Cowabunga, Inc. *and* Chadwick Hines. Case 10–CA–151454

February 26, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

The General Counsel seeks summary judgment in this case on the grounds that there are no genuine issues of material fact as to the allegations of the complaint, and that the Board should find, as a matter of law, that the Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing an agreement that prohibits its employees from participating in collective or class litigation in all forums and that employees reasonably would believe bars or restricts their right to file unfair labor practice charges with the Board.

Pursuant to a charge filed by Chadwick Hines on May 4, 2015, the General Counsel issued the complaint on August 17, 2015. The complaint alleges that, since at least March 20, 2014, the Respondent has maintained the Mutual Agreement to Arbitrate (the Agreement) as a condition of employment and that the Agreement prohibits its employees from pursuing multiparty, class or collective claims regarding employees' terms and conditions of employment in all forums, judicial and arbitral. Employees are required to sign the Agreement, and the Charging Party did so.

The relevant portions of the Agreement read as follows:

> 1. Binding Arbitration of Disagreements and Claims
>
> We each hereby voluntarily promise, agree, and consent to resolve any claim covered by this Agreement through binding arbitration, rather than through court litigation. We further agree that such binding arbitration pursuant to this Agreement shall be the sole and exclusive remedy for resolving any such covered claims or disputes.
>
> 2. Claims Covered by This Agreement
>
> a. Covered Claims: Claims and disputes covered by this Agreement include all claims by Employee against Cowabunga, Inc. (as defined below) and all claims that Cowabunga, Inc., may have against Employee, including, without limitation, any claims Employee may have relating to his/her hiring, terms and conditions of employment, job assignments, payment of any wages, benefits or other forms of compensation, and/or separation from employment, such as any claims involving:
>
> (1) Any federal, state, or local laws, regulations, or statutes prohibiting employment discrimination (such as, without limitation, race, sex, national origin, age, disability, religion), retaliation, and harassment, including but not limited to claims arising under Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), the Age Discrimination in Employment Act ("ADEA"), the Americans with Disabilities Act ("ADA"), the Equal Pay Act ("EPA"), the Civil Rights Acts of 1866 and 1871, 42 U.S.C. § 1981, the Family and Medical Leave Act ("FMLA"), Pregnancy Discrimination Act ("PDA") and any state law equivalents.
>
> . . . .
>
> For all covered claims, Employee and Cowabunga, Inc. expressly waive any right to a trial by jury. No covered claims may be asserted as part of a multi-plaintiff, class or collective action. Moreover, no covered claims may proceed to arbitration on a multi-plaintiff, class or collective basis. Rather, each allegedly aggrieved employee must proceed to arbitration separately and individually, and the Employee's arbitration proceeding shall encompass only the covered claims purportedly possessed by such individual Employee.
>
> b. Claims Not Covered: The only disputes between Employee and Cowabunga, Inc. which are not included within this Agreement are:
>
> (1) Any claim by Employee for workers' compensation or unemployment compensation benefits.
>
> (2) Any claim by Employee for benefits under a company plan which provides its own arbitration procedure.
>
> (3) Any claim by Cowabunga, Inc. for injunctive relief for Employee's violation of contract, common law, statutes related to trade secrets or confidential information, covenants not to compete or other restrictive covenants.

The complaint alleges that, by maintaining the Agreement, which prohibits employees from pursuing multiparty, class, or collective claims regarding their terms and conditions of employment in all forums, judicial and

arbitral, the Respondent interfered with employees' Section 7 rights to engage in protected concerted activities.

The complaint additionally alleges that the Respondent violated the Act when it sought to enforce this Agreement on April 30, 2015, by filing a motion to dismiss or, in the alternative, to stay and compel arbitration in a wage and hour class action filed by Charging Party Hines in Federal district court.[1]

Lastly, the complaint alleges that maintaining the Agreement independently violated Section 8(a)(1) because employees reasonably would believe that the Agreement bars or restricts their right to file unfair labor practices with the Board.

On September 8, 2015, the Respondent filed an answer. On September 11, 2015, the Respondent filed an amended answer admitting all of the factual allegations in the complaint but denying the legal conclusions and asserting certain affirmative defenses.

On October 22, 2015, the General Counsel filed a Motion for Summary Judgment. On December 14, 2015, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On January 11, 2016, the General Counsel and the Respondent filed responses.

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

Ruling on Motion for Summary Judgment

1. 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 in *D. R. Horton*, *Inc.,* 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and found unlawful the maintenance and enforcement of a mandatory arbitration agreement requiring employees to waive the right to commence or participate in class or collective actions in all forums, whether arbitral or judicial. As stated above, the Respondent's answer admits all of the factual allegations in the complaint. Specifically, the Respondent's answer admits that it requires employees to execute the Agreement as a condition of employment and that the Agreement expressly requires that all employment-based claims be resolved through individual, binding arbitration. The Respondent's answer further admits that it filed a motion to dismiss or in the alternative stay and compel arbitration in *Chadwick Hines v. Cowabunga, Inc*. We therefore find that there are no material issues of fact; nor has the Respondent raised any other issues warranting a hearing.

In its response to the Board's Notice to Show Cause, the Respondent presents a number of arguments to support its assertion that its maintenance and enforcement of the Agreement did not violate the Act in any way.

First, the Respondent argues that *D. R. Horton* and *Murphy Oil*, supra, were wrongly decided when finding that similar mandatory arbitration provisions violated Section 8(a)(1). We disagree. Accordingly, we apply *D. R. Horton* and *Murphy Oil USA* here, and find that the Respondent violated Section 8(a)(1) by maintaining and enforcing the Agreement. The Agreement expressly requires employees to bring all employment-related claims to individual arbitration and to waive—in any forum—their right to pursue claims on a class or collective basis.

We therefore find that the Respondent's maintenance of the Agreement violates the Act.

The Respondent next argues that the complaint should be dismissed because Hines did not engage in concerted activity in filing the FLSA lawsuit in Federal district court. We reject this argument. As the Board made clear in *Beyoglu*, 362 NLRB No. 152 (2015), "the filing of an employment-related class or collective action by an individual is an attempt to initiate, to induce, or to prepare for group action and is therefore conduct protected by Section 7." Id., slip op. at 2. See also *D. R. Horton*, 357 NLRB at 2279.

We also reject the Respondent's argument that Hines does not meet the definition of an "employee" under the Act because he was no longer employed by the Respondent at the time the Respondent filed its motion to compel. The Board has long held that the broad definition of "employee" contained in Section 2(3) of the Act covers former employees. See *Briggs Mfg. Co*., 75 NLRB 569, 571 (1947). Accord: *Leslie's Poolmart, Inc.*, 362 NLRB No. 184 slip op. at 1 fn. 2 (2015); *PJ Cheese, Inc.*, 362 NLRB No. 177, slip op. at 3 fn. 9 (2015).

The Respondent additionally argues that the complaint is time barred by Section 10(b) because the initial unfair labor practice charge was filed and served more than 6 months after Hines signed and became subject to the Agreement. We reject this argument, because the Respondent continued to maintain the unlawful Agreement during the 6-month period preceding the filing of the initial charge. The Board has long held under these circumstances that maintenance of an unlawful workplace rule, such as the Respondent's Agreement, constitutes a continuing violation that is not time barred by Section 10(b). See *PJ Cheese*, supra, slip op. at 1; *Neiman Marcus Group*, 362 NLRB No. 157, slip op. at 2 fn. 6 (2015); and *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27,

[1] *Chadwick Hines v. Cowabunga, Inc.*, Case No. 1:15-CV-00828-LMM (United States District Court, Northern District of Georgia, Atlanta Division). On May 5, 2015, Hines filed a Notice of Dismissal Without Prejudice with the court.

slip op. at 2 fn. 7 (2015). It is equally well established that an employer's enforcement of an unlawful rule, like the Agreement here, independently violates Section 8(a)(1). See *Murphy Oil*, supra at 19–21. The Respondent enforced its arbitration Agreement on April 30, 2015, within the relevant 6-month period before the charge was filed and served.[2]

2. Additionally, we find that the Respondent unlawfully sought to enforce the Agreement. In *Murphy Oil*, the Board found that the employer's motion in Federal district court to dismiss a collective FLSA action and to compel individual arbitration pursuant to its mandatory arbitration agreement violated Section 8(a)(1) because that enforcement action unlawfully restricted employees' exercise of Section 7 rights. 361 NLRB No. 72, slip op. at 19. As in *Murphy Oil*, the Respondent unlawfully enforced its arbitration agreement when it petitioned the district court to dismiss or to stay and compel arbitration in order to compel employees to arbitrate their claims individually.[3]

3. Lastly, we find the Agreement to be independently unlawful because employees would reasonably believe that it waived or limited their right to file a charge with the Board or to access the Board's processes.

It is well settled that a work rule violates Section 8(a)(1) if employees would reasonably believe that the rule interferes with their ability to file Board charges, even if the policy does not expressly prohibit access to the Board. See *Murphy Oil*, supra, slip op. at 19 fn. 98; *D. R. Horton*, supra, 357 NLRB at 2278 fn. 2; *U-Haul Co. of California*, 347 NLRB 375, 377–378 (2006), enfd. mem. 255 Fed.Appx. 527 (D.C. Cir. 2007). Furthermore, it is settled that production of extrinsic evidence, such as testimony showing that employees interpreted the rule to preclude access to the Board, is not a precondition to finding that a rule is unlawful by its terms. See, e.g., *Murphy Oil*, supra, slip op. at 13 fn. 79; *Hills & Dales General Hospital*, 360 NLRB No. 70, slip op. at 1–2 (2014) (citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–647 (2004); *Claremont Resort & Spa*, 344 NLRB 832, 832 (2005)).

Here, the Respondent admits that it maintains the Agreement as a condition of employment. The Agreement requires that all "claims" between the employee and the Respondent "relating to his/her hiring, terms and conditions of employment, job assignments, payment of any wages, benefits or other forms of compensation, and/or separation from employment" be decided exclusively by arbitration. The term "claims" includes

> any claims involving . . . [a]ny federal, state, or local laws, regulations, or statutes prohibiting employment discrimination (such as, without limitation, race, sex, national origin, age, disability, religion), retaliation, and harassment, including but not limited to claims arising under Title VII of the Civil Rights Act of 1964, as amended ("Title VII"), the Age Discrimination in Employment Act ("ADEA"), the Americans with Disabilities Act ("ADA"), the Equal Pay Act ("EPA"), the Civil Rights Acts of 1866 and 1871, 42 U.S.C. § 1981, the Family and Medical Leave Act ("FMLA"), Pregnancy Discrimination Act ("PDA") and any state law equivalents.

Although the Agreement does not explicitly prohibit employees from filing charges with the Board, employees would reasonably read it to do so—particularly in light of the breadth of the provision quoted above, its reference to "any claim" under Federal laws or statutes, and its specific inclusion of claims of discrimination, retaliation, payment of wages, and "separation from employment." See *Hoot Winc LLC*, 363 NLRB No. 2, slip

[2] Our dissenting colleague, relying on his dissenting position in *Murphy Oil*, 361 NLRB No. 72, slip op. at 22–35 (2015), would find that the Respondent's Agreement does not violate Sec. 8(a)(1). He observes that the Act does not "dictate" any particular procedures for the litigation of non-NLRA claims, and "creates no substantive right for employees to insist on class-type treatment" of such claims. This is all surely correct, as the Board has previously explained in *Murphy Oil*, above, 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*, above, 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*, 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*, above, slip op. at 18; *Bristol Farms*, above, 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*, above, slip op. at 17–18; *Bristol Farms*, above, slip op. at 2.

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

op. at 1 (2015); *U-Haul Co. of California*, supra, 347 NLRB at 377.[4]

Accordingly, we grant the General Counsel's Motion for Summary Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, Respondent, a Georgia corporation with an office and place of business in Alpharetta, Georgia, has been engaged in the operation of a number of retail restaurant facilities in Georgia, Alabama, and South Carolina.

During the 12-month period ending December 31, 2014, the Respondent, in conducting its operations described above, derived gross revenues in excess of $500,000 and purchased and received at its Georgia facilities goods or services valued in excess of $5000 which originated outside the State of Georgia.

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

II. ALLEGED UNFAIR LABOR PRACTICES

Since at least March 20, 2014, the Respondent has required its current and former employees to sign the Agreement as a condition of employment. The Agreement requires that employees bring all "claims" between the employee and the Respondent "relating to his/her hiring, terms and conditions of employment, job assignments, payment of any wages, benefits or other forms of compensation, and/or separation from employment" to individual binding arbitration, thereby interfering with employees' Section 7 right to engage in collective legal activity and interfering with employees' access to the Board and its processes. On April 30, 2015, the Respondent sought to enforce the Agreement described above by filing a motion to dismiss or in the alternative stay and compel arbitration to compel individual arbitration rather than class-wide litigation of claims in a class-action wage-and-hour complaint filed against the Respondent by the Charging Party in *Chadwick Hines v. Cowabunga, Inc.*, Case No. 1:15-CV-00828-LMM (United States District Court, Northern District of Georgia, Atlanta Division).

CONCLUSIONS OF LAW

1. The Respondent, Cowabunga, Inc., is an employer within the meaning of Section 2(6) of the Act.

2. By maintaining a mandatory and binding arbitration agreement that employees reasonably would believe bars or restricts them from filing charges with the National Labor Relations Board or from accessing the Board's processes, and by maintaining and 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, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act, and has violated Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Consistent with our decision in *Murphy Oil*, supra, slip op. at 21, and the Board's usual practice in cases involving unlawful litigation, we shall order the Respondent to reimburse plaintiffs in the wage and hour class action lawsuit for all reasonable expenses and legal fees, with interest, that they may have incurred in opposing the Respondent's unlawful motion to dismiss the class action and to compel arbitration.[5] *See Bill Johnson's Restaurant 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" and "any other proper relief that would effectuate the policies of the Act."). Interest shall be computed in the manner prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). See *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 835 fn. 10 (1991) ("[I]n make-whole orders for suits maintained in violation of the Act, it is appropriate and necessary to award interest on litigation expenses"), enfd. 973 F.2d 230 (3d Cir. 1992). We shall also order the Respondent to rescind or revise the Agreement and to notify employees that it has done so.[6]

[4] Although our colleague concurs in our finding that employees would reasonably believe that the Agreement waived or limited their right to file a charge with the Board or to access the Board's processes, we note his view that an individual arbitration agreement lawfully may require the arbitration of unfair labor practice claims, if the agreement reserves to employees the right to file charges with the Board. We disagree with that view for the reasons stated in *Ralphs Grocery*, 363 NLRB No. 128 (2016).

[5] The General Counsel represents that no attorneys' fees accrued to Charging Party Hines in defending against the Respondent's motion to dismiss and does not seek reimbursement of expenses and legal fees for Hines in connection with the Respondent's motion. We leave to compliance the determination of whether other plaintiffs in the class action lawsuit accrued expenses and legal fees in opposing the Respondent's motion.

[6] We reject the Respondent's argument that its motion to dismiss and to compel arbitration was protected by the First Amendment's

ORDER

The Respondent, Cowabunga, Inc. Alpharetta, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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

(b) Maintaining and/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.

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

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

(a) Rescind the Mutual Agreement to Arbitrate (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, and that it does not restrict employees' right to file charges with the National Labor Relations Board or to access the Board's processes.

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

(c) In the manner set forth in the remedy section of this decision, reimburse plaintiffs for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing the Respondent's motion to dismiss the collective lawsuit and compel arbitration.

(d) Within 14 days after service by the Region, post at its Savannah, Georgia facility copies of the attached notice marked "Appendix A," and at all other facilities where the unlawful Agreement has been in effect, copies of the attached notice marked "Appendix B."[7] Copies of the notice, on forms provided by the Regional Director for Region 10, 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 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 its Savannah, Georgia facility at any time since November 4, 2014. If the Respondent has gone out of business or closed any facilities other than the one involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix B" to all current and former employees employed by the Respondent at those facilities at any time since November 4, 2014.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 10 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 26, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring in part and dissenting in part.

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

Because the lawsuit has been voluntarily dismissed, we find it unnecessary to order the Respondent, as in *Murphy Oil* (slip op. at 21–22), to notify the court that it no longer opposes Hines's lawsuit. See, e.g,. *RPM Pizza*, 363 NLRB No. 83, slip op. at 2 fn. 5 (2015).

[7] 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."

In this case, my colleagues find that the Respondent's Mutual Agreement to Arbitrate (MAA) violates Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) because the MAA waives the right to participate in class or collective actions regarding non-NLRA employment claims. Charging Party Chadwick Hines signed the MAA, and later he filed a class action lawsuit against the Respondent in Federal district court alleging wage and hour violations. In reliance on the MAA, the Respondent filed a motion to dismiss or, in the alternative, to stay and compel arbitration.[1] My colleagues find that the Respondent thereby unlawfully enforced its MAA. I respectfully dissent from these findings for the reasons explained in my partial dissenting opinion in *Murphy Oil USA, Inc.*[2]

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.[3] 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."[4] This aspect of Section 9(a) is reinforced by Section 7 of the Act, which protects each employee's right to "refrain from" exercising the collective rights enumerated in Section 7. Thus, I believe it is clear that (i) the NLRA creates no substantive right for employees to insist on class-type treatment of non-NLRA claims;[5] (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;[6] and (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA).[7] 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.

Because I believe the Respondent's MAA was lawful under the NLRA, I would find it was similarly lawful for the Respondent to file a motion in Federal court seeking

[1] A few days after the Respondent filed its motion, Hines filed a Notice of Dismissal Without Prejudice with the court.

[2] 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 denied enforcement by the Court of Appeals for the Fifth Circuit. *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015).

[3] 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).

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

[5] 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.").

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

[7] 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).

to enforce the MAA. That the Respondent's motion was reasonably based is supported by court decisions that have enforced similar agreements.[8] As the Fifth Circuit recently observed after rejecting (for the second time) the Board's position regarding the legality of class-waiver agreements: "[I]t is a bit bold for [the Board] to hold that an employer who followed the reasoning of our *D. R. Horton* decision had no basis in fact or law or an 'illegal objective' in doing so. The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders."[9] I also believe that any Board finding of a violation based on the Respondent's meritorious motion in Federal district court to compel arbitration would improperly risk infringing on the Respondent's rights under the First Amendment's Petition Clause. See *Bill Johnson's Restaurants v. NLRB,* 461 U.S. 731 (1983); *BE & K Construction Co. v. NLRB,* 536 U.S. 516 (2002); see also my partial dissent in *Murphy Oil,* above, 361 NLRB No. 72, slip op. at 33–35. Finally, for similar reasons, I believe the Board cannot properly require the Respondent to reimburse plaintiffs in the class action lawsuit for their attorneys' fees in the circumstances presented here. *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 35.

Accordingly, as to these issues, I respectfully dissent.[10]

Dated, Washington, D.C. February 26, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX A

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration agreement that employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board or to access the Board's processes.

WE WILL NOT maintain and/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.

[8] See, e.g., *Murphy Oil, Inc., USA v. NLRB*, above; *Johnmohammadi v. Bloomingdale's*, 755 F.3d 1072 (9th Cir. 2014); *D. R. Horton, Inc. v. NLRB*, above; *Owen v. Bristol Care, Inc*., 702 F.3d 1050 (8th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013).

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

[10] I agree with my colleagues that the Charging Party's status as a former employee does not deprive him of standing to file and pursue the unfair labor practice charge here. I also agree with the majority's finding that the complaint is not time barred by Sec. 10(b).

For the following reasons, I concur in my colleagues' finding that the MAA unlawfully interferes with NLRB charge filing in violation of Sec. 8(a)(1). All employees were required to sign the MAA, which in pertinent part requires employees to resolve by arbitration "all claims by Employee against Cowabunga, Inc. . . . and all claims that Cowabunga, Inc., may have against Employee, including, without limitation, any claims Employee may have relating to his/her hiring, terms and conditions of employment, job assignments, payment of any wages, benefits or other forms of compensation, and/or separation from employment, such as any claims involving [a]ny federal, state, or local laws, regulations, or statutes prohibiting employment discrimination . . . ." For the reasons stated in my separate opinion in *Rose Group d/b/a Applebee's Restaurant,* 363 NLRB No. 75, slip op. at 3–5 (2015) (Member Miscimarra, concurring in part and dissenting in part), I believe that an agreement may lawfully provide for the arbitration of NLRA claims, and such an agreement does not unlawfully interfere with Board charge filing, at least where the agreement expressly preserves the right to file claims or charges with the Board or, more generally, with administrative agencies. Here, however, the Agreement does not qualify in any way the requirement that "any claims Employee may have relating to his/her hiring, terms and conditions of employment, job assignments, payment of any wages, benefits or other forms of compensation, and/or separation from employment," including "any claims involving [a]ny federal . . . statutes prohibiting employment discrimination," must be resolved in binding arbitration and in this manner only. To the contrary, the MAA states that "binding arbitration pursuant to this Agreement shall be the sole and exclusive remedy for resolving any such covered claims or disputes." These provisions of the MAA, taken together, appear to preclude the filing of a Board charge, and nothing in the MAA states otherwise. For these reasons, I join my colleagues in finding that the Agreement violates the Act by unlawfully restricting the filing of charges with the Board. See *U-Haul Co. of California,* 347 NLRB 375, 377 (2006), enfd. mem. 255 Fed. Appx. 527 (D.C. Cir. 2007); *Murphy Oil*, above, slip op. at 22 fn. 4 (Member Miscimarra, dissenting in part); *GameStop Corp.*, 363 NLRB No. 89, slip op. at 6–7 (Member Miscimarra, concurring in part and dissenting in part); *Rose Group d/b/a Applebee's Restaurant*, above (Member Miscimarra, concurring in part and dissenting in part); *FUJI Foods,* 363 NLRB No. 118, slip op. at 4 fn. 13 (2016) (Member Miscimarra, concurring in part and dissenting in part).

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 (the 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, and that it does not restrict your right to file charges with the National Labor Relations Board or to access the Board's processes.

WE WILL notify all 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, WE WILL provide them a copy of the revised agreement.

WE WILL reimburse plaintiffs for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing our motion to dismiss the collective lawsuit and compel arbitration.

COWABUNGA, INC.

The Board's decision can be found at www.nlrb.gov/case/10–CA–151454 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., Room 5011, Washington, D.C. 20570, or by calling (202) 273–1940.

APPENDIX B

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration agreement that employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board or to access the Board's processes.

WE WILL NOT maintain and/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 (the 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, and that it does not restrict your right to file charges with the National Labor Relations Board or to access the Board's processes.

WE WILL notify all 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, WE WILL provide them a copy of the revised agreement.

COWABUNGA, INC.

The Board's decision can be found at www.nlrb.gov/case/10–CA–151454 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.