**Apple American Group LLC Applebees, d/b/a/ Applebees Neighborhood Grill and Bar *and* Cole S. Essling.** Case 18–CA–103319

February 22, 2016

## DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On September 30, 2013, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions with supporting argument.

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 brief and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order as modified and set forth in full below.[1]

Pursuant to *D. R. Horton*, 357 NLRB No. 184 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), the judge found that the Respondent violated Section 8(a)(1) of the Act by maintaining its Dispute Resolution Program, which requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial. In *Murphy Oil USA, Inc*., 361 NLRB No. 72 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), the Board reaffirmed the relevant holdings of *D. R. Horton*, supra.

Based on the judge's application of *D. R. Horton* and our subsequent decision in *Murphy Oil*, we affirm the judge's findings[2] and conclusions and adopt the recommended Order as modified and set forth in full below.

## ORDER

The National Labor Relations Board orders that the Respondent, Apple American Group LLC Applebees, d/b/a Applebees Neighborhood Grill and Bar, St. Paul, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a Dispute Resolution 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.

(b) 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.

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[1] This case was submitted to the judge on a joint motion to waive a hearing and have the case decided on a stipulated record. The judge ordered that the Respondent cease and desist from "maintaining *or enforcing*" (emphasis added) its Dispute Resolution Program and that the Respondent "[n]otify arbitral or judicial panels, if any, where the Respondent has attempted to enjoin or otherwise prohibit employees from bringing or participating in class or collective actions that it is withdrawing those objections and that it no longer objects to such employee actions." However, neither the complaint nor the statement of issues in the joint motion alleges that the Respondent enforced the Dispute Resolution Program within the 10(b) period. Accordingly, we shall omit the above quoted language from the Order and notice. We shall further modify the judge's recommended Order to conform to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified.

[2] The Respondent argues that the Board had only two valid members at the time *D. R. Horton* issued because, in the Respondent's view, the recess appointment of then-Member Becker was constitutionally invalid under *NLRB v. Noel Canning*, 705 F.3d 490 (D.C. Cir. 2013), affd. 134 S.Ct. 2550 (2014). The Respondent thus contends that the Board lacked a quorum when it issued *D. R. Horton*. See *New Process Steel, L.P. v. NLRB*, 560 U.S. 674 (2010). We reject this argument for the reasons set forth in *Murphy Oil*, supra, slip op. at 2 fn. 16. See also *Mathew Enterprise, Inc. v. NLRB*, 771 F.3d 812, 813 (D.C. Cir. 2014) ("[T]he President's recess appointment of Member Becker was constitutionally valid."); *Gestamp South Carolina, LLC v. NLRB*, 769 F.3d 254, 257–258 (4th Cir. 2014) (same).

The Respondent also argues that its Dispute Resolution Program includes an exemption allowing employees to file charges with administrative agencies, including with the Board, and thus does not, as in *D. R. Horton,* unlawfully prohibit them from collectively pursuing litigation of employment claims in all forums. In support of its argument, the Respondent cites *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053–1054 (8th Cir. 2013), in which the court stated, in dicta, that the arbitration agreement there did not bar all concerted employee activity in pursuit of employment claims because the agreement permitted employees to file charges with administrative agencies that could file suit on behalf of a class of employees. We reject this argument for the reasons set forth in *SolarCity Corp.*, 363 NLRB No. 83, slip op. at 2–4 (2015).

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

Likewise, for the reasons explained in *Murphy Oil* and *Bristol Farms*, above, there is no merit to our colleague's view that finding the Agreement unlawful runs afoul of employees' Sec. 7 right to "refrain from" engaging in protected concerted activity. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 18; *Bristol Farms*, 363 NLRB No. 45, slip op. at 3. Nor is he correct in insisting that Sec. 9(a) of the Act requires the Board to permit individual employees to prospectively waive their Sec. 7 right to engage in concerted legal activity. See *Murphy Oil*, slip op. at 17–18; *Bristol Farms*, slip op. at 2.

(a) Rescind the Dispute Resolution Program in all its forms, or revise it in all its forms to make clear to employees that the policy does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums.

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

(c) Within 14 days after service by the Region, post at its St. Paul, Minnesota facility and at all other facilities where the unlawful Dispute Resolution Program is or has been in effect copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 18, 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 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, 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 March 7, 2013.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 18 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 22, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[3] 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."

MEMBER MISCIMARRA, dissenting.

In this case, my colleagues find that the Respondent's Dispute Resolution Program (DRP) violates Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) because the DRP waives the right to participate in class or collective actions regarding non-NLRA employment claims. I respectfully dissent from this finding for the reasons explained in my partial dissenting opinion in *Murphy Oil USA, Inc.*[1]

I agree that an employee may engage in "concerted" activities for "mutual aid or protection" in relation to a claim asserted under a statute other than NLRA.[2] However, Section 8(a)(1) of the Act does not vest authority in the Board to dictate any particular procedures pertaining to the litigation of non-NLRA claims, nor does the Act render unlawful agreements in which employees waive class-type treatment of non-NLRA claims. To the contrary, as discussed in my partial dissenting opinion in *Murphy Oil*, NLRA Section 9(a) protects the right of every employee as an "individual" to "present" and "adjust" grievances "at any time."[3] This aspect of Section

[1] 361 NLRB No. 72, slip op. at 22–35 (2014) (Member Miscimarra, dissenting in part). The Board majority's holding in *Murphy Oil* invalidating class-action waiver agreements was recently denied enforcement by the Court of Appeals for the Fifth Circuit. *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015).

Because I disagree with the Board's decisions in *Murphy Oil,* above, and *D. R. Horton, Inc.,* 357 NLRB No. 184 (2012), enf. denied in pert. part 737 F.3d 344 (5th Cir. 2013), and I believe the NLRA does not render unlawful arbitration agreements that provide for the waiver of class-type litigation of non-NLRA claims, I find it unnecessary to reach whether such agreements should independently be deemed lawful to the extent they "leave[] open a judicial forum for class and collective claims," *D. R. Horton*, 357 NLRB No. 184, slip op. at 12, by permitting the filing of complaints with administrative agencies that, in turn, may file class- or collective-action lawsuits. See *Owen v. Bristol Care, Inc.,* 702 F.3d 1050 (8th Cir. 2013).

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

[3] *Murphy Oil*, above, slip op. at 30–34 (Member Miscimarra, dissenting in part). Sec. 9(a) states: "Representatives designated or selected for the purposes of collective bargaining by the majority of the em-

9(a) is reinforced by Section 7 of the Act, which protects each employee's right to "refrain from" exercising the collective rights enumerated in Section 7. Thus, I believe it is clear that (i) the NLRA creates no substantive right for employees to insist on class-type treatment of non-NLRA claims;[4] (ii) a class-waiver agreement pertaining to non-NLRA claims does not infringe on any NLRA rights or obligations, which has prompted the overwhelming majority of courts to reject the Board's position regarding class-waiver agreements;[5] and (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA).[6] Although questions may arise regarding the enforceability of particular agreements that waive class or collective litigation of non-NLRA claims, I believe these questions are exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims.

Accordingly, I respectfully dissent.

Dated, Washington, D.C. February 22, 2016

Philip A. Miscimarra, Member

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

[4] When courts have jurisdiction over non-NLRA claims that are potentially subject to class treatment, the availability of class-type procedures does not rise to the level of a substantive right. See *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) ("The use of class action procedures . . . is not a substantive right.") (citations omitted), petition for rehearing en banc denied No. 12-60031 (5th Cir. 2014); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.").

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

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

## NATIONAL LABOR RELATIONS BOARD

## 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 a Dispute Resolution Program (DRP) that requires you, 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 DRP in all its forms, or revise it in all its forms to make clear that the DRP does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums.

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

APPLE AMERICAN GROUP LLC APPLEBEES D/B/A APPLEBEES NEIGHBORHOOD GRILL AND BAR

The Board's decision can be found at www.nlrb.gov/case/18-CA-103319 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.

*Tyler Wiese, Esq.,* for the General Counsel.
*Melissa Griffin, Esq. (Apple American Group LLC),* for the Respondent.

## DECISION

### STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. The parties herein waived a hearing and submitted this case directly to me by way of a Joint Motion and Stipulation of Facts dated August 20, 2013. The complaint herein, which issued on July 19, 2013,[1] and was based upon an unfair labor practice charge that was filed on April 22 by Cole S. Essling, an Individual, alleges that since March 7, Apple American Group LLC–Applebees d/b/a Applebees Neighborhood Grill and Bar, herein called Respondent, issued, promulgated and maintained an employee handbook rule containing a mandatory arbitration clause that would reasonably be understood by employees to prohibit them from filing collective or class-wide legal actions against the Respondent in any forum, whether legal or arbitral, in violation of Section 8(a)(1) of the Act.

The Joint Motion and Stipulation of Facts provides as follows:

1. The charge in this proceeding was filed by the Charging Party on April 22, 2013, and a copy was served by regular mail on Respondent on about that same date. Respondent acknowledges receipt of the charge.

2. On July 19, 2013, the Acting Regional Director for Region Eighteen of the National Labor Relations Board issued a complaint in this proceeding alleging Respondent violated the National Labor Relations Act (Act). Respondent and the Charging Party each acknowledge receipt of a copy of the complaint, which was served on both by mail on that same date.

3. Respondent filed an answer to complaint on July 31, 2013. The Acting General Counsel and the Charging Party each acknowledge receipt of a copy of the answer, which was served on both by mail on that same date.

4. (a) At all material times, Respondent, a Delaware corporation with facilities throughout the United States, including a facility in St. Paul, Minnesota, has been engaged in the operation of public restaurants selling food and beverages throughout the country.

(b) In conducting its operations described above in subparagraph (a) during the calendar year ending December 31, 2012, Respondent derived gross revenues in excess of $500,000.

(c) In conducting its operations described above in subparagraph (a) during the calendar year ending December 31, 2012, Respondent purchased and received at its St. Paul, Minnesota facility goods and services valued in excess of $50,000 from entities located outside the State of Minnesota.

(d) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

5. Respondent operates approximately 440 Applebee's restaurants across 23 states.

6. During the last 6 months, Respondent has maintained an employee handbook containing a mandatory dispute resolution procedure. This employee handbook was distributed to employees at all restaurants operated by Respondent, including its facility located at 1018 Meadowlands Drive in St. Paul, Minnesota.

7. The mandatory dispute resolution procedure consists of two documents:

> "Receipt of Dispute Resolution and Agreement to Abide by Dispute Resolution Program" ("Receipt") and "Dispute Resolution Program."

8. Since this dispute resolution procedure was introduced, employees have been required to sign the "Receipt of Dispute Resolution and Agreement to Abide by Dispute Resolution Program." Both the Receipt and the Dispute Resolution Program constitute terms and conditions of employment for employees.

9. Since 2008, four complaints have been filed against Apple American Group LLC and its subsidiaries on behalf of classes of employees alleging employment-related violations of various State and Federal statutes. In each instance, the Respondent has asserted the existence of class and collective action waivers in the "Receipt of Dispute Resolution and Agreement to Abide by Dispute Resolution Program" and "Dispute Resolution Program" as a defense to the class action complaints. In two of those cases, the forum court has denied Respondent's motions to compel individual arbitration. In one other action for violations of the Fair Labor Standards Act, the parties settled before a ruling was issued. In the fourth case, also alleging violations of the Fair Labor Standards Act, the Respondent has not yet been served.

10. Charging Party Cole S. Essling has not expressed any intention to file, nor has he actually filed, any collective, representative or class action claims against Respondent.

11. The issues presented in this matter are:

(a) Whether Respondent's mandatory dispute resolution policy would reasonably be read by employees as prohibiting them from bringing class or collective claims in any forum, whether legal or arbitral, against Respondent.

(b) Whether Respondent has interfered with, coerced, or restrained its employees' exercise of their Section 7 rights, in

[1] Unless indicated otherwise, all dates referred to herein relate to the year 2013.

violation of Section 8(a)(1) of the Act, by maintaining its mandatory dispute resolution policy.

The Joint Motion further provides that Counsel for the General Counsel's and the Respondent's Statements of Position are attached thereto, and that the Stipulation is made without prejudice to any objection that any party may have as to the relevancy of any of the facts therein.

Respondent's Dispute Resolution Program states as follows:

This Dispute Resolution Program is adopted for Apple American Group (Apple American Group LLC and Apple American Group II LLC) and all subsidiaries or affiliated entities, and all successors and assigns of any of them, all of which are collectively hereinafter referred to as the "Company."

The Company is committed to building a strong relationship between the Company and all of our employees—a relationship that is based on trust and open communication. The Company is an equal opportunity employer and strives to maintain an atmosphere of mutual trust and open, honest communication. By working together, we can reach any goal we set for ourselves. We do not and will not tolerate harassment or discrimination by any employee, regardless of their status with the Company, and no employee will be retaliated against for using this Program.

We understand, however, that problems and disagreements are unavoidable when people with different viewpoints spend a lot of time together. We cannot entirely eliminate disagreements, but we can provide a process for resolving them when they do occur by taking prompt constructive action.

Based on these beliefs and values, we developed this DISPUTE RESOLUTION PROGRAM (the "Program"). The Program is a four- step process for resolving workplace problems quickly and fairly. This policy describes the steps that both you and the Company must take to resolve many types of workplace problems. The Company is also obligated to follow the Program and will also be bound by arbitration. The types of problems covered by the Program are explained in detail in this policy.

THIS PROGRAM IS A CONDITION OF YOUR EMPLOYMENT AND IS THE MANDATORY AND EXCLUSIVE MEANS BY WHICH DISPUTES BETWEEN YOU AND THE COMPANY MAY BE RESOLVED, SO READ THE INFORMATION IN THIS PROGRAM BOOKLET CAREFULLY.

When you have a work-related problem, follow the steps listed below in this policy.

**Step 1: UTILIZE THE OPEN DOOR POLICY**

In any relationship, when a disagreement occurs, keeping emotions bottled up inside only causes the problem to get bigger. At the Company we want to encourage open communication so we can solve the problem with the least amount of stress for those involved. To do this, we have developed an Open-Door Policy that encourages you to talk with your manager to get your concerns addressed quickly.

**1. Talk directly to your immediate manager.** If you have a problem, first discuss it with your Manager or General Manager as soon as possible after the problem arises.

**2. Talk to a higher level of management.** Sometimes, you may not be able to resolve the issue with your Manager or General Manager. If this is the case, take your concern to your Area Director, Director of Operations or up to the Market President to get the answers you need.

**3. Talk with Human Resources.** If you have tried the above steps and are not satisfied, or if you are not comfortable talking to your managers for any reason, you can contact your Human Resources Generalist to get the help you need.

**4. Talk with Support Center.** If for any reason you are uncomfortable with following the prior steps, you should feel free to contact the Support Center Human Resource Dept. at 216.525.2775 or Employee Hotline at 800.837.3667 x1300 and ask for help.

**Step 2: EXECUTIVE REVIEW**

If you have tried the Open Door Policy and are not satisfied, you may request the Executive Review Step. In this step, the Company's President or his designee (the "Executive") will review the issue or problem and attempt to resolve the issue or problem to your satisfaction and to the satisfaction of your Manager and the Company. Failing that, the Executive will make a decision.

Here is how you obtain access to the Executive Review Step:

**1. Request review.** As soon as possible after your exhaustion of the Open Door Policy Step process, you can start the Executive Review process by contacting the Company's Employee Relations department. The Employee Relations department can be reached at 216.525.2775 or you can call the Employee Hotline at 800.837.3667 x1300 and ask for help.

**2. Submit information.** In order to access the Executive Review Step, you should provide a written statement that contains as much of the following information as is reasonably available to you:

a. Describe in detail, to the best of your ability, the factual basis on which your claim is made.

b. Describe the measures you have taken at the Communication Step to resolve the issue including the supervisors you have spoken with about the problem.

c. Describe the nature and extent of any remedy or relief you believe you should have. You can obtain a copy of a form to use for this purpose from the Human Resources Department.

**3. The Review.** The Company's Executive will review the problem and make whatever investigation he believes is appropriate under the circumstances. This may include, in all likelihood, a discussion with you and your Manager and a review of all relevant documents.

**4. The Solution.** The Executive will attempt to find a way to resolve the problem to the satisfaction of all the parties involved in the situation. However, if the problem

cannot be resolved in this manner, the Executive will make a decision. That decision will be made in writing, generally within thirty (30) days of your request for executive review.

**5. Non-Legal Claims.** If your claim is not a statutory or common law claim ("legal claim"), Executive Review is the final step in the Dispute Resolution Program. (Only legal claims may proceed to mediation or arbitration). For example, mediation and arbitration are not available to review performance evaluations, job elimination or lay-off decisions, Company work rules, policies and pay rates, or increases or decreases in benefits, except to the extent such matters relate to statutory or common law claims.

**Step 3: MEDIATION**

If you believe you have a legal claim that was not solved through the Open Door Policy or Executive Review, the next step is Mediation. In Mediation, an objective, independent third party tries to help the parties reach a mutually agreeable solution.

When you or the Company requests Mediation, the Company will contact the American Arbitration Association (AAA) or a similar organization specializing in dispute resolution. The agency will assign a professional mediator to mediate the dispute. The mediator will listen, work to open communication lines, and offer creative solutions. But the mediator does not make a final decision. It is up to you and the Company to reach agreement. The goal of mediation is to develop a solution that satisfies both parties involved.

Here is how to put the Mediation Step to work for you:

**1. Advise the Employee Relations department that you request Mediation**. You should request Mediation as soon as possible, generally within sixty (60) days from the date you complete the Executive Review Step, so that the issues will be fresh in your mind. You will be requested to complete a Request for Mediation form, which will be furnished.

**2. Select mediator**. When either you or the Company request Mediation, the parties will select an outside, independent neutral mediator to handle the mediation process. The Company will pay the fees of the mediator and the mediation agency.

**3. You, the mediator and the Company representative meet**. The mediator will schedule a meeting between you and the Company representative. The mediator will guide the discussion and help resolve the problem. However, it is up to both you and the Company to reach agreement. The mediator does not make the final decision.

**4. Written agreement**. If appropriate, after you and the Company have agreed upon a solution, a written agreement will be signed by the parties.

**Step 4: ARBITRATION**

If you have a work-related problem that involves one of your legally protected rights, which has not been resolved through the earlier steps, you may request Arbitration.

In Arbitration, an outside neutral expert chosen and agreed upon by you and the Company, called an "arbitrator," becomes involved in the resolution process. He or she listens to the facts, then makes a final binding decision and awards any damages, just like a judge in a court of law. Arbitration is less formal than conventional court litigation but is clearly established and governed by rules and standards of conduct, which are designed to assure due process of law is fully protected. The goal of Arbitration is to provide effective and efficient problem resolution.

Here is how the Arbitration process works:

**1. Request Arbitration.** If you believe you have a legal claim, you may request that your claim go to Arbitration. Simply complete an Arbitration Request Form (provided upon request) and return it to the Company at its Cleveland, Ohio Support Center addressed to the attention of the Apple American Group Employee Relation Department, 6200 Oak Tree Blvd, Suite 250, Independence, Ohio 44131. The form can be obtained from your Human Resources Generalist. The Arbitration will be conducted by the AAA or any similar organization mutually acceptable to you and the Company. The arbitration will be conducted under the AAA's "National Rules for the Resolution of Employment Disputes", which are in effect at the time the demand for arbitration is filed. The rules can be obtained from the AAA's website at ADR.org or from the Company upon request.

The arbitration agency selected (the "agency") will then bill you and the Company each a filing fee. Your portion of that fee is limited to $125.00. The Company will pay the balance of the agency's initial filing fee and will pay the arbitrator's fee. If you establish that you cannot pay the filing fee, the Company will pay your portion of the fee.

**2. A hearing is set.** The arbitrator will schedule a date, time and place for a hearing. During this hearing, both you and the Company present the pertinent facts, documents, and witnesses. You may hire a lawyer to participate in the Arbitration hearing with you. The hearing will be conducted in the community where you are/were employed by the Company or in another mutually agreeable location.

**3. A decision is made.** Based on the information presented and the facts gathered, the arbitrator will make a final binding decision in writing that will set forth the essential findings and conclusions on which the award is based. The decision of arbitrator shall have a final and binding effect in any related litigation. If you win, the arbitrator can award you anything you might seek through a court of law. By using Arbitration, your rights are protected and damages can be paid if those rights have been violated.

**PROGRAM RULES CLAIMS SUBJECT TO ARBITRATION**

Claims and disputes subject to arbitration include all those legal claims you may now or in the future have against the Company or against its officers, directors, shareholders, em-

ployees or agents, including claims related to any Company employee benefit program or against its fiduciaries or administrators (in their personal or official capacity), and all claims that the Company may now or in the future have against you, whether or not arising out of your employment or termination, except as expressly excluded under the "Claims Not Subject to Arbitration" section.

Legal claims that are subject to arbitration include, but are not limited to:

*claims for wages or other compensation;

* claims for breach of any contract, covenant or warranty (expressed or implied);

* tort claims (including, but not limited to, claims for physical, mental or psychological injury, but excluding statutory workers compensation claims);

* claims for wrongful termination;

* claims for sexual or other illegal harassment or discrimination (including, but not limited to, claims based on race, sex, sexual orientation, religion, national origin, age, medical condition or disability whether under federal, state or local law);

* claims for benefits or claims for damages or other remedies under any employee benefit program sponsored by the Company (after exhausting administrative remedies under the terms of such plans);

* "whistleblower" claims under any federal, state or other governmental law, statute, regulation or ordinance;

* claims for a violation of any other non-criminal federal, state or other governmental law, statute, regulation or ordinance; and

* claims for retaliation under any law, statute, regulation or ordinance.

**CLAIMS NOT SUBJECT TO ARBITRATION**

The only claims or disputes not subject to arbitration are as follows:

* any claim by an employee for benefits under a plan or program which provides its own binding arbitration procedure;

* any statutory workers compensation claim; and

* unemployment insurance claims;

Your agreement to adhere to this Dispute Resolution Program does not prohibit you from pursuing an administrative claim with the National Labor Relations Board, any state or federal department of labor or the United States Equal Employment Opportunity Commission. This Agreement, does, however, preclude you from personally pursuing court action regarding any such claim.

Additionally, nothing in this Agreement is intended to prevent either you or the Company from obtaining injunctive relief in court to prevent irreparable harm pending the conclusion of any arbitration conducted hereunder and either of us may apply to the appropriate state or federal court for a temporary restraining order, preliminary injunction, or other interim or conservatory relief, as necessary, without breach of this arbitration agreement and without abridgement of the powers of the arbitrator.

The parties also agree that any arbitration between the employee and the Company is of their individual claim and that any claim subject to arbitration will not be arbitrated on a collective or class-wide basis. However, this provision does not preclude employees from exercising their rights under the National Labor Relations Act to joining other employees in a collective action to improve working conditions.

Also, any non-legal dispute is not subject to arbitration. Examples include disputes over a performance evaluation, issues with co-workers, or complaints about your work site or work assignment which do not allege a legal violation. Neither the employee nor the Company has to submit the items listed under this "Claims Not Subject to Arbitration" caption to arbitration under this Program and may seek and obtain relief from a court or the appropriate administrative agency.

**REQUIRED NOTICE OF ALL CLAIMS**

When seeking arbitration, the claimant must file the Request for Arbitration form and give written notice of any claim to the other party within one year of the act complained of or within the applicable statute of limitations period, whichever is longer. Subject to any exceptions under applicable law, the day the act complained of occurred shall be counted for purposes of determining the applicable period.

Use the Request for Arbitration form when submitting a claim for arbitration. Identify and describe the nature of all claims asserted and the facts on which your claims are based. Send this written notice by certified or registered mail, return receipt requested. If the Company wishes to invoke Arbitration, it will also complete a Request for Arbitration form identifying and describing the nature of all claims asserted and the facts on which the claims are based and send this written notice to you at the last address recorded in the Company's payroll records.

**ARBITRATION PROCEDURES**

You must use the Mediation Step explained in this policy before requesting Arbitration. The agency will administer any Arbitration under the MA's "National Rules for the Resolution of Employment Disputes" and in conformity with this Dispute Resolution Program. Go to ADR.org to obtain a copy of the rules or request a copy from the Company. The rules in effect on the date a demand is made shall control.

The arbitration will be before a neutral arbitrator who is licensed to practice law and who has significant experience in the employment law area. The arbitration shall apply the substantive law and the laws of remedies, if applicable, of the state in which the claim arose, or federal law or both, depending upon the claims asserted. The decision of the arbitrator shall be in writing and shall provide the reasons for the award unless the parties agree otherwise.

The arbitrator shall have jurisdiction to hear and rule on prehearing disputes and is authorized to hold a pre-hearing conference by telephone or in person, as the arbitrator deems nec-

essary. The arbitrator shall have the authority to rule on a motion to dismiss and/or a motion for summary judgment by any party and, in doing so, must apply the standards governing such motion under the Federal Rules of Civil Procedure.

**PRE-HEARING PROCEDURES**

You and the Company each have the right to take the deposition of individuals and expert witnesses designated by another party. Depositions and other pre-trial discovery will be taken in accordance with the order of the arbitrator selected under the Program, who shall allow adequate discovery. You and the Company have the right to subpoena witnesses to the Arbitration in accordance with the Federal Rules of Civil Procedure. At least thirty (30) days before the Arbitration, you and the Company must exchange lists of witnesses, including any experts, and copies of all exhibits to be used at the Arbitration.

**ARBITRATION FEES AND COSTS**

There are two types of administrative fees and costs associated with Arbitration; a filing fee with the arbitration agency selected and payment to the arbitrator for his or her services and expenses. Such fees and other expenses shall be allocated as follows:

1. The party requesting Arbitration must pay a $125.00 filing fee to the agency to request Arbitration. If you request Arbitration the Company will pay the balance of the initial filing fee, and will pay the entire fee if it requests Arbitration.
2. Either party, at its expense, may arrange for and pay the cost of a court reporter to provide a stenographic record of the Arbitration proceedings.
3. Each party shall be responsible for its own attorneys' fees and related litigation expenses, if any; however, if any party prevails on a statutory claim, which allows the prevailing party to be awarded attorneys' fees the arbitrator may award reasonable fees to the prevailing party.
4. Where permitted by law, the arbitrator may assess attorneys' fees against a party upon showing by the other party that the first party's claim is frivolous or unreasonable or factually groundless.
5. If either party pursues a legal claim covered by the Dispute Resolution Program in court or by any means other than Arbitration, the responding party shall be entitled to stay or dismissal of such action, the remand of such action to Arbitration, and the recovery of all costs and attorneys' fees and expenses related to such action.

**MULTI-STATE BUSINESS**

The Company is engaged in transactions involving interstate commerce and your employment involves such commerce; therefore, the parties agree that the Federal Arbitration Act shall govern the interpretation, enforcement and proceedings under the Dispute Resolution Program.

**PROGRAM PROVISIONS/ENFORCEMENT**

The provisions of the Program document are severable and, should any provision be held unenforceable, all others will remain valid and binding. No provision of the Program document will be held unenforceable if such provision can be reasonably interpreted in a manner that results in such provision being enforceable. The arbitrators, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, arbitrability, applicability, enforceability or formation of the agreement to arbitrate including, but not limited to, any claim that all or any part of the agreement to arbitrate is void and voidable.

If a court should determine that Arbitration under this Program is not the exclusive, final, and binding method for the Company and its employees to resolve disputes and/or that the decision and award of the arbitrator is not final and binding as to some or all of a party's claim(s), the party must submit the claim(s) to Arbitration and pursue the Arbitration to conclusion before filing or pursuing any legal, equitable, or other legal proceeding for any eligible claim in a court of competent jurisdiction.

**PROGRAM STEPS**

While we encourage you to use all of the steps in the Program in the order outlined, we realize that in some cases it may not be appropriate to use the preliminary steps. Accordingly, if your claim involves a legal claim that is subject to Arbitration hereunder, you may proceed directly to Step 3, Mediation, without first using Step 1, Open Door Policy or Step 2, Executive Review. The Company may skip Steps 1 and 2 if a legal claim is involved.

**NOT AN EMPLOYMENT CONTRACT/EXCLUSIVE REMEDY**

While this Program constitutes a binding promise between you and the Company to resolve all disputes pursuant to the process outlined herein, this Program is not and shall not be construed to create any contract of employment, expressed or implied. Nor does this Program in any way alter the "at will" status of any employment. This Program will prevent you from filing a lawsuit in Court for individual, class, or collective relief for a legal claim subject to arbitration.

Analysis

The issue herein is whether the Respondent's Dispute Resolution Program (Program) violates Section 8(a)(1) of the Act. In support of this allegation, counsel for the General Counsel cites *D. R. Horton*, 357 NLRB No. 184 (2012), where the Board found a similar policy to violate Section 8(a)(1) of the Act. However, whereas *Horton* precluded employees from filing joint, class, or collective claims against the employer addressing wages and other compensation, breach of contract claims, tort claims, wrongful termination claims, sexual or other illegal harassment or discrimination claims, or other claims specified therein, the Program herein specifically provides that it does not prohibit employees from filing workers compensation claims, unemployment insurance claims, or claims before the Board, any State or Federal department of labor, or the United States Equal Employment Opportunity Commission. However, unlike some recent cases, the Program does not contain an "opt out" provision wherein employees have the right to

refuse to participate in the Program by executing an agreement, in a timely manner, setting forth their decision to refuse to participate.

Counsel for the General Counsel, in his Statement of Position, states that the Board applies the test set forth in *Lutheran Heritage Village–Livonia*, 343 NLRB 646 (2004), i.e., whether the rule *explicitly* restricts Section 7 activity or, even if it doesn't, whether employees would reasonably believe that it did, and the instant rule explicitly requires that all legal claims of the employees must be submitted to arbitration, and ". . . on an individual basis and not as a class or collective action." Because these provisions require employees to waive their Section 7 rights to bring class or collective claims in any forum against the Respondent, counsel for the General Counsel argues that the Program's restrictions violate Section 8(a)(1) of the Act. The fact that the Program specifically provides that the employees do not waive their rights to bring actions before the Board or other Governmental agencies does not change this result, citing *Horton* (at slip opinion p. 6), which states: "if the Act makes it unlawful for employers to require employees to waive their right to engage in one form of activity, it is no defense that employees remain able to engage in *other* concerted activities."

Counsel for the Respondent, in her Statement of Position, states that there is no substantive right to class, collective or representative arbitration procedures created by laws other than the Act, and that this matter can be distinguished from *Horton* as it explicitly permits employees to file claims with the Board, departments of labor, or the EEOC; therefore the Program does require employees to "waive the right to maintain class or collective actions in **all** forums." She further states that *Horton* "has been discredited by every citable court decision in which it has been considered," and should be here, as well. Therefore, she argues, the complaint should be dismissed.

In *Horton*, the Board found the arbitration provision unlawful because it "clearly and expressly bars employees from exercising substantive rights that have long been protected by Section 7 of the NLRB." The Board did not say that the required arbitration provision violated the Act only because it barred employees from exercising their Section 7 rights of filing charges with the Board to enforce those rights. The Board clearly was saying that Section 7 rights include the right to collectively bring court and arbitral actions. Therefore, it is clear to me that the restriction contained in the Program are unlawful even with the proviso that employees maintain their right to file charges with the Board and other Governmental agencies. Further, while I agree with counsel for the Respondent that the courts have "discredited" the Board's *Horton* decisions, I am bound by that decision.

Counsel for the Respondent, in her brief, makes a number of arguments to establish that *Horton* was decided incorrectly in addition to arguing that this matter can be differentiated from Horton because it permits access to the Board. She argues that the complaint contravenes the Federal Arbitration Act and that class or collective court or arbitral actions are not necessarily concerted unless the other employees affirmatively consented to, or joined with, the complaining party. She further argues that even if the Program prohibits employees from filing class or collective actions, it does not limit arbitrator's ability to consolidate claims or issue collective relief. However, the Board decided *Horton* and unless and until it determines that Horton was incorrectly decided, or the Supreme Court so decides, I am bound by that decision. I therefore find that the Respondent's Dispute Resolution Program violates Section 8(a)(1) of the Act.

## CONCLUSIONS OF LAW

1. Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Dispute Resolution Program maintained by the Respondent violates Section 8(a)(1) of the Act.

## THE REMEDY

Having found that the Respondent has violated the Act by maintaining the Dispute Resolution Program, I recommend that Respondent be ordered to cease and desist from enforcing this policy, and to post the Board notice set forth below at each of its locations where the Dispute Resolution Program is in effect. Further, I recommend that Respondent be ordered to notify all arbitral and judicial panels where it has attempted to enjoin, or otherwise prohibit, employees from bringing or participating in class or collective actions, that it withdrawing these objections and that it no longer objects to such employee actions.

Upon the foregoing findings of fact, conclusions of law, and based upon the entire record, I hereby issue the following recommended[2]

## ORDER

The Respondent, Apple American Group LLC Applebees, d/b/a Applebees Neighborhood Grill and Bar, St. Paul, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining or enforcing its Dispute Resolution Program.

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

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

(a) Notify all employees at locations where the Program is in effect, that it will no longer maintain or enforce the provisions contained in the Dispute Resolution Program referred to in the employee handbook that prohibits employees from bringing or participating in class or collective actions in an arbitral or judicial forum relating to wages, hours or terms and conditions of employment.

(b) Notify arbitral or judicial panels, if any, where the Respondent has attempted to enjoin or otherwise prohibit employees from bringing or participating in class or collective actions that it is withdrawing those objections and that it no longer objects to such employee actions.

(c) Within 14 days after service by the Region, post at each

[2] 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.

of its facilities where the Dispute Resolution Policy is maintained or enforced, copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 18, 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. 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 March 7, 2013.

(d) 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. September 30, 2013

[3] 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."

## 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 the Dispute Resolution Program referred to in the Employees' Handbook as far as it prohibits you from bringing or participating in class or collective actions relating to your wages, hours or terms and conditions of employment in arbitrations or court actions and WE WILL delete these provisions from our Employee Handbook.

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

WE WILL notify any arbitral or judicial panel where we have attempted to prevent or enjoin you from commencing, or participating in, joint or class actions relating to wages, hours or other terms and conditions of employment that we are withdrawing our objections to these actions, and WE WILL no longer object to you bringing or participating in such class or collective actions.

APPLE AMERICAN GROUP LLC APPLEBEES D/B/A APPLEBEES NEIGHBORHOOD GRILL AND BAR