UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LESLIE'S POOLMART, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

U.S. COURT OF APPEALS
RECEIVED
SEP 8 2015
FIFTH CIRCUIT

PETITION FOR REVIEW

Pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure, Leslie's Poolmart, Inc. (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 Leslie's Poolmart, Inc. and Keith Cunningham, NLRB Case No. 21-CA-102332, reported in an Order at 362 NLRB No. 184, dated August 25, 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 for pool supplies in Louisiana, Texas, and Mississippi.

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 receive any further relief to which it may be entitled.

Respectfully submitted,

By: _____

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ATTORNEYS FOR PETITIONER
LESLIE'S POOLMART, INC.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MURPHY OIL USA, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent

CERTIFICATE OF SERVICE

I certify that the foregoing Petition for Review was served via Federal Express overnight mail on September 8, 2015, to the following:

Richard F. Griffin, Jr. General Counsel
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Blumenthal, Nordrehaug & Bhowmik
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La Jolla, CA 92037

By: _____
Jeffrey A. Schwartz, Esq.

U.S.C.A. RECEIVED SEP 08 2015 FIFTH CIRCUIT

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.

Leslie's Poolmart, Inc. *and* Keith Cunningham. Case 21–CA–102332

August 25, 2015

DECISION AND ORDER

MEMBERS HIROZAWA, JOHNSON, AND MCFERRAN

On January 17, 2014, Administrative Law Judge Lisa D. Thompson issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed a limited cross-exception and 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[1] and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[2] findings,[3] and conclusions[4]

[1] The judge applied the Board's decision in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. denied in relevant part, 737 F.3d 344 (5th Cir. 2013), to find that the Respondent violated Sec. 8(a)(1) by maintaining and enforcing a Mutual Agreement to Arbitrate Claims (Agreement), which required employees, as a condition of employment, to agree to resolve certain employment-related disputes exclusively through individual arbitration and to relinquish any right to resolve such disputes through collective or class action. In *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), the Board reaffirmed the relevant holdings of *D.R. Horton*. We affirm the judge's findings and conclusions based on her application of *D.R. Horton* and on our subsequent decision in *Murphy Oil*. The Respondent argues that Member Becker's appointment expired before the decision in *D.R. Horton* issued. For the reasons set forth in *Murphy Oil*, above, slip op. at 2 fn. 16, we reject this argument.

[2] The Respondent argues that the complaint is time-barred by Sec. 10(b) because the Charging Party, Keith Cunningham, did not file an unfair labor practice charge within six months of the date he became subject to the Agreement. We agree with the judge that this argument lacks merit. The complaint alleges that the Respondent violated the Act by maintaining and enforcing the Agreement. The Respondent stipulated that it has maintained the Agreement as a condition of employment at all material times and since at least October 10, 2012, and that it has sought to enforce the Agreement since at least about April 1, 2013. These dates are within the 6-month period preceding the filing of the charge. The Board has repeatedly held that the maintenance of an unlawful rule is a continuing violation, regardless of when the rule was promulgated. See *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, slip op. at 12 (2015).

We further reject the Respondent's argument that Cunningham does not have standing to assert his unfair labor practice charge because he is no longer an employee. The Board has long held that the broad definition of "employee" contained in Sec. 2(3) of the Act covers former employees. See *Briggs Mfg. Co.*, 75 NLRB 569, 571 (1947); accord *Cellular Sales of Missouri, LLC*, supra, 362 NLRB No. 27, slip op. at 1 fns. 3, 7. Moreover, Sec. 102.9 of the Board's Rules & Regulations provides that a charge may be filed by "any person," without regard to whether that person is a Sec. 2(3) employee.

[3] Although the Agreement does not explicitly restrict activities protected by Sec. 7, we agree with the judge in finding, based upon the parties' stipulation, that the Agreement has been enforced to compel arbitration on an individual rather than a class or collective basis. Accordingly, the Agreement has been applied to restrict the exercise of Sec. 7 rights, and is thus unlawful under *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). Cf. *Hitachi Capital America Corp.*, 361 NLRB No. 19, slip op. at 2–3 (2014) (finding rule unlawful because it was applied to restrict Sec. 7 rights, without reaching whether rule was facially overbroad). In affirming the judge's finding, we do not rely on *Brighton Retail, Inc.*, 354 NLRB 441 (2009), a case decided when the Board had only two sitting members. See *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010). Instead, we rely on the language of Secs. 7 and 8(a)(1) of the Act. We additionally reject the Respondent's argument that its Motion to Compel Arbitration cannot be an unfair labor practice because it is protected by the First Amendment. See *Countrywide Financial Corp.*, 362 NLRB No. 165 (2015).

We also reject the Respondent's argument, with which our dissenting colleague agrees, that Cunningham was not engaged in protected concerted activity when he filed his class action suit. See *Beyoglu*, 362 NLRB No. 152, slip op. at 2 (2015) ("[T]he filing of an employment-related class or collective action by an individual employee is an attempt to initiate, to induce, or to prepare for group action and is therefore conduct protected by Section 7."). Our dissenting colleague observes that the lawsuit filed by Cunningham is an "opt-out" form of class action, which our colleague says does not demonstrate concertedness because, by its nature, such a lawsuit does not require, or seek to induce, "action" by other class members in order to participate. As the Board has previously stated, whether a plaintiff class is styled as "opt in" or "opt out" by the procedural rules governing any particular class action is not relevant to the question of whether the filing of that class action constitutes concerted activity:

> Plainly, the filing of the action contemplates—and may well lead to—active or effective *group* participation by employees in the suit, whether by opting in, by not opting out, or by otherwise permitting the individual employee to serve as a representative of his coworkers. It is this potential "to initiate or to induce or to prepare for group action," in the phrase of *Meyers II* [*Meyers Industries*, 281 NLRB 882, 887 (1986), affd. sub nom *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988)]—collectively seeking legal redress—that satisfies the concert requirement of Section 7.

Murphy Oil, 361 NLRB No. 72, slip op. at 13 (2014) (emphasis in original); see also *Beyoglu*, supra, 362 NLRB No. 152, slip op. at 2 (quoting *Murphy Oil* on this point). Moreover, as our colleague notes with respect to opt-out classes, "class members must decide whether or not to opt out." *Hernandez v. Vitamin Shoppes*, 95 Cal. Rptr. 3d 734, 745 (Cal. App. 2009). Making that decision whether to participate in the lawsuit is itself a form of "action."

[4] For the reasons set forth in detail in his dissents in *Murphy Oil*, slip op. at 35–58, and *Countrywide Financial Corp.*, above, Member Johnson would not find that the Respondent's maintenance or enforcement of the Agreement violates the Act. 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*, 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 pass on the Respondent's related argument that Cunningham was not engaged in concerted activity when, as an individual plaintiff, he filed a complaint in the Supreme Court of Los Angeles County on behalf of himself and other similarly situated current and former employees of the Respondent. He observes, however, that the lawsuit filed by Cunningham is an "opt-out" form of class action, typical under California law, where the entire class of employ-

EXHIBIT A

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

ORDER

The National Labor Relations Board orders that the Respondent, Leslie's Poolmart, Inc., Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining or enforcing 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.

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

(b) Notify all applicants and current and former employees who were required to sign the Agreement in any form that the Agreement has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) Notify the United States District Court for the Central District of California that it has rescinded or revised the mandatory arbitration agreement upon which it based its motion to dismiss Keith Cunningham's class and representative claims, and inform the court that it no longer opposes the plaintiff's action on the basis of that agreement.

(d) In the manner set forth in this decision, reimburse Keith Cunningham for any reasonable attorneys' fees and litigation expenses that he may have incurred in opposing the Respondent's motion to dismiss his class and representative claims.

(e) Within 14 days after service by the Region, post at its City of Industry, California facility copies of the attached notice marked "Appendix A" and at all other facilities nationwide copies of the attached notice marked "Appendix B,"[6] in both English and Spanish. 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 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, 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,

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ces is denominated as plaintiffs, and post-certification, will be considered plaintiffs if they do not subsequently opt out. See Cal. Code Civ. Proc. 382; see also, e.g., *Hernandez v. Vitamin Shoppes*, 95 Cal. Rptr. 3d 734, 745 (Cal. App. 2009) (in case of post-certification class settlement, "class members must decide whether or not to opt out"). Considering the realities of the opt-out class action, therefore, Member Johnson believes that the mere filing of such an action falls outside of the framework created by *Meyers II* for determining protected, concerted activity. See *Meyers Industries, Inc.*, 281 NLRB No. 118 (1986) ("*Meyers II*"), enfd., *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied, 487 U.S. 1205 (1988). This kind of filing, as a matter of procedural law, is not a request for class member employees to actually do anything, and thus it does not "initiate" or "induce" those employees to engage in action, as described by *Meyers II*. Id. at 887 ("We reiterate, our definition of concerted activity...encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.") In fact, the named plaintiff(s) in an opt-out class action would logically seek to induce *inaction* by other employees (i.e., not opting out) in response to the litigation. Nor do such filings constitute preparation for actual group action or a "truly group complaint," under *Meyers II*. Here, the concept that everyone within the ambit of the complaint's class description supports the class action—merely upon the filing of that complaint—is a legal fiction created by the class action procedure, not an actuality. See also *Murphy Oil*, slip op. at 43–44 (Member Johnson, dissenting).

[5] Consistent with our decision in *Murphy Oil*, we amend the judge's remedy and shall order the Respondent to reimburse Cunningham for all reasonable expenses and legal fees, with interest, incurred in opposing the Respondent's unlawful motion in the United States District Court for the Central District of California to compel individual arbitration of his 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 No. 8 (2010). See *Teamsters Local 776 (Rite Aid Corp.)*, 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 also amend the judge's remedy to order the Respondent to notify the district court that the Respondent has rescinded or revised the Agreement and to inform the court that it no longer opposes the plaintiff's claims on the basis of the Agreement.

Finally, we shall modify the judge's recommended Order and substitute a new notice to conform to our amended remedy and the Board's standard remedial language.

[6] 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."

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 October 10, 2012.

(f) 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. August 25, 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 or enforce 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 the Mutual Agreement to Arbitrate Claims (Agreement) in all of its forms, or revise it in all of its forms to make clear that the Agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums.

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

WE WILL notify the court in which we moved to dismiss Keith Cunningham's class and representative claims that we have rescinded or revised the mandatory arbitration agreement upon which we based our motion and WE WILL inform that court that we no longer oppose the plaintiff's action on the basis of that agreement.

WE WILL reimburse Keith Cunningham for any reasonable attorneys' fees and litigation expenses that he may have incurred in opposing our motion to dismiss his class and representative claims.

LESLIE'S POOLMART, INC.

The Board's decision can be found at http://www.nlrb.gov/case/21-CA-102332 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

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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 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 the Mutual Agreement to Arbitrate Claims (Agreement) in all of its forms, or revise it in all of its forms to make clear that the Agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums.

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

LESLIE'S POOLMART, INC.

The Board's decision can be found at http://www.nlrb.gov/case/21-CA-102332 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.

Alice J. Garfield, Esq., for the General Counsel.

Frank M. Liberatore and *Jaclyn Floryan, Esqs.*, for the Respondent.

Kyle R. Nordrehaug and *Nicholas De Blouw, Esqs.*, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LISA D. THOMPSON, Administrative Law Judge. This matter is before me on a stipulated record. On April 8, 2013, Keith Cunningham ("Charging Party" or "Cunningham") filed a charge in Case 21–CA–102332 against Leslie's Poolmart, Inc. ("Respondent"). The General Counsel issued the complaint and notice of hearing on June 28, 2013. On July 12, 2013, Respondent filed its answer, denying all material allegations and setting forth its affirmative defenses to the complaint.

The complaint alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the "NLRA" or the "Act") when: (1) Respondent required its current and former employees, including Cunningham, as a condition of employment, to enter into individual arbitration agreements that do not expressly require employees to waive their right to pursue class, collective, or representative actions, but Respondent intends for them to do so; and (2) on or about April 1, 2013, Respondent filed a Motion to Compel with the United States District Court for the Central District of California ("District Court") in Case No. 13-02122 CAS (CWx) seeking an order compelling arbitration of Cunningham's individual claims, dismissing his lawsuit, and dismissing his class or collective action claims. (Jt. Mot. Stip. Facts Exhs. 1–2.)[1]

On September 25, 2013, the parties submitted their Stipulation of Facts, Motion to Submit Case on Stipulation, and their Motion Requesting Permission to Forego Submission of Short Position Statements to Associate Chief Administrative Law Judge Gerald Etchingham. Judge Etchingham directed the parties to submit posthearing briefs by November 1, 2013, but ultimately, extended the posthearing brief deadline to December 2, 2013. On November 22, 2013, this case was reassigned to the docket of the undersigned. On December 2, 2013, the parties submitted their respective posthearing briefs in this case.

Upon the stipulated record, and in full consideration of the briefs submitted, I make the following

FINDINGS OF FACT

I. JURISDICTION

The parties stipulated to the following facts as to the nature of Respondent's business and jurisdiction:

1. At all material times, Respondent, a Delaware corporation operates and sells pool and spa chemicals and supplies throughout the United States. Its principal office is located in Phoenix, Arizona, but it has branch locations throughout the State of California. (Jt. Mot. Stip. Facts, Stip. 3.)

2. During a 12-month period ending May 14, 2013, Respondent derived gross revenues in excess of $500,000. At its California branch locations, Respondent purchased and received goods valued in excess of $50,000 from outside the State of California. (Jt. Mot. Stip. Facts, Stip. 4.)

[1] Abbreviations used in this decision are as follows: "Jt. Mot. Stip. Facts" for the parties' Stipulation of Facts, Motion to Submit Case on Stipulation, and Motion Requesting Permission to Forgo Submission of Short Position Statements; "GC Br." for the General Counsel's brief; and "R. Br." for Respondent's brief.

3. Respondent admits, and I find, that it is an employer within the meaning of Section 2(2), (6), and (7) of the Act. (Jt. Mot. Stip. Facts, Stip. 5.)

4. Respondent further admits, and I find, Board jurisdiction as alleged in the complaint. (Jt. Mot. Stip. Facts, Stip. 2(a).)

II. ALLEGED UNFAIR LABOR PRACTICES

A. Stipulated Background Facts

1. The Charging Party was employed by Respondent as a retail assistant store manager from September 2011 to September 2012. (R. Br. 3.)

2. At all material times, Respondent maintained a Mutual Agreement to Arbitrate Claims that requires employees to resolve certain employment related disputes with Respondent exclusively through binding arbitration. Specifically, the agreement provides that:

> The Company and I mutually consent to the resolution by arbitration of all claims or controversies ("claims"), past, present or future, whether or not arising out of my employment (or its termination), that the Company may have against me or that I may have against . . . (1) the Company, (2) its officers, directors, employees or agents in their capacity as such or otherwise, (3) the Company's parent, subsidiary and affiliated entities, (4) the Company's benefit plans or the plans' sponsors, fiduciaries, administrators, affiliates and agents, and/or (5) all successors and assigns of any of them.
>
> The only claims that are arbitrable are those that . . . would have been justiciable [sic] under applicable state or federal law. The claims covered by this Agreement include, but are not limited to: claims for wages or other compensation due; claims for breach of any contract or covenant (express or implied); tort claims; claims for discrimination (including, but not limited to, race, sex, sexual orientation, religion, national origin, age, marital status, physical or mental disability or handicap, or medical condition); claims for benefits (with certain exceptions) . . . ; and claims for violation of any federal, state, or other governmental law, statute, regulation, or ordinance. (Jt. Mot. Stip. Facts, Exh. 4.)[2]

3. The Agreement does not, on its face, limit an employee's employment related claims to individual arbitration. It also does not expressly prohibit an employee's right to assert classwide, collective, or representative actions in an arbitral or judicial forum. (Id.)

4. On September 22, 2011, the Charging Party received and electronically executed Respondent's arbitration agreement described in paragraph 2. The concluding language in the agreement states:

> Voluntary Agreement. I ACKNOWLEDGE THAT I HAVE CAREFULLY READ THIS AGREEMENT, THAT I UNDERSTAND ITS TERMS, THAT ALL UNDERSTANDINGS AND AGREEMENTS BETWEEN THE COMPANY AND ME RELATING TO THE SUBJECTS COVERED IN THE AGREEMENT ARE CONTAINED IN IT, AND THAT I HAVE ENTERED INTO THE AGREEMENT VOLUNTARILY AND NOT IN RELIANCE ON ANY PROMISES OR REPRESENTATIONS BY THE COMPANY OTHER THAN THOSE CONTAINED IN THIS AGREEMENT ITSELF. I UNDERSTAND THAT BY SIGNING THIS AGREEMENT I AM GIVING UP MY RIGHT TO A JURY TRIAL.
>
> Employee initials: KC
>
> I FURTHER ACKNOWLEDGE THAT I HAVE BEEN GIVEN THE OPPORTUNITY TO DISCUSS THIS AGREEMENT WITH MY PRIVATE LEGAL COUNSEL AND HAVE AVAILED MYSELF OF THAT OPPORTUNITY TO THE EXTENT I WISH TO DO SO (capitalized in original).
>
> Signature: Keith Cunningham Date: 9/22/2011 1:37 PM[3]

5. At all material times, and at least since October 10, 2012, as part of its hiring process, Respondent required all new employees at its California branch locations to agree and execute the arbitration agreement described in paragraph 2 as a condition of employment. (Jt. Mot. Stip. Facts, Stips. 6–7.)

6. On or about February 13, 2013, following his separation from employment with Respondent, Cunningham filed a complaint in the Supreme Court of Los Angeles County on behalf of himself and other similarly situated current and former employees of Respondent. (Jt. Mot. Stip. Facts, Exh. 5.)

7. The complaint alleged that the Respondent incorrectly and unlawfully calculated and paid overtime to class members for overtime worked since 2009. (Id.)

8. On March 5, 2013, Respondent removed the case to District Court in Civil Case No. 13–02122 CAS (CWx). (R. Br. 5.)

9. On or about April 1, 2013, Respondent filed a Motion to Compel Arbitration and Memorandum of Points and Authorities in Support Thereof with the District Court. (Jt. Mot. Stip. Facts, Exh. 6.)

10. In its motion, Respondent sought an order to dismiss Cunningham's lawsuit, compel arbitration of Cunningham's *individual claims* and dismiss his class/collective action claims, pursuant to the terms of the arbitration agreement described in paragraph 2. (Id.)

11. On April 8, 2013, Cunningham filed an unfair labor practice complaint with the Board alleging that Respondent's arbitration agreement prohibited employees from filing class, collective and representative actions regarding employment-related disputes in an arbitral or judicial forum violative of Section 7 of the Act. (Jt. Mot. Stip. Facts, Exh. 1.)

12. On about June 25, 2013, the District Court granted Respondent's Motion by dismissing all classwide claims, finding that Cunningham's individual claims must proceed to arbitration. (Jt. Mot. Stip. Facts, Exh. 7.) However, the Court denied Respondent's motion to the extent it sought to prevent Cunningham from pursuing a representative claim under the Private

[2] The agreement expressly provided that either party could initiate an administrative charge with the Board.

[3] Jt. Mot. Stip. Facts, Exh. 4.

Attorney General Act of 2004 (PAGA) (Cal. Labor Code §2699) in arbitration. (Id.)

DISCUSSION AND ANALYSIS

The issue in this case is whether Respondent's mandatory arbitration agreement violates Section 8(a)(1) of the Act even though the agreement does not expressly prohibit employees from engaging in protected concerted activities.

The General Counsel alleges that Respondent violated the Act by maintaining and enforcing an unlawful arbitration agreement which does not expressly preclude employees from filing classwide, collective or representative actions in an arbitral or judicial forum, but is intended by the Respondent to do so. Further, the General Counsel contends that, because Respondent moved to compel Cunningham to resolve his *individual* claims through arbitration and sought to dismiss his class and collective claims in District Court, it's very actions in enforcing the agreement has the effect of leading employees to reasonably believe they cannot engage in concerted activity protected by Section 7 of the Act.

Respondent counters that the complaint must be dismissed because: (1) Charging Party's complaint was untimely filed; (2) the Board lacked jurisdiction when it decided *D. R. Horton, Inc.*, thus the decision is invalid based on the ruling in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), cert. granted 81 U.S.L.W. 3695 (U.S. June 24, 2013) (No. 12–1281); or alternatively, (3) I should stay resolution of this decision pending the Supreme Court's ruling in *Noel Canning;* (4) the Fifth Circuit recently overruled the Board's decision in *D. R. Horton* upholding mandatory arbitration of classwide, collective and representative claims;[4] (5) the Board's decision in *D. R. Horton* is inapplicable since it is contrary to controlling Supreme Court precedent and the Federal Arbitration Act (FAA); (6) the Charging Party was not engaged in "concerted activity"; and (7) Respondent's filing of its motion to compel enforcement of its arbitration agreement does not constitute a violation of the Act.

Based on the evidence, I conclude that, even though the agreement is silent regarding the filing of collective actions, Respondent violated Section 8(a)(1) of the Act because, by its own contentions and actions, it essentially mandates that employees waive, as a condition of employment, their right to file class, collective, or representative claims in any arbitral or judicial forum. As explained herein, I believe this result is consistent with the current reasoning set forth in *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012) which, despite the recent Fifth Circuit decision, I am currently bound to adhere.

1. The complaint is timely

Respondent first contends that this case should be dismissed, because Cunningham's charge is time barred by Section 10(b) of the Act, because it was filed more than 6 months after September 22, 2011, the date he signed and was subject to the agreement. However, this argument is without merit as I find a continuing violation exists that makes Cunningham's charge timely.

Contrary to Respondent's assertions, I find that the alleged unlawfulness of the arbitration agreement is not related solely to circumstances existing in September 2011, when Cunningham signed the agreement and became subject to it. Instead, at issue is the legality of Respondent's *continued* maintenance of the agreement. The Board has held that an employer commits a continuing violation of the Act throughout the period that an unlawful rule is maintained. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). More importantly, it is well settled that an agreement entered into outside the 10(b) period may be found unlawful within the 10(b) period where its provisions are unlawful on their face or enforced inside the 10(b) period. *Teamsters Local 293 (R. L. Lipton Distributing)*, 311 NLRB 538, 539 (1993); *Whiting Milk Corp.*, 145 NLRB 1035, 1037–1038 (1964), enforcement denied on other grounds 342 F.2d 8 (1st Cir. 1965). In this case, the agreement mandated that Cunningham arbitrate certain employment related claims, including wages and compensation, with Respondent even after his termination.[5] The evidence further shows that Respondent stipulated that it has continued and is continuing to require all new hires to execute the agreement. Indeed, Respondent admits that, at least since April 1, 2013, it sought to enforce its arbitration agreement with the Charging Party before the U.S. District Court. Cunningham filed his unfair labor practice charge on April 8, 2013. Thus, I find that, as late as April 1, 2013, a continuing violation existed such that the charge is not timebarred. *Control Services*, 305 NLRB 435, 435 fn. 2, 442 (1991), enfd. mem. 961 F.2d 1568 (3d Cir. 1992); *Guard Publishing Co.*, 351 NLRB 1110, 1110 fn. 2 (2007).

2. The Board had jurisdiction in *D. R. Horton, Inc.*

Respondent next asserts that the Board's ruling in *D. R. Horton, Inc.* is invalid, because the Board lacked the requisite quorum when the decision was issued. See *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). Here, Respondent argues that President Obama's appointments of Board Members Sharon Block and Richard Griffin were invalid since they were not made during a constitutionally valid Senate recess. As such, Respondent avers that the Board has lacked a quorum to issue any decisions, including in *D. R. Horton, Inc.*, since the expiration of Member Becker's term on January 3, 2012 (citing *New Process Steel v. NLRB*, 1380 S.Ct. 2635, 2640 (2010) (held "two [remaining Board] members may [not] continue to exercise that delegated authority once the group's (and the Board's) membership falls to two.")

However, the Board has repeatedly rejected any ruling that it

[4] On December 3, 2013, Respondent filed a letter brief in addition to a post-hearing brief. The letter brief addressed the recent decision issued by the Fifth Circuit Court of Appeals in *D. R Horton v. NLRB*, 2013 WL 6231617 (C.A. 5, Dec. 3, 2013) (No. 12–60031) which effectively overruled the Board's decision in *D. R. Horton, Inc.* On December 5, 2013, the General Counsel also filed a letter brief opposing Respondent's letter brief and addressing the Fifth Circuit's decision. Although I did not authorize the parties to file additional briefs beyond the posthearing briefs, I have considered the parties' additional filings in this decision.

[5] Specifically, the language of the agreement Cunningham signed expressly provides that, "This Agreement to arbitrate shall survive the termination of my employment. . . ."

did not have the requisite three-board member authority. Although the D.C. Circuit in *Noel Canning* concluded that the President's recent recess appointments to the Board were invalid, the Court also noted that this conclusion is in conflict with several other courts of appeals' rulings. See *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), cert denied 544 U.S. 942 (2005); *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); and *U.S. v. Allocco*, 305 F.2d 704 (2d Cir. 1962). While the Fourth Circuit recently agreed with the decision in *Noel Canning*, see *NLRB v. Enterprise Leasing Co. Southeast, LLC*, 722 F.3d. 609 (4th Cir. 2013), the Board declined to follow the Fourth Circuit's rationale. See *Bloomingdale's Inc.*, 359 NLRB No. 113 (2013) (citing *Evans v. Stephens*, supra; *U.S. v. Woodley*, supra; and *U.S. v. Allocco*, supra). Indeed, even the Fifth Circuit in its decision in *D. R. Horton* agreed that the Board had the requisite authority to issue decisions. See *D. R. Horton v. NLRB*, 2013 WL 6231617, (5 C.A. Dec. 3, 2013) (No. 12–60031). Thus, the Board has rejected Respondent's lack of authority argument, because the issue regarding the validity of recess appointments "remains in litigation, and pending a definitive resolution, [so] the Board is charged to fulfill its responsibilities under the Act." See *G4S Regulated Security Solutions*, 359 NLRB No. 101, slip op. at 1 fn. 1 (2013), citing *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. at 1 fn. 1 (2013). Accordingly, Respondent's argument fails and the Board's decision and reasoning in *D. R. Horton* is currently binding upon me.

3. Respondent's Request to Stay Resolution of this case is denied

Alternatively, Respondent requests that I stay resolution of this decision pending the Supreme Court's ruling in *Noel Canning*. This argument is also unavailing, and I decline to stay this decision for the reasons stated in *Bloomingdale's Inc.*, supra.

4. *D.R. Horton, Inc.* is the controlling law in this matter and does not conflict with the FAA or U.S. Supreme Court precedent

Respondent next avers that this matter should be dismissed as the Fifth Circuit's recent decision in *D. R Horton v. NLRB*, 2013 WL 6231617, (5 C.A. Dec. 3, 2013) (No. 12–60031) effectively overruled the Board's prior decision and is binding on the undersigned. In addition, Respondent avers that U.S. Supreme Court precedent has determined that, to the extent the NLRA conflicts with the Federal Arbitration Act (FAA) vis-à-vis the permissibility of mandatory binding arbitration of employment matters, the NLRA is preempted by the FAA. However, neither argument is persuasive.

The Supreme Court has increasingly shown great deference to enforcement of arbitration agreements. See *AT&T Mobility, LLC v. Concepcion*, 131 S.Ct. 1740, 1749 (2011). In *Concepcion*, the Court emphasized that its cases "place it beyond dispute that the FAA was designed to promote arbitration." The Court explained that the purpose of the FAA is to "ensur[e] that private arbitration agreements are enforced according to its terms." See *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 109 S.Ct. 1248 (1989). Indeed, the Board also acknowledges that the provisions of the FAA evince a "liberal policy favoring arbitration agreements." See *D. R. Horton, Inc.*, supra, slip op. at 8, so long as the agreements do not preclude employees from exercising their substantive rights under Section 7 of the Act. Id. at 9.

In *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), the charging party was required, as a condition of employment, to sign an arbitration agreement which required him to resolve all claims through mandatory, binding arbitration. The agreement did not have an opt-out clause. In addition, the arbitration agreement contained a clause precluding the charging party and other employees covered by the Act from filing joint, class, or collective claims in arbitral and judicial forums. However, 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" which the Board found to be a substantive right protected under Section 7 of the Act. While the Board acknowledged the interplay between the FAA and the NLRA, the Board reasoned that the ruling in *D. R. Horton* was consistent with Supreme Court precedent which found the FAA inapplicable when an arbitration agreement precludes employees from exercising a substantive right. Thus, the Board found the arbitration agreement fell under the exception to enforcement under the FAA since the agreement prohibited employees from filing collective and class actions, a substantive right protected under Section 7 of the NLRA.

I find that the Supreme Court has not expressly overruled *D. R. Horton*. Although the Court has upheld the enforcement of individual arbitration agreement in employment related matters, see, e.g., *Concepcion*, supra, and *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013), the Court has not addressed or resolved the issue of exclusive arbitration over class and/or collective actions. As such, *D. R. Horton* is the controlling law applicable in this case. Even in the face of other Federal circuit decisions to the contrary, *D. R. Horton* represents current Board precedent that I must follow. *Manor West, Inc.*, 311 NLRB 655, 667 fn. 43 (1993); see also *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984) ("We emphasize that it is a judge's duty to apply established Board precedent which the Supreme Court has not reversed. It is for the Board, not the judge, to determine whether precedent should be varied") (citation omitted). This is true even in the face of criticism of the rule of *D. R. Horton* by some Federal courts. See *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004). Moreover, because I find that Respondent has effectively precluded Charging Party from exercising his right to engage in protected concerted activity, a substantive right under Section 7 of the Act, the NLRA is not preempted by the FAA.

Applying Board precedent to this case, I find that Respondent's arbitration agreement violates the Act. While the arbitration agreement does not, on its face, prohibit collective or class action, it has the effect of doing so as evinced when Respondent, in moving to compel arbitration of his claims, sought to preclude Cunningham from filing a class action lawsuit and maintained that "arbitration is the elected and required forum for resolving [Charging Party's] *individual claims.*" (Jt. Mot. Stip. Exh. 6) (emphasis in original). The NLRA "protects employees' ability to join together to pursue workplace grievances, including through litigation." *D. R. Horton*, supra, slip op.

at 2. By filing a class action lawsuit in court, both Cunningham (and the charging party in *D. R. Horton*) were engaging in conduct that the Board noted is "not peripheral but central to the Act's purposes." Id. at 4. The Board found that there was no conflict between the NLRA and the FAA "so long as the employer leaves open a judicial forum for class and collective claims, [thus] employees' NLRA rights are preserved without requiring the availability of classwide arbitration." Id., slip op. at 16. While the agreement is silent as to collective or class actions, in practice, Respondent closed the avenue to pursue collective and/or classwide litigation when it sought to limit Cunningham and other similarly situated employees to arbitration of their individual claims. Because I am currently bound by the ruling in *D. R. Horton* until it is reversed by the Supreme Court, I do not find anything meaningfully distinguishable between Respondent's arbitration agreement and the one in *D. R. Horton*, which the Board found violative of the Act.

5. Charging Party engaged in protected concerted activity

Respondent next claims that Cunningham's filing of his lawsuit in State court is not protected concerted activity under Section 7 of the Act, because "although [his] complaint contained class allegations and a description of a putative class, he had no co-plaintiff and there was no evidence that anyone other than Cunningham and his counsel were involved in the initiation or prosecution of the case." (R. Br. 17.) The General Counsel counters that Cunningham engaged in protected activity because 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." (GC Br. 10 citing *Mushroom Transportation Co. v. NLRB*, 330 F.2d. 683, 685 (3d Cir. 1964).)

Section 8(a)(1) of the Act provides that 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 of the Act. 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." See *Brighton Retail, Inc.*, 354 NLRB 441, 441 (2009).

In *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), and in *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity. Individual action is concerted if it is engaged in with the object of initiating or inducing group action. *Whitaker Corp.*, 289 NLRB 933 (1988). The "mutual aid or protection" clause of the Act includes employees acting in concert to improve their working conditions through administrative and judicial forums.

In this case, it is clear under Board law that Cunningham engaged in protected concerted activity when he filed his class action lawsuit in State court. See *Harco Trucking, LLC*, 344 NLRB 478 (2005); *Host International*, 290 NLRB 442, 443 (1988) (filing a collective action to address wages, hours, and other terms and conditions of employment constitutes protected activity unless done with malice or in bad faith). Even without class member status, the evidence demonstrates that, by filing his classwide lawsuit, Cunningham 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 overtime pay violations against Respondent. *Whitaker*, supra. Consequently, Respondent's action to force Cunningham, and other employees covered under the Act, to waive their right to file a classwide action in any arbitral or judicial forum, interfered with and restrained them from exercising their Section 7 rights. Accordingly, Respondent's argument fails on this point.

Therefore, based on the foregoing, I find that Respondent's actions violated Section 8(a)(1) of the Act when, by its actions and practices, it mandates that employees covered by the Act must waive, as a condition of employment, their right to file joint, class, or collective claims in any arbitral or judicial forum.

6. Respondent's Motion to Compel Arbitration violates Section 8(a)(1) of the Act

Lastly, the General Counsel advances the same arguments and cited authority to this allegation as it does to the charge contesting the arbitration agreement. (GC Br. 5–6, fn. 6.) Respondent argues that filing its motion to compel is not violative of the Act, because its filing constitutes a "constitutionally protected petitioning of the government under the First Amendment." (R. Br. 11–13.) However, Respondent's argument misses the point. Rather, this matter involves whether Respondent's actions in enforcing its mandatory arbitration agreement (by filing a motion to compel in district court) interferes, restrains, or coerces Cunningham and similarly situated employees from exercising their substantive rights to file classwide litigation. Under *D. R. Horton, Inc.* and other Board precedent, I find that Respondent's action violates the Act.

Therefore, I find that Respondent's action violated Section 8(a)(1) of the Act when it moved to restrict Cunningham's exercise of his Section 7 rights by filing a motion in District Court to compel arbitration and dismissal of Cunningham's collective and class claims.

CONCLUSIONS OF LAW

1. Respondent, Leslie's Poolmart is an employer within the meaning of Section 2(6) and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory and binding arbitration agreement which required employees to resolve certain employment-related disputes exclusively through individual arbitration and, though not expressly, but in practice, required them to relinquish any right they have to resolve such disputes through collective or class action.

3. Respondent violated Section 8(a)(1) of the Act by seeking to enforce its unlawful arbitration agreement by filing a motion in District Court compelling arbitration and dismissing Charging Party's collective and class claims.

REMEDY

Having found that the Respondent 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.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[6]

ORDER

The Respondent, Leslie's Poolmart, Inc. of Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and enforcing a mandatory and binding arbitration policy that, either expressly or impliedly, or by Respondent's actions or practice, waives the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(b) Seeking court action to enforce a mandatory and binding arbitration policy that, either expressly or impliedly, or by Respondent's actions or practice, waives 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 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 the arbitration agreement to make it clear to employees that the agreement does not constitute a waiver of their right to maintain employment related class or collective actions in all forums.

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

(c) File a motion with the United States District Court for the Central District of California in Civil Case No. 13–02122 CAS (CWx) asking that the court vacate its order to compel arbitration.

(d) Reimburse Charging Party and/or any other employees who joined in Civil Case No. 13–02122 CAS (CWx) for any litigation expenses: (i) directly related to opposing Respondent's Motion to Compel; and/or (ii) resulting from any other legal action taken in response to Respondent's efforts to enforce the arbitration agreement.

(e) Within 14 days after service by the Region, post at all facilities where the arbitration agreement applied, copies of the attached notice marked "Appendix"[7] in both English and Spanish. 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, the 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 and former employees by such means. Respondent also shall duplicate and mail, at its own expense, a copy of the notice to all former employees who were required to sign the mandatory and binding arbitration policy during their employment with Respondent. 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, 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 January 1, 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 Respondent has taken to comply.

Dated, Washington, DC January 17, 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 and binding arbitration policy that, expressly or impliedly, by our actions or practices, waives the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind or revise the arbitration agreement to make it clear to employees that the agreement does not constitute a waiver of their right to maintain class or collective actions in all forums.

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[6] 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.

[7] 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."

WE WILL notify employees of the rescinded or revised agreement, including providing them with a copy of the revised agreement or specific notification that the agreement has been rescinded.

WE WILL reimburse Charging Party and/or any other employees who joined in the collective litigation for litigation expenses incurred which were directly related to opposing our Motion to Compel Arbitration and/or reimburse employees for any other legal action taken in response to our efforts to enforce the agreement.

LESLIE'S POOLMART, INC.