's associate handbook requires employees to take employment disputes through its 4-step process referred to and trademarked as "NMG Resolutions™." Relevant here, the fourth and final step requires employees to submit to arbitration, in accordance with the Arbitration Agreement, any workplace dispute that has not been resolved internally or through mediation. (GC Exh. 1(g), Appx. D–E.) Monjazeb was required to agree to the terms in the handbook on November 23, 2009. The acknowledgment form states, in relevant part:

> I have received and had an opportunity to review The NMG Binding Arbitration Program, which sets forth the terms and conditions of NMO's binding arbitration plan which provides that arbitration is the exclusive means of resolving any and all disputes or claims I or the Company may have against each other, arising out of or connected in any way with my employment with NMG, in lieu of a judge or jury trial. The Company has advised me that if I accept or continue employment with the Company, I am deemed to have accepted the Binding Arbitration Program.

(GC Exh. 1(g), Appx. F.)

D. Monjazeb's Class Complaint

On August 20, 2010, Monjazeb filed a class action wage-and-hour complaint against the Respondent in the Superior Court of the State of California, San Francisco County, alleging violations of various California Labor Code provisions. (Jt. Exh. 1.) The Respondent filed an answer on October 12, 2010, and asserted as its eighth affirmative defense that Monjazeb was "subject to a written arbitration agreement requiring her to submit any employment-related dispute to final and binding arbitration."[5] (Jt. Exh. 2.)

On August 3, 2011, the Respondent filed a motion to compel arbitration or in the alternative to stay the class action. Monjazeb responded on August 19, 2011, with an opposition. The Respondent replied on August 25, and the parties then filed a slew of related motions with the Superior Court. On December 20, 2011, Superior Court Judge Richard A. Kramer issued an order dismissing Monjazeb's claims except those covered by the Private Attorney General's Act (PAGA), which were stayed pending outcome of the arbitration or further court order. (Jt. Exhs. 4–11.)

Monjazeb filed a demand for arbitration with the American Arbitration Association (AAA) on January 10, 2012. She filed an amended demand on January 18, to include a demand for class arbitration. (Jt. Exh. 12.) On February 5, the Respondent's attorney sent a letter to Lesley Barton, manager of ADR services at the AAA, stating that in accordance with paragraph 15 of the Agreement, it would not participate in class arbitration. (Jt. Exh. 13.) In response, Monjazeb sought to have her class action lawsuit reinstated in state court. The parties continued to file various motions, ultimately culminating in an October 30, 2012 order from Judge Kramer vacating the previous order compelling arbitration, based upon his finding that Arbitration Agreement was unconscionable under California law, and issuing a new order denying the Respondent's motion to compel arbitration. The Respondent appealed Judge Kramer's order on December 20, 2012. At the time of this decision the appeal was pending before the California Court of Appeal for the First Appellate District. (Jt. Exhs. 13A-28.)

IV. DECISION AND ANALYSIS

A. Mandatory Waiver of Class Action Claims

Under Section 8(a)(1) of the Act, it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. The rights guaranteed in Section 7 include the right "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 . . ."

The Board has held that activity is concerted if it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), revd. sub nom *Prill v. NLRB*, 755 F. 2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom *Prill v. NLRB*, 835 F. 2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Concerted activity also includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action" and where an individual employee brings "truly group complaints to management's attention." *Meyers II*, 281 NLRB at 887.

The Respondent asserts that as a putative class member, the Charging Party was not engaged in concerted activity. Established case law instructs otherwise. Section 7 "protects employees from retaliation by their employers when they seek to improve [their] working conditions through resort to administrative and judicial forums. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565–566 (1978); see also *D.R. Horton*, supra, slip op. at 3; see also *Standsco Oil & Royalty Co.*, 42 NLRB 942, 948–949 (1942); *United Parcel Service*, 252 NLRB 1015, 1018, 1022 fn.

[5] That same day, the Respondent filed an application with the state court for an order designating the case as complex. (Jt. Exh. 3.)

26 (1980), enfd. 677 F.2d 421 (6th Cir. 1982). Whether class member status existed is immaterial since the Act "protects employees who engage in individual action . . . with the objective of initiating or inducing group action." *Mushroom Transportation Co. v. NLRB*, 330 F.2d. 683, 685 (3d Cir. 1964). Even without class member status, Monjazeb's class action lawsuit sought to "enlist the support of fellow employees in mutual aid and protection" and intended to "initiat[e] or induc[e] group action" regarding alleged wage-and-hour violations against the Respondent. *Whitaker Corp.*, 289 NLRB 933 (1988). "Clearly, an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7." *D.R. Horton*, supra, slip op. at 3.[6] I therefore find Monjazeb was engaged in protected concerted activity when she filed and pursued her class action suit.

I find the MAP is a condition of employment, as employees and applicants must agree to its terms to be employed by the Respondent.[7] Accordingly, it is treated in the same manner as other unilaterally implemented workplace rule. When evaluating whether a rule, including a mandatory arbitration policy, violates Section 8(a)(1), the Board applies the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). See *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed.Appx. 527 (D.C. Cir. 2007); *D.R. Horton*, supra. Under *Lutheran Heritage*, the first inquiry is whether the rule explicitly restricts activities protected by Section 7. If it does, the rule is unlawful. If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage* at 647. Because the MAP explicitly prohibits employees from pursuing employment-related claims on a class or collective basis, I find it violates Section 8(a)(1). In addition, by moving to compel arbitration and refusing to arbitrate anything other than an individual claim, the Respondent has applied the MAP to restrict Section 7 rights.

The Respondent argues, based on the Supreme Court's reasoning in *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740, 1746 (2011), and other related case law,[8] that the Board in *D.R. Horton* erred by failing to follow the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1 et. seq. The Board, however, considered these arguments and precedents in *D.R. Horton* to support a different conclusion by which I am bound.[9]

Next, the Respondent argues that I should follow the reasoning of the Court of Appeals for the Fifth Circuit, which vacated the Board's *D.R. Horton* decision. *D.R. Horton, Inc. v. NLRB*, No. 12–60031 (5th Cir. Dec. 3, 2013). Because I am bound by Board precedent until it is either overturned by the Supreme Court or reversed by the Board itself, this argument fails.

Citing to the Supreme Court precedent discussed above, along with *American Express. Co. v. Italian Colors Restaurant*, 133 S.Ct. 2034 (2013), as well as lower court decisions repudiating *D.R. Horton*, the Respondent asserts that the instant complaint lacks merit. The Respondent requests that I follow the recent decision of Administrative Law Judge Bruce Rosenstein in *Chesapeake Energy Corporation*, No. 14-CA-100530 (November 8, 2013). This decision is not precedential, however, and to the extent it conflicts with the Board's case law, I am precluded from following it. The Respondent argues, and Judge Rosenstein found, that *American Express Co.* makes clear that it is improper to find a congressional command where none exists. *American Express Co.* involved a group of merchants who were unhappy with the rates American Express charged them to use their cards at their respective businesses. At issue before the Court was whether the merchants were bound by agreements mandating individual arbitration of these disputes and precluding a class action suit for violation of antitrust law. The merchants argued that without the ability to proceed collectively, it was not cost effective to challenge American Express' rates. The Court noted that the laws at issue, the Sherman and Clayton Acts, fail to reference class actions, and found that the "antitrust laws do not guarantee an affordable procedural path to the vindication of every claim." Id. at 2309. Though the NLRA likewise does not reference class or collective actions, the Board in *D.R. Horton* distinguished it from other statutes the Court has considered by finding that Section 7 substantively guarantees employees the right to engage in collective action, including collective legal action, for mutual aid and protection concerning wages, hours, and working conditions. As the Board stated, "the intent of the FAA was to leave substantive rights undisturbed." *D.R. Horton*, slip op. at 11. No such substantive statutory provision was asserted in *American Express Co.*, and therefore the decision is not sufficiently on point to warrant straying from Board precedent. See *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984); *Los Angeles New Hospital*, 244 NLRB 960, 962 fn. 4 (1979), enfd. 640 F2d 1017 (9th Cir. 1981).

The Respondent next contends that the remedies the General Counsel has requested create obstacles to the enforcement of the FAA, and because the FAA is preemptive, they must be denied. The Board has rejected this position regarding the rela-

[6] At fn. 5 in *D.R. Horton*, the Board, citing to court decisions, notes, "Employees surely understand what several Federal courts have recognized: that named plaintiffs run a greater risk of suffering unlawful retaliation than unnamed class members." As such, the Board observed that "in a quite literal sense, named-employee-plaintiffs protect the unnamed class members."

[7] The Respondent's asserted affirmative defense that the MAP was voluntary is discussed below.

[8] *AT&T Mobility LLC v.Concepcion*, supra; *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012); *Marmet Health Care Center. v. Brown*, 132 S.Ct. 1201 (2012); *Stolt-Nielsen S.A. v. Animal Feeds International Corp.*, 559 U.S. 662 (2010); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 119 (2001); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991); *Shearson/American Express v. McMahon*, 482 U.S. 220, 227 (1987); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983). Though a couple of the cases the Respondent cites were not specifically referenced in *D.R. Horton*, the principles for which they were cited were addressed.

[9] Though the *American Express Co.* decision came after *D.R. Horton*, I have addressed this below.

tionship between the FAA and the NLRA, as set forth in *D. R. Horton*, so I am unable to find merit to this defense as a general matter. More specifically, the Respondent incorporates its 10th, 11th, and 12th affirmative defenses to argue a lack of remedial power. I address these more specific arguments below.

In support of its 10th, 12th, and 13th affirmative defenses, the Respondent asserts that the Board lacks the authority to order reimbursement of litigation expenses for actions taken in court because this would interfere with the authority of the Superior Court in Monjazeb's pending civil case. I disagree, as the court is not determining whether the Respondent violated the Act by its actions in litigation. Monjazeb may lose her lawsuit alleging violations of the California Labor Code and therefore lose any entitlement for the court to order reimbursement attorney's fees as a remedy.[10] Win or lose, her class action lawsuit is still protected concerted activity under the Act. It is a matter of common sense that if collective and class legal actions are protected by the Act, any remedy imposed upon the Respondent for interfering with an active protected lawsuit is going to implicate another forum in some fashion. Such interference, be it by way of legal action or otherwise, is unlawful and requires a make whole remedy, including attorney's fees incurred in fighting the unlawful legal action. *J.A. Croson Co.*, 359 NLRB No. 2, slip op. at 10 (2012); See also *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 747 (1983). The fact that Monjazeb initiated the lawsuit does not, in my view, create a meaningful distinction. The Respondent by its actions in court is challenging Board case law which very clearly holds the MAP violates the Act. The motion to compel arbitration, which by virtue of the MAP can only be on an individual basis, is the crux of the challenge. Inherent in the challenge are risks, which the Respondent is assuming by declining to follow the Board's case law as it works its way through the system. In any event, the General Counsel's requested remedy of attorney's fees for defending against the motion to compel arbitration does not intrude upon the court's ability to determine the merits of Monjazeb's claims before it. Should Monjazeb prevail in court and be entitled to attorney's fees as a result of the Respondent's violations of State law, the California Superior Court judiciary is fully capable of applying California law to sort out the equities when devising its remedy.

The 11th affirmative defense asserts that the complaint is barred because it would require the Respondent to rescind the MAP with respect to all employees, including supervisors, mangers, and other employees not covered by the Act. The General Counsel contends that the complaint only seeks a remedy for employees as defined by the Act. Any remedial order will thus reflect the scope of the complaint the term "employee" will be construed in accordance with the Act.

The Respondent's 12th affirmative defense contends that the Board lacks jurisdiction to order the Respondent to take or abstain from taking action with regard to the Charging Party's civil action in state court. The law does not require the employer to permit class action civil lawsuits. Instead, *D.R. Horton* states that a forum for class or collective claims must be available. The MAP foreclosed both judicial and arbitral class action options, and therefore Monjazeb, in turn, attempted to pursue her class claims in each forum. Because the MAP is facially invalid and unlawful, a Board order requiring the Respondent to withdraw its opposition to Monjazeb's state court claim comports with established precedent. *Bill Johnson's Restaurants*, supra, fn. 5 (1983); *Loehmann's Plaza*, 305 NLRB 663, 671 (1991); *Federal Security, Inc.*, 336 NLRB 703 (2001), remanded on other grounds, 202 WL31234984 (D.C. Cir. 2002). I find, however that an order requiring the Respondent to withdraw its opposition to Monjazeb's class claim either in court or arbitration better aligns with the Board's decision in *D.R. Horton*.

The Respondent argues that *D.R. Horton* is void because the Board lacked a quorum when it issued the decision. This argument derives from the D.C. Circuit's decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), which the Board has rejected and so must I. See, e.g., *Bloomingdale's Inc.*, 359 NLRB No. 113 (2013). Moreover, the Board denied the Respondent's motion to dismiss based on alleged lack of quorum, and therefore any argument that this was erroneous is properly addressed to the Board. The Respondent further argues that the complaint is barred because individuals involved in prosecuting it were not properly appointed.

Next, the Respondent asserts that continued prosecution of this case violates its First Amendment rights to defend itself in the lawsuit the Charging Party initiated under *Bill Johnson's v. NLRB*, 461 U.S. 731, 741 (1983), and *BE&K Construction*, 536 U.S. 516 (2002). I find that instant case falls within the exception set forth in *Bill Johnson's* at footnote 5, which states in relevant part:

> It should be kept in mind that what is involved here is an employer's lawsuit that the federal law would not bar except for its allegedly retaliatory motivation. We are not dealing with a suit that is claimed to be beyond the jurisdiction of the state courts because of federal-law preemption, or a suit that has an objective that is illegal under federal law. Petitioner concedes that the Board may enjoin these latter types of suits. Brief of Petitioner 12-13, 20; Reply Brief for Petitioner 8. Nor could it be successfully argued otherwise, for we have upheld Board orders enjoining unions from prosecuting court suits for enforcement of fines that could not lawfully be imposed under the Act, see *Granite State Joint Board, Textile Workers Union*, 187 N.L.R.B. 636, 637 (1970), enforcement denied, 446 F.2d 369 (CA1 1971), rev'd, 409 U.S. 213, 93 S.Ct. 385, 34 L.Ed.2d 422 (1972); *Booster Lodge No. 405, Machinists & Aerospace Workers*, 185 N.L.R.B. 380, 383 (1970), enforced in relevant part, 148 U.S.App.D.C. 119, 459 F.2d 1143 (1972), aff'd, 412 U.S. 84, 93 S.Ct. 1961, 36 L.Ed.2d 764 (1973), and this Court has concluded that, at the Board's request, a District Court may enjoin enforcement of a state-court injunction "where [the Board's] federal power pre-

[10] I note that California Labor Code sec.218.5 authorizes attorney's fees for the prevailing party in " any action brought for the nonpayment of wages, fringe benefits, or health and welfare or pension fund contributions . . . if any party to the action requests attorney's fees and costs upon the initiation of the action." Sec. 1194(a) entitles employees who have been found to have received less than minimum wage or overtime compensation to attorney's fees, among other remedies.

empts the field." *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144, 92 S.Ct. 373, 377, 30 L.Ed.2d 328 (1971).

The Board has determined that these exceptions apply in the wake of *Bill Johnson's* and *BE&K Construction*. See, e.g., *Allied Trades Council (Duane Reade Inc.)*, 342 NLRB 1010, 1013 fn. 4 (2004); *Teamsters, Local 776 (Rite Aid Corp.)*, 305 NLRB 832, 835 (1991). Moreover, as the General Counsel notes, particular litigation tactics may fall within the exception even if the entire lawsuit may not be enjoined. *Wright Electric, Inc.*, 327 NLRB 1194, 1195 (1999), enfd. 200 F.3d 1162 (8th Cir. 2000); *Dilling Mechanical Contractors, Inc*, 357 NLRB No. 56 (2011). As such, since the Board has concluded in *D.R. Horton* that agreements such as those comprising the MAP explicitly restrict Section 7 activity, the Respondent's attempt to enforce the MAP in state court by moving to compel arbitration fall within the unlawful objective exception in *Bill Johnson's*.

The Respondent asserts that the proceedings before the Board must be stayed pending outcome of the state court civil action, relying on the Board's decision following remand in *Bill Johnson's*. *Bill Johnson's Restaurants*, 290 NLRB 29 (1988). The facts of that case, however, did not implicate the exception set forth above, as stated by Associate Chief Administrative Law Judge Gerald Etchingham in his order denying the Respondent's motion to stay. The Respondent further contends that the Board's complaint should be stayed because it seeks remedies inconsistent or incompatible with those of the San Francisco Superior Court in the Charging Party's wage-and-hour lawsuit. These arguments were not distinguished from the arguments in support of the *Bill Johnson's* defense asserted above, and are therefore unavailing.[11] (R. Br. pp. 17–21.)

The Respondent raises a timeliness defense under Section 10(b) of the Act, which states in pertinent part, that "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 . . ." The Respondent filed a motion to dismiss on February 26, 2013, asserting the charge was untimely. As of the date this decision was written, the Board had not ruled on this motion, and I denied a motion to stay proceedings pending the Board's ruling. I did so based on my determination that the issue has repeatedly and consistently been decided squarely against the Respondent's position.

The Respondent contends that this case should be dismissed, because Monjazeb's charge was filed more than 6 months after November 20, 2009, the date she signed and was subject to the agreement, and more than 6 months after her employment with the Respondent ended. However, this argument is without merit under controlling case law holding that a continuing violation exists as long as the rule is still being enforced at the time of the charge. See *American Cast Iron Pipe Co.*, 234 NLRB 1126 fn. 1 (1978); *Alamo Cement Co.*, 277 NLRB 1031, 1036–1037 (1985) (no time bar where enforcement allegation could not have been litigated sooner); *The Guard Publishing Co.*, 351 NLRB 1110, 1110 fn. 2 (2007) ("maintenance during the 10(b) period of a rule that transgresses employee rights is itself a violation of Sec. 8(a)(1).") In this case, the agreement mandated that Monjazeb arbitrate employment-related claims pursuant to the MAP even after her termination. She acted in a timely fashion while the MAP was in effect and the Respondent was enforcing it against her.[12]

The Respondent further contends that, even if *D.R. Horton* is accepted as good law, by accepting employment with Neiman Marcus after being informed about the MAP, Monjazeb voluntarily agreed to arbitration. Specifically, the Respondent avers that footnote 28 of *D.R. Horton* leads to the conclusion that applicants, as opposed to current employees, who accept employment after knowingly signing an arbitration agreement have voluntarily acceded to abide by it. Footnote 28 states that the Board does not reach the following question:

> [W]hether, if arbitration is a mutually beneficial means of dispute resolution, an employer can enter into an agreement that is not a condition of employment with an individual employee to resolve either a particular dispute, or all potential employment disputes through a non-class arbitration rather than litigation in court.

Here, however, the MAP was a condition of Monjazeb's employment, i.e., she could either agree to the MAP's terms or not work for the Respondent. Whether it was a condition of her employment from the outset or a condition she was required to accept as a current employee in order to retain employment makes no difference analytically with regard to whether the MAP interfered with her Section 7 right to collective legal action.[13] The question posed by the Board in footnote 28 was whether an agreement to engage in non-class arbitration on a purely voluntary basis without regard to employment or continued employment would violate the Act. The mandatory nature of the agreement here takes it outside the scope of the Board's reference in footnote 28.

B. Effect on Employees' Ability to file Board Charges

Finally, I will address the Respondent's contention that the complaint does not allege that the MAP violates the Act because it would reasonably be interpreted as preventing employees from filing charges with the Board. While the complaint could have been more specific, it provided the Respondent with sufficient notice of the documents at issue (the application,

[11] Associate Chief Administrative Law Judge Gerald Etchingham denied the Respondent's motion to stay proceedings, and I agree with his reasoning, as incorporated by reference.

[12] Any contention that Monjazeb was not an employee at the time she filed her charge is unavailing, as an "employee" includes "former employees of a particular employer." *Briggs Mfg. Co.*, 75 NLRB 569, 571 (1947); See also *Frye Electric Inc.*, 352 NLRB 245, 357 (2008.)

[13] To hold otherwise renders meaningless longstanding protections for applicants. See *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941). Moreover, while it was the Charging Party's choice to work for Neiman Marcus even though it meant agreeing to the MAP, taken to its logical extreme, if waivers such as the MAP are judicially sanctioned and become the norm for employers, employees will increasingly be faced with the option of foregoing statutorily protected collective litigation about wages, hours, and working conditions for mutual aid and protection or not working.

In any event, Monjazeb was required to agree to the terms set forth in the Arbitration Agreement and the associate handbook on November 23, 2009, 3 days after her employment with the Respondent started.

Arbitration Agreement, the associate handbook and the attendant acknowledgement forms), the time frame when the alleged violation occurred, and the relief requested . Under the Board's requirements, this is sufficient. See *American Newspaper Publishers Assn. v. NLRB*, 193 F.2d 782, 800 (7th Cir. 1951), affd. 345 U.S. 100 (1953). The complaint alleges that the MAP violates Section 8(a)(1) by requiring employees to agree to individual arbitration of employment-related disputes and requests the following relief, at paragraph 8:

> As part of the remedy for Respondent's unfair labor practices, the Acting General Counsel seeks an order requiring that Respondent cease and desist from maintaining and/or attempting to enforce a mandatory arbitration agreement that employees reasonably could believe bars or restricts their right to file charges with the National Labor Relations Board.

I find this put the Respondent on sufficient notice.

The Respondent contends that the NMG Resolutions program was modified to ensure employees are notified they may file charges with the Board. The Board denied the Respondent's motion to dismiss based on this argument and any argument that this was erroneous is properly made to the Board.

Turning to the merits, in evaluating the impact of a rule on employees, the appropriate inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). A rule does not violate the Act if a reasonable employee merely *could* conceivably read it as barring Section 7 activity. Rather, the inquiry is whether a reasonable employee *would* read the rule as prohibiting Section 7 activity. *Lutheran Heritage,* supra. The Board must give the rule under consideration a reasonable reading and ambiguities are construed against its promulgator. *Lafayette Lutheran Heritage,* supra at 647; *Lafayette Park Hotel,* 326 NLRB at 828; and *Cintas Corp. v. NLRB*, 482 F.3d 463, 467-470 (D.C. Cir. 2007). Moreover, the Board must "refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." *Lutheran Heritage* supra at 646.

The Respondent states that the Arbitration Agreement expressly states: "The Agreement does not prohibit a Covered Employee from filing a charge or complaint with a governmental agency such as the Equal Employment Opportunity Commission, the National Labor Relations Board, or like state agencies." Section 3 of the agreement includes as "covered disputes" numerous claims involving wages, hours, and working conditions, such as

> Discrimination or harassment on the basis of race, color, gender, sexual orientation, religion, national origin, age, disability, *or any other unlawful basis* (emphasis added.)
>
> . . .
>
> Violations of any . . . governmental statute . . . relating to workplace health, and safety, voting, meal or rest breaks, . . . minimum wage and overtime pay, pay days, holiday pay, vacation pay, severance/separation pay, or payment at termination.
>
> . . .
>
> Retaliation for filing a protected claim for benefits (such as workers' compensation) *or exercising rights under any statute.* (emphasis added).
>
> . . .
>
> [C]laims of wrongful termination or constructive discharge.
>
> . . .
>
> All other employment-related legal disputes, controversies, or claims arising out of, concerning, or relating in any way to, employment or cessation of employment with the Company

Notably, section 4, which directly follows and is entitled, "Claims not Covered by This Agreement," contains no exception for filing charges with the Board. The last sentence of section 4 states, "If there is any inconsistency between this Section and the definition of covered Claims in Section 3, then this Section controls." It is not until section 5, entitled "Agreement Limitations" where the language stating that the Agreement does not prohibit a covered employee from filing a charge with the Board appears. There is, unlike in section 4, no statement that section 5 controls in the event of an inconsistency between section 5 and the covered disputes set forth in section 3.

Moreover, as the General Counsel points out, the job application, the Arbitration Agreement acknowledgement form, the NMG Resolutions Plan document, the NMG Resolutions Plan document acknowledgement form, and the associate handbook all expressly state that disputes with the Respondent must be resolved through arbitration, with no reference to filing charges with the Board.

Considering that ambiguities must be construed against the employer, I find the MAP violates Section 8(a)(1) because would cause employees to reasonably believe that they would need to arbitrate employment-related claims covered by section rather than file charge with the Board. See *Aroostook County Regional Opthamology Center*, 317 NLRB 218 (1995).

V. CONCLUSIONS OF LAW

(1) The Respondent, The Neiman Marcus Group, Inc., is an employer within the meaning of Section 2(6) and (7) of the Act.

(2) The Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory and binding arbitration program (MAP), consisting of: (a) a mandatory arbitration agreement and mandatory arbitration agreement acknowledgment form requiring employees to individually arbitrate employment-related disputes; (b) a resolutions plan and a resolutions plan acknowledgment form requiring all employment-related disputes to be submitted to individual binding arbitration; and (c) an associate handbook and associate handbook acknowledgment form requiring all employment-related disputes to be submitted to individual binding arbitration.

(3) The Respondent violated Section 8(a)(1) of the Act when it enforced the MAP by: (a) requiring the Charging Party to agree to the mandatory arbitration agreement, resolutions plan and associate handbook; and (b) asserting the MAP in litigation the Charging Party brought against the Respondent.

(4) The Respondent violated Section 8(a)(1) of the Act by

maintaining a mandatory and binding arbitration policy that employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

As I have concluded that the MAP is unlawful, the recommended order requires that the Respondent revise or rescind it, and advise its employees in writing that said rule has been so revised or rescinded. Because the Respondent utilized the MAP on a corporatewide basis, the Respondent shall post a notice at all locations where the MAP, or any portion of it requiring all employment-related disputes to be submitted to individual binding arbitration, was in effect. See, e.g., *U-Haul Co. of California*, supra, fn. 2 (2006); *D.R. Horton*, supra, slip op. at 17.

I recommend the Company be required to reimburse Charging Party Monjazeb for any litigation and related expenses, with interest, to date and in the future, directly related to the Company's filing its motion to compel arbitration in Case No. CGC-10-502877, in the Superior Court of California, San Francisco County and in the California Court of Appeal for the First Appellate District. Determining the applicable rate of interest on the reimbursement will be as outlined in *New Horizons*, 283 NLRB 1173 (1987) (adopting the Internal Revenue Service rate for underpayment of Federal taxes). Interest on all amounts due to Monjazeb shall be computed on a daily bases as prescribed in *Kentucky River Medical Center*, 356 NLRB 8 (2010), enf. denied on other grounds sub. nom., *Jackson Hospital Corp. v. NLRB*, 647 F. 3d 1137 (D.C. Cir. 2011).

I recommend the Respondent be required to ensure the Charging Party has a forum to litigate her class complaint by either: (1) withdrawing its appeal of the California Superior Court's order vacating its prior order compelling Charging Party to arbitrate and issuing a new order denying Respondent's motion to compel arbitration; or (2) permitting the Charging Party to renew her demand arbitrate her class claims and notifying the Manager of ADR Services at the AAA that it will proceed with classwide arbitration.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondent, The Neiman Marcus Group, Inc., Beverly Hills, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and enforcing a mandatory arbitration program that requires its employees to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(b) Enforcing its mandatory arbitration program by requiring employees, including the Charging Party to sign acknowledgement forms agreeing to the mandatory arbitration agreement, resolutions plan and associate handbook.

(c) Enforcing its mandatory arbitration program by asserting it in litigation the Charging Party brought against the Respondent.

(d) Maintaining a mandatory and binding arbitration policy that restricts employees' protected activity or that employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

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

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

(a) Rescind or revise all elements of the MAP to make it clear to employees that it does not constitute a waiver in all forums of their right to maintain employment-related class or collective actions and does not restrict employees' right to file charges with the National Labor Relations Board.

(b) Notify the employees of the rescinded or revised MAP provisions to include providing them a copy of the revised MAP documents or specific notification that the agreement has been rescinded.

(c) Reimburse the Charging Party for any litigation expenses: (i) directly related to opposing the Respondent's motion to compel arbitration; and/or (ii) resulting from any other legal action taken in response to Respondent's efforts to enforce the arbitration agreement.[15]

(d) Ensure the Charging Party has a forum to litigate her class complaint by either: (1) withdrawing its appeal of the California Superior Court's order vacating its prior order compelling Charging Party to arbitrate and issuing a new order denying Respondent's motion to compel arbitration; or (2) permitting the Charging Party to renew her demand arbitrate her class claims and notifying the Manager of ADR Services at the AAA that it will proceed with classwide arbitration.

(e) Within 14 days after service by the Region, post at all facilities where the MAP, or any portion of it requiring all employment-related disputes to be submitted to individual binding arbitration copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 31, 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, the

[14] 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.

[15] The General Counsel requests that I order reimbursement for all employees who have incurred legal expenses during the 10(b) period. As no evidence of any other legal proceeding other than the Charging Party's has been presented, I have fashioned the remedy accordingly.

[16] 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."

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. 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 August 3, 2011.

(f) 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. February 6, 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 or enforce a mandatory arbitration program consisting of: (a) a mandatory arbitration agreement and mandatory arbitration acknowledgment form requiring employees to individually arbitrate employment-related disputes; (b) a resolutions plan and a resolutions plan acknowledgment form requiring all employment-related disputes to be submitted to individual binding arbitration; and (c) an associate handbook and associate handbook acknowledgment form that requires all employment-related disputes to be submitted to individual binding arbitration.

WE WILL NOT enforce a mandatory arbitration program by requiring Charging Party Sheila Monjazeb to agree to the mandatory arbitration agreement, resolutions plan and associate handbook.

WE WILL NOT enforce a mandatory arbitration program by asserting it in litigation the Charging Party Sheila Monjazeb brought against us.

WE WILL NOT maintain a mandatory arbitration policy that employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

WE WILL rescind or revise the Mandatory Arbitration Program to make it clear to employees that the agreement does not constitute a waiver of their right in all forums to maintain class or collective actions and does not restrict employees' right to file charges with the National Labor Relations Board.

WE WILL notify employees of the rescinded or revised mandatory arbitration program, including providing them with a copy of any revised agreements, acknowledgement forms or other related documents, or specific notification that the agreement has been rescinded

WE WILL reimburse Charging Party Sheila Monjazeb for any litigation expenses: (i) directly related to opposing the Respondent's Motion to Compel Arbitration; and/or (ii) resulting from any other legal action taken in response to Respondent's efforts to enforce the arbitration agreement.

WE WILL ensure the Charging Party Sheila Monjazeb has a forum to litigate her class complaint by either: (1) withdrawing our appeal of the California Superior Court's order vacating its prior order compelling Charging Party to arbitrate and issuing a new order denying Respondent's motion to compel arbitration; or (2) permitting her to renew her demand arbitrate her class claims and notifying the manager of ADR services at the AAA that it will proceed with class arbitration.

THE NEIMAN MARCUS GROUP, INC.