

No. _____

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CENTURY FAST FOODS, INC,
a California corporation,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Review of Decision and Order Issued In
Century Fast Foods, Inc. and William Lujan
Case No. 31-CA-116102

PETITION FOR REVIEW

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Petitioner Century Fast Foods, Inc. states that it is a California corporation with an office and principal place of business in Chatsworth, California. No privately-held or publicly-held corporation holds 10% or more in Century Fast Foods, Inc.'s stock.

Respectfully submitted,

DATED: March 10, 2016

FISHER & PHILLIPS LLP

By: /s/ Wendy M. Coats
Lonnie D. Giamela
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*Attorneys for Petitioner
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PETITION FOR REVIEW

Pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure, Century Fast Foods, Inc. (“Petitioner”) petitions the United States Court of Appeals for the Ninth Circuit for review of a Decision and Order of the National Labor Relations Board (“NLRB”) in the matter styled *Century Fast Foods Inc. and William Lujan*, NLRB Case No. 31-CA-116102, reported at 363 NLRB No. 97, dated January 20, 2016. See Attachment “A.”

This Court has jurisdiction in this matter pursuant to Section 10(f) of the National Labor Relations Act because the NLRB’s “Decision and Order” is a final order. 29 U.S.C. § 160(f). Petitioner is a party aggrieved by the Decision and Order. Petitioner transacts business within this judicial circuit, as defined in 28 U.S.C. § 41.

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

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

Respectfully submitted,

DATED: March 10, 2016

FISHER & PHILLIPS LLP

By: /s/ Wendy M. Coats
Lonnie D. Giamela
Wendy McGuire Coats
Attorneys for Petitioner
Century Fast Foods Inc.

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

Century Fast Foods, Inc. and William Lujan. Case 31-CA-116102

January 20, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On April 24, 2015, Administrative Law Judge Ariel L. Sotolongo issued the attached decision. The Respondent filed exceptions and a supporting brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions,¹ and to adopt the recommended Order, as modified and set forth in full below.²

The judge found, applying the Board's decisions in *D. R. Horton*, 357 NLRB No. 184 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied ___ F.3d ___ (5th Cir. 2015), that the Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing an Agreement to Arbitrate (Agreement) that 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.³ The judge also found, relying on *D. R. Horton*

¹ We shall amend the judge's conclusions of law to reflect that the Respondent only maintained, but did not enforce, the provisions in the Agreement that prohibit employees from accessing the Board's processes and that require employees to keep arbitration proceedings confidential.

² We shall modify the judge's recommended Order to conform to the Board's standard remedial language for the violation found, and we shall substitute new notices to conform to the Order as modified.

³ 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*, supra, 361 NLRB No. 72, slip op. at 2, and *Bristol Farms*, 363 NLRB No. 45, slip op. at 2 and 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*, supra, 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*, 361 NLRB No. 72, slip op. at 18; *Bristol Farms*, 363 NLRB No. 45, slip op.

and *U-Haul of California*, 347 NLRB 375, 377-378 (2006), enf. 255 Fed.Appx. 527 (D.C. Cir. 2007), that maintaining the Agreement violated Section 8(a)(1) because employees reasonably would believe that it bars or restricts their right to file unfair labor practice charges with the Board.

Based on the judge's application of *D. R. Horton* and *Murphy Oil*, we affirm the judge's findings and conclusions,⁴ and adopt the recommended Order as modified and set forth in full below.

at 2. 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.

Finally, we reject our dissenting colleague's view that the Respondent's motion to compel arbitration was protected by the First Amendment's Petition Clause. In *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (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).

⁴ Although the Agreement does not explicitly restrict class or collective employment claims, we find, contrary to our dissenting colleague, that employees would reasonably read it to restrict their Sec. 7 right to engage in collective action because it requires employees to use "confidential" binding arbitration. See *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). This requirement precludes employees from discussing arbitral claims with their coworkers or learning that coworkers are pursuing work-related claims in arbitration, effectively thwarting their ability to pursue their claims on a class or collective basis. We also find that the Agreement was applied to restrict Sec. 7 rights under the third prong of *Lutheran Heritage*. The Respondent clearly interpreted and applied the Agreement to bar class or collective action as it moved to compel arbitration on an individual rather than a class or collective basis. See *Countrywide Financial Corp.*, 362 NLRB No. 165, slip op. at 3-5 (2015); *Leslie's Poolmart, Inc.*, 362 NLRB No. 184, slip op. at 1 fn. 3 (2015); *Philmar Care, LLC*, 363 NLRB No. 57, slip op. at 1 (2015).

The Respondent contends that its arbitration agreement is voluntary and therefore does not fall within the proscriptions of *Murphy Oil* and *D. R. Horton*, supra, which involved agreements that were imposed on employees as a condition of employment. See *D. R. Horton*, slip op. at 13 fn. 28. We agree with the judge that the Agreement was imposed as a condition of employment. Even if the agreement were voluntary, however, an arbitration agreement that precludes collective action in all forums is unlawful because it requires employees to prospectively waive their Sec. 7 right to engage in concerted activity. See *On Assignment Staffing Services*, 362 NLRB No. 189, slip op. at 1, 5-8 (2015); *Bristol Farms*, 363 NLRB No. 45, slip op. at 1-2 (2015). For this reason, we find it unnecessary to rely on the judge's findings that "at the time of signing, Lujan was under 18 years of age" and that "the language of the [Agreement] was in very small print, barely legible."

For the reasons stated by the judge, we agree that employees reasonably would construe the Agreement to restrict their access to the Board's processes. *U-Haul Co. of California*, supra.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following as Conclusion of Law 4.

"4. Respondent violated Section 8(a)(1) of the Act by maintaining a mandatory arbitration agreement that employees would reasonably believe bars or restricts the right to file charges with the National Labor Relations Board."

2. Substitute the following as Conclusion of Law 5.

"5. Respondent violated Section 8(a)(1) of the Act by maintaining a mandatory arbitration agreement that requires employees to keep any arbitration confidential."

ORDER

The National Labor Relations Board orders that the Respondent, Century Fast Foods, Inc., Chatsworth, California, 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.

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

(c) Maintaining a mandatory arbitration agreement that requires employees to keep confidential any arbitration proceedings undertaken as the result of such agreement.

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

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

(a) Rescind the mandatory arbitration agreement in all of its forms, or revise it in all of its forms to make clear

The Respondent argues that its Agreement includes an exemption allowing employees to file charges with administrative agencies and thus does not, as in *D. R. Horton* and *Murphy Oil*, 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 stated in *SolarCity Corp.*, 363 NLRB No. 83 (2015).

We also adopt the judge's finding that the confidentiality provision of the arbitration agreement independently violates Sec. 8(a)(1). See *Professional Janitorial Services of Houston*, 363 NLRB No. 35, slip op. at 1 fn. 3 (2015); *Double Eagle Hotel & Casino*, 341 NLRB 112, 115 (2004), enfd. 414 F. 3d 1249 (10th Cir. 2005), cert. denied 546 U.S. 1170 (2006). We agree with the judge that the Respondent failed to show a legitimate and substantial business justification that outweighs the employees' Sec. 7 rights.

to employees that the arbitration agreement does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums, that it does not bar or restrict employees' right to file charges with the National Labor Relations Board, and that it does not require employees to keep confidential any arbitration proceedings undertaken as the result of such agreement.

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

(c) Notify the Superior Court of the State of California in Case No. BC513815 that it has rescinded or revised the mandatory arbitration agreement upon which it based its motion to stay William Lujan's class lawsuit and to compel individual arbitration of his claims, and inform the court that it no longer opposes the lawsuit on the basis of the arbitration agreement.

(d) In the manner set forth in the remedy section of the judge's decision, reimburse William Lujan and any other plaintiffs in Case No. BC513815 for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing the Respondent's motion to stay the class lawsuit and compel individual arbitration.

(e) Within 14 days after service by the Region, post at its Chatsworth, California facility copies of the attached notice marked "Appendix A," and at all other facilities where the unlawful arbitration agreement is or has been in effect, copies of the attached notice marked "Appendix B."⁵ Copies of the notices, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or 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

⁵ 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."

Exhibit A

CENTURY FAST FOODS, INC.

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copy of the notice marked “Appendix A” to all current employees and former employees employed by the Respondent at any time since April 30, 2013, and any employees against whom the Respondent had enforced its mandatory arbitration agreement since October 24, 2013.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 20, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring in part and dissenting in part.

In this case, my colleagues find that the Respondent’s Agreement to Arbitrate (Agreement) violates Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) because the Respondent has applied it to require individual arbitration of non-NLRA employment claims.¹ Charging Party William Lujan signed the Agreement, and later he filed a class action lawsuit against the Respondent in State court alleging violations under the California Labor Code and the California Business and Professions Code. In reliance on the Agreement, the Respondent filed a Notice of Motion and Motion to Compel Arbitration on an Individual Basis, Strike Class Allegations, and Stay the Proceedings Pending Arbitration (Motion to Compel).² My colleagues find that the Respondent thereby unlawfully enforced its Agreement. I respectfully dissent from these findings for the reasons explained in my partial dissenting opinion in *Murphy Oil USA, Inc.*³

¹ The Agreement requires that non-NLRA employment claims be resolved through arbitration, but it does not expressly prohibit class or collective arbitration.

² The court struck the class allegations and stayed the litigation pending completion of the arbitration of Lujan’s individual claim.

³ 361 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*, No. 14-60800, 2015 WL 6457613 (5th Cir. 2015).

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.⁴ 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.”⁵ 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;⁶ (ii) a class-waiver agreement per-

⁴ I agree that non-NLRA claims can give rise to “concerted” activities engaged in by two or more employees for the “purpose” of “mutual aid or protection,” which would come within the protection of NLRA Sec. 7. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 23–25 (Member Miscimarra, dissenting in part). However, the existence or absence of Sec. 7 protection does not depend on whether non-NLRA claims are pursued as a class or collective action, but on whether Sec. 7’s statutory requirements are met—an issue separate and distinct from whether an individual employee chooses to pursue a claim as a class or collective action. *Id.*; see also *Beyoglu*, 362 NLRB No. 152, slip op. at 4–5 (2015) (Member Miscimarra, dissenting). Here, Lujan filed the lawsuit by himself, and there is no evidence that he ever sought the support of any other employee. Accordingly, the record fails to establish that Lujan engaged in protected concerted activity. See *Beyoglu*, above (Member Miscimarra, dissenting) (finding that employee’s individual act of filing a collective action was not concerted activity).

⁵ *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).

⁶ 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)

taining to non-NLRA claims does not infringe on any NLRA rights or obligations, which has prompted the overwhelming majority of courts to reject the Board's position regarding class-waiver agreements;⁷ and (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA).⁸ 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.⁹

Because I believe the Respondent's Agreement was lawful under the NLRA, I would find it was similarly lawful for the Respondent to file a motion in State court seeking to enforce the Agreement.¹⁰ It is relevant that

("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.")

⁷ 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 USA, Inc. 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.*, No. 14-CV-5882 (VEC), 2015 WL 1433219 (S.D.N.Y. Mar. 27, 2015); *Nanavati v. Adecco USA, Inc.*, No. 14-cv-04145-BLF, 2015 WL 1738152 (N.D. Cal. Apr. 13, 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).

⁸ 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).

⁹ Because I disagree with the Board's decisions in *Murphy Oil* and *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), enfd. denied in 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 on employees' behalf. See *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013). For the same reasons, I also find it unnecessary to address the Respondent's argument that the Agreement, which was part of a 2-page employment application, is voluntary under state law.

¹⁰ The Agreement was silent as to whether arbitration may be conducted on a class or collective basis. In finding the Respondent's Motion to Compel unlawful, my colleagues rely on *Philmar Care, LLC*, 363 NLRB No. 57 (2015), *Countrywide Financial Corp.*, 362 NLRB No. 165 (2015), and *Leslie's Poolmart, Inc.*, 362 NLRB No. 184 (2015). In these cases, a Board majority decided that the employer violated the Act by moving to compel individual arbitration based on

the State court that had jurisdiction over the non-NLRA claims *granted* the Respondent's motion to compel arbitration. That the Respondent's motion was reasonably based is also supported by court decisions that have enforced similar agreements.¹¹ 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."¹² I also believe that any Board finding of a violation based on the Respondent's meritorious State court motion to compel arbitration would improperly risk infringing on the Respondent's rights under the First Amendment's Petition Clause. See *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983); *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002); see also my partial dissent in *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 33–35. Finally, for similar reasons, I believe the Board cannot properly require the Respondent to reimburse the Charging Party and any other plaintiffs in Case No. BC513815 for their attorneys' fees in the circumstances presented here. *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 35.

an arbitration agreement that, like the Respondent's, was silent regarding the arbitrability of class and collective claims. For the reasons stated in former Member Johnson's dissent in *Countrywide Financial*, however, above, slip op. at 8¹⁰ the Board's decisions in those cases are in conflict with the FAA and Supreme Court precedent construing that statute. The Court has held that a "party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Stolt-Nielsen S.A. v. Feeds International Corp.*, 559 U.S. 662, 684–685 (2010) (emphasis in original). Obviously, where an arbitration agreement is silent regarding class arbitration, there is no such contractual basis. Thus, Respondent's motion to compel individual arbitration was "well-founded in the FAA as authoritatively interpreted by the Supreme Court." *Philmar Care*, above, slip op. at 4 fn. 11 (Member Miscimarra, dissenting); see also *Countrywide Financial*, above, slip op. at 9 (Member Johnson, dissenting).

¹¹ See, e.g., *Murphy Oil USA, Inc. v. NLRB*, above; *Johnmohammadi v. Bloomington'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).

¹² *Murphy Oil USA, Inc. v. NLRB*, above, at fn. 6.

Accordingly, as to these issues,¹³ I respectfully dissent.

¹³ I concur with my colleagues' finding that the Agreement unlawfully interferes with protected concerted activity in violation of Sec. 8(a)(1) based on its requirement that employees "use confidential binding arbitration" (emphasis added) to resolve covered disputes. Here, I rely on the fact that a central aspect of protected concerted activity under the NLRA involves discussions and coordination between or among two or more employees regarding employment-related disputes, including those that may be resolved in arbitration, see fn. 4, above; such discussions and coordination would appear to be precluded by "confidential" arbitration; and the record reveals no reasonable limitations on or justifications for a blanket requirement of confidentiality. Cf. *Banner Estrella Medical Center*, 362 NLRB No. 137, slip op. at 13-19 (Member Miscimarra, dissenting in part) (describing requirement that the Board strike a proper balance between asserted business justifications and potential impact on NLRA rights).

Additionally, I agree with my colleagues that the Agreement unlawfully interferes with the filing of charges with the Board, although I disagree with their rationale. My colleagues find that employees would reasonably construe the Agreement to restrict their access to the Board's processes "[f]or the reasons stated by the judge," and the judge principally relied on the fact that the Agreement broadly requires that "any claims" between the employee and the Respondent be submitted to binding arbitration. Contrary to the judge and my colleagues, I believe that parties may lawfully agree to submit NLRA claims to arbitration, provided their agreement does not otherwise interfere with NLRB charge-filing. See *The Rose Group d/b/a Applebee's*, 363 NLRB No. 75, slip op. at 3-5 (2015) (Member Miscimarra, dissenting in part); see also *GameStop Corp.*, 363 NLRB No. 89, slip op. at 4-7 (2015) (Member Miscimarra, concurring in part and dissenting in part). Here, however, the Agreement requires the employee "first to present any . . . claims in full written detail to TACO BELL," "next, to complete any TACO BELL internal review process," and "finally, to complete any external administrative remedy (such as with the Equal Employment Opportunity Commission)." The first two provisions appear to restrict the right to file Board charges unless and until employees "first" present the claim "in full written detail" to the Respondent and "next" complete the Respondent's internal review process. Such a restriction, to the extent it operates as a prerequisite for Board charge-filing, violates Sec. 8(a)(1). The Agreement does provide for employees "to complete any external administrative remedy," and a reference to an "external administrative remedy" could encompass NLRB remedies. However, as noted above, the Agreement appears to interpose mandatory prerequisites before the filing of an "administrative" charge with an "external" agency like the NLRB. Moreover, the requirement that employees "complete any external remedy" does not fairly describe the filing of an NLRB charge because, under the NLRB's procedures, filing a charge does not "complete" a potential Board remedy. Rather, charge-filing represents the mere commencement of NLRB proceedings. The filing of a charge is followed by a lengthy, multiple-step progression, including an investigation, the potential issuance of a complaint, a possible hearing before an administrative law judge, the filing with the Board of potential exceptions to the judge's decision and recommended order, and potential compliance proceedings (among other things). See *Brinker International Payroll Company L.P.*, 363 NLRB No. 54, slip op. at 4 fn. 10 (2015) (Member Miscimarra, concurring in part and dissenting in part). Accordingly, for these reasons, I concur with my colleagues' conclusion that the Agreement violates Sec. 8(a)(1) by interfering with Board charge-filing. See *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. mem. 255 Fed.Appx. 527 (D.C. Cir. 2007).

Dated, Washington, D.C. January 20, 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 our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

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

WE WILL NOT maintain a mandatory arbitration agreement that requires employees to keep confidential any arbitration proceedings undertaken as the result of such agreement.

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

WE WILL rescind the mandatory arbitration agreement in all of its forms, or revise it in all of its forms to make clear that the arbitration agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, that it does not restrict your right to file charges with the National Labor Relations Board, and that it does not require you to keep confidential any arbitration proceedings undertaken as the result of such agreement.

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

WE WILL notify the court in which William Lujan filed his class lawsuit that we have rescinded or revised the mandatory arbitration agreement upon which we based our motion to stay his class lawsuit and compel individual arbitration, and WE WILL inform the court that we no longer oppose William Lujan's class lawsuit on the basis of that agreement.

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

CENTURY FAST FOODS, INC.

The Board's decision can be found at [www.nlr.gov/case/31-CA-116102\[J1\]](http://www.nlr.gov/case/31-CA-116102[J1]) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



APPENDIX B

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

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

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

WE WILL NOT maintain a mandatory arbitration agreement that requires employees to keep confidential any arbitration proceedings undertaken as the result of such agreement.

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

WE WILL rescind the mandatory arbitration agreement in all of its forms, or revise it in all of its forms to make clear that the arbitration agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, that it does not restrict your right to file charges with the National Labor Relations Board, and that it does not require you to keep confidential any arbitration proceedings undertaken as the result of such agreement.

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

CENTURY FAST FOODS, INC.

The Board's decision can be found at [www.nlr.gov/case/31-CA-116102\[J2\]](http://www.nlr.gov/case/31-CA-116102[J2]) 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.



Rudy L. Fong Sandoval, Esq., for the General Counsel.
Lonnie D. Giamela, Esq. (Fisher & Phillips, LLP), for the Respondent.

DECISION

STATEMENT OF THE CASE

ARIEL L. SOTOLONGO, Administrative Law Judge. This is another case in a steady stream of cases, by now numerous, that raise issues related to the Board's decisions in *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), petition for rehearing en banc denied (5th Cir. No. 12-60031, April 16, 2014), and more recently, *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), where the Board reaffirmed and further elaborated on the principles announced in *D. R. Horton*. This case is before me based on a Joint Motion to Transfer Proceedings to the Division of Judges and Stipulation of Issues Presented (Joint Motion), which contained a stipulated record attaching certain documents, referenced in the Stipulation of Facts that was also part of the Joint Motion, as set forth below.¹

FINDINGS OF FACT

In their Stipulation of Facts (SOF), which is part of the Joint Motion, the parties agreed to the following facts:

1. (a) The charge in this proceeding was filed by the Charging Party on October 30, 2013, and a copy was served by regular mail on Respondent on November 5, 2013.

(b) The first amended charge in this proceeding was filed by the Charging Party on January 28, 2014, and a copy was served by regular mail on Respondent on February 3, 2014.

2. (a) At all material times, Respondent has been a corporation with an office and place of business in Los Angeles and a facility in Chatsworth, California, where Respondent has been engaged in operating public restaurants selling food and beverages.

(b) In conducting its operations during the 12-month period ending November 25, 2013, Respondent purchased and received at its Chatsworth, California facility goods and services valued in excess of \$5,000 directly from points outside the State of California.

(c) In conducting its operations during the 12-month period ending November 25, 2013, Respondent derived gross revenues in excess of \$500,000.

3. 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.²

4. Charging Party William A. Lujan (Lujan) is a former em-

¹ I granted the initial joint motion on December 19, 2014. Thereafter, on March 26, 2015, the parties submitted a corrected joint motion, which included some missing pages from the attached documents in the original Joint Motion. I granted the corrected joint motion on the same day.

² In light of the factual stipulation contained in paragraph 2(a) through (c) above, I concur with the stipulation contained in paragraph 3, and conclude that at all times material herein, the Respondent has been an employer engaged in commerce within the meaning of Sec. 2(2), (6), and (7) of the Act.

ployee of Respondent. Lujan worked for Respondent from about November 2, 2012 through February 13, 2013.

5. In seeking employment with Respondent, Lujan filled out, signed and dated, an application for employment on October 22, 2012, attached hereto as Exhibit A [of the Joint Motion] (employment application). The employment application does not have an "opt out" provision.

6. (a) The employment application signed by Lujan is standardized and contains a section entitled "Agreement to Arbitrate," (arbitration provision) which reads:

Agreement to Arbitrate. Because of the delay and expense of the court system, TACO BELL and I agree to use confidential binding arbitration, instead of going to court, for any claims that arise between me and Taco Bell, its related companies, and/or their current or former employees. Without limitation, such claims would include any concerning compensation, employment including, but not limited to, any claims concerning sexual harassment or discrimination, or termination of employment. Before arbitration I agree: (i) first to present any such claims in full written detail to TACO BELL; (ii) next, to complete any TACO BELL internal review process; and (iii) finally, to complete any external administrative remedy (such as with the Equal Employment Opportunity Commission). In any arbitration, the then prevailing employment dispute resolution rules of the American Arbitration will apply, except that TACO BELL will pay the arbitrator's fees, and TACO BELL will pay that portion of the arbitration filing fee in excess of the similar court filing fee had I gone to court.

(b) Multiple former and current employees of Respondent have executed the arbitration provision given to Lujan on October 22, 2012, as part of Respondent's hiring process.

7. As part of Respondent's hiring process, from October 22, 2012 through February 12, 2013, Respondent required all job applicants, including Lujan, to sign and date the employment application described above, in paragraph 5.

8. It is Respondent's position that agreement to abide by the arbitration provision contained in employment application was not a required condition of employment for an applicant to be hired by Respondent.

9. It is General Counsel's position that agreement to abide by the arbitration provision contained in the employment application was a required condition of employment for an applicant to be hired by Respondent.

10. About July 2, 2013, Charging Party Lujan filed a class action complaint in the Superior Court of the State of California, County of Los Angeles, Case No. BC513815 (Superior Court), attached hereto as Exhibit B [of the Joint Motion], alleging wage-and-hour and other violations under the California Labor Code and the California Business and Professions Code.

11. About October 24, 2013, Respondent filed a Notice of Motion and Motion to Compel Arbitration on an Individual Basis, Strike the Class Allegations and to Stay the Proceedings Pending Arbitration, filed concurrently with Notice of Motion; Declaration of Sheila Cook; Declaration of Lonnie D. Giamela, collectively attached hereto as Exhibit C [of the Joint Motion], (Motion to Compel) with the Superior Court.

12. About January 6, 2014, Charging Party Lujan filed an opposition to Respondent's Motion to Compel, filed concurrently with Lujan's declaration, attached hereto as Exhibit D [of the Joint Motion]. As noted by Lujan in Lujan's Declaration in support of the opposition, at paragraph 4: "During my application process, I was given a job application form. I was told by Jesse Suarez, the store manager that I needed to fill out the application, sign and date it. I was not given an opportunity to negotiate the employment application's terms or strike any terms in the application—it was a take-it-or-leave-it form." Nowhere in Lujan's declaration does it indicate that any agent of Respondent indicated that the application was a "take it or leave it form."

13. Lujan was under the age of eighteen at the time he signed the employment application containing the arbitration provision. As noted in Lujan's opposition to Respondent's Motion to Compel, noted above and attached hereto as Exhibit D [of the Joint Motion], Lujan's legal counsel took the position in those proceedings that Lujan was protected by the "infancy doctrine" which permitted him to disaffirm the arbitration provision.

14. On March 10, 2014, the Superior Court granted Respondent's Motion to Compel, attached hereto as Exhibit F [of the Joint Motion], severing from the arbitration provision the three-part internal review procedure as well as the "confidential" nature of the arbitration provision. Charging Party appealed the matter to the California Court of Appeals.

15. Respondent and Charging Party, on August 22, 2014, came to a resolution of all claims to the underlying class action complaint, including resolution of the Motion to Compel and appeal noted herein. The settlement did not resolve any class allegations as the class allegations were dismissed by the civil court. Thereafter, the Regional Director of the NLRB Region 31, did not approve Charging Party's withdrawal request of the underlying unfair labor practice matter, because the Regional Director determined settlement of the underlying civil class action complaint does not remedy the Section 8(a)(1) allegations in the instant complaint.

Discussion and Analysis

The parties, in the Joint Motion, also stipulated that the issues presented in this case are as follows:

ISSUE 1(a): Did Respondent violate Section 8(a)(1) by maintaining and enforcing its mandatory arbitration provision, which it required employees to sign as a condition of employment, as alleged in the instant Complaint, by filing its October 24, 2013 Motion to Compel Charging Party Lujan to individually arbitrate class wage and hour claims?

ISSUE 1(b): Did Respondent violate Section 8(a)(1) by maintaining and enforcing its mandatory arbitration provision, as alleged in the instant Complaint, by filing its October 24, 2013 Motion to Compel Charging Party Lujan to individually arbitrate class wage and hour claims, even if employees were not required to sign the arbitration provision as a condition of employment.

ISSUE 2: Whether Respondent's mandatory arbitration provision, subject of Respondent's October 24, 2013 Mo-

tion to Compel Charging Party Lujan to individually arbitrate class wage and hour claims, violates Section 8(a)(1) of the Act by restricting access to the Board and its processes, as alleged in the instant Complaint.

ISSUE 3: Whether Respondent's mandatory arbitration provision, executed by Charging Party Lujan, subject of Respondent's October 24, 2013 Motion to Compel Arbitration on an Individual Basis, violates Section 8(a)(1) of the Act by requiring that employees use "confidential arbitration" thereby prohibiting employees from discussing their terms and conditions of employment, as alleged in the instant Complaint.

1. Whether the "Agreement To Arbitrate" is a condition of employment

In order to decide the above-stipulated issues, however, a more basic and fundamental issue must first be decided, the answer to which is the key to decide the rest: Did Lujan enter into the above-described Agreement to Arbitrate (ATA) voluntarily or was agreeing to the ATA a condition of hire and thus a term and condition of employment? Respondent avers that Lujan agreed to enter the ATA voluntarily, whereas the General Counsel argues that it was a condition of employment. As discussed below, if I find that the ATA was a mandatory condition of employment, the Board's rulings in *D.R. Horton* and *Murphy Oil*, supra, would suggest that at least some aspects of the ATA and its ramifications violated Section 8(a)(1) of the Act. If, on the other hand, I find that Lujan entered into the ATA voluntarily, and that it was not a condition of employment, the same violations might not exist.

Initially, I note that the ATA is silent on the issue; there is no language in the ATA itself that explicitly mandates that an employee sign it in order to gain or maintain employment. Accordingly, I must decide whether in light of the circumstances there was an *implicit* requirement that Lujan sign the ATA as a condition of employment.

In that regard, I first note that at the time of signing, Lujan was under 18 years of age, and thus a minor. (Stipulation of Facts [SOF], ¶ 17). Second, I note that the ATA appears to be part of the employment application itself, appearing on the bottom half of the second page, just above the signature line for the applicant, and that the language of the ATA is in very small print, barely legible.³ Additionally, I note that Respondent's Store Manager, Jesse Suarez, gave Lujan the application and told him to fill it out and sign it, without more, and that although no one told Lujan that it was a "take it or leave it" proposition, that is how Lujan interpreted it. (SOF, ¶ 12). Finally, I note that there is no "opt out" provision in the ATA (SOF ¶ 5), and that multiple former and current employees of Respondent have executed the same ATA as part of Respondent's hiring process (SOF ¶ 6(b)). Although the SOF is silent on this issue,

³ Although the SOF makes no mention of this, I assume that the copy of the application that is attached as SOF Exh.A, pp. A-1 and A-2, is a true copy of the application for employment submitted by Lujan, which reflects the actual size of the application and the font size contained in such document. Even if a true copy of the application and the size of the font was larger, however, it would not impact my conclusions, as discussed below.

I find that it is reasonable to infer that no *successful* job applicant has ever refused to agree to the ATA, since the hiring of such individual under those circumstances would be a significant, even crucial, fact in favor of Respondent's position that the ATA was not a condition of employment. Thus, the mere fact that Respondent has not proffered such evidence or insisted that it be made part of the SOF signals that this has never occurred, most likely because no applicant believed that the job application would be accepted or approved if the candidate did not sign such provision. Indeed, as described above, looking at the application itself, there are no separate signature lines for the ATA and the rest of the application; there is only one single signature line at the bottom of page 2 of the application immediately after the ATA. (SOF Exh. A, p. 1–2). Thus, the ATA appears to be an organic component of the application for employment itself, and not a separate or separable component. There is absolutely no indication in the application form that would even indirectly suggest to the applicant that the ATA portion could be declined or severed from the rest of the application.

Taking all the above factors into account, I conclude that any job applicant in the same circumstances would reasonably conclude that he/she could not “opt out” of the ATA, and would reasonably believe that agreeing to the ATA was a necessary and mandatory component of the application process itself. I find that it was thus reasonably for Lujan—and any other candidate—to conclude that the whole application, including the ATA, was a “take it or leave it” proposition. Indeed, there is additional circumstantial evidence suggesting that Respondent viewed the ATA as a mandatory condition of employment. Thus, as described in the SOF, on or about October 4, 2013, Respondent filed a Motion to Compel Arbitration in the Superior Court of the State of California (SOF ¶ 11). In its Memorandum of Points and Authorities in support of its Motion to Compel (SOF Exhibit C, p. 14–15) filed with the court, Respondent, citing California case precedent, indicates that when an employer imposes *mandatory arbitration as a condition of employment* (emphasis supplied), the employee cannot be made to bear the costs of arbitration. In refuting the claimant's defense in its state court pleadings that the ATA was “unconscionable” under California law, Respondent argues that the ATA provides that Respondent bears the costs of any arbitration under its terms, and therefore complied with California law requiring that employers bear the cost of arbitration imposed on employees. Such argument reasonably implies that Respondent concedes that the ATA was a mandatory condition of employment, or would likely be found to be such in state court. Simply put, I cannot imagine that Respondent would otherwise have included such language in the ATA agreeing to bear the costs of arbitration.

Accordingly, and for the reasons set forth above, I conclude that the ATA was a mandatory condition of employment. This conclusion partly answers issues 1(a) and 1(b) as stipulated by the parties and as set forth above, which posed the question whether the ATA was a mandatory condition of employment.

2. Whether Respondent violated the Act by maintaining and enforcing a mandatory arbitration provision

I now turn to the rest of the substantive issues posed by issues 1(a) and 1(b), namely whether Respondent violated Section 8(a)(1) of the Act, as alleged in the complaint paragraph(s) 5(b) and (c), by filing its October 24, 2013 Motion to Compel Lujan to individually arbitrate class wage and hour claims.

It is clear that the Board's decisions in *D.R. Horton* and *Murphy Oil*, supra, are dispositive of these issues. In *Murphy Oil*, the Board reaffirmed its ruling in *D.R. Horton* that an employer violates Section 8(a)(1) of the Act when it requires employees, as a condition of employment, to enter into arbitration agreements that preclude them from filing class action suits regarding their wages, hours and other conditions of employment. As discussed above, I have concluded that the ATA was a mandatory condition of employment. Although the ATA itself is silent on the issue of employees bringing class actions, Respondent tipped its hand when it filed its Motion to Compel Arbitration on an Individual Basis (and striking class action) in California State Court. This type of action was found unlawful by the Board in *Murphy Oil*, citing *D. R. Horton*, the only distinction being that the court action filed by the employer in that case was in Federal court, as opposed to a state court action in the present case—a distinction without a difference. I find it unnecessary to explain or elaborate regarding the Board's rationale for its rulings in *D. R. Horton* and *Murphy Oil*, both which provide lengthy analysis and discussions of these issues. By now, there have been multiple cases heard by Board administrative law judges throughout the country regarding these issues since the Board decided *D. R. Horton*, and multiple cases now pending before the Board on these matters. Although the facts in each of these cases may vary somewhat, the universal theme in most, if not all of them, is the validity of compulsory arbitration agreements that preclude employees from seeking class action litigation to vindicate their rights. Almost without exception, these types of compulsory arbitration agreements have been found to be unlawful, as have employer actions to enforce such agreements. These issues can fairly be described as controversial, particularly in light of the 5th Circuit Court of Appeals—and arguably other Circuits—disagreement with the Board's ruling in *D. R. Horton*, but by now the Board's position on these matters is clear and well publicized.

In that regard, I note that in its brief Respondent makes an impassioned argument against the Board's ruling in *D.R. Horton* and *Murphy Oil*, citing the courts' rejection of the Board's ruling and rationale in *D. R. Horton*, which Respondent argues was wrongly decided. Suffice it to say, however, that in the absence of a Supreme Court ruling on this line of cases, I am compelled to follow the Board's rulings, not the rulings of any Circuit court. *Pathmark Stores*, 342 NLRB 378, fn. 1 (2004); *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984); *Iowa Beef Packers*, 144 NLRB 615, 616 (1963), *enfd.* in part 331 F.2d 176 (8th Cir. 1964). Thus, unless there is an unexpected reversal by the Board on its views in these matters in the near future, it is reasonable to infer that the Board will continue on this path unless the Supreme Court overrules it, or until *all* Circuit courts disagree with the Board and its orders become unenforceable. This last scenario would, at least in the near future, be very

unlikely for purely logistical reasons if nothing else. In that regard I note that many of the cases now pending before the Board were not actually litigated, but rather submitted via stipulated records, as the present case was, in order to “fast track” these issues to the Board, and eventually to the Circuit courts in order for employers to test the Board’s *Horton* doctrine. Thus, employers—and their representatives—are by now on notice that the Board will continue to find these types of compulsory arbitration agreements and actions to enforce them to be unlawful.⁴

Respondent additionally makes what I believe is a novel argument: that the State of California (or its Supreme Court) should be joined as an indispensable party in this matter because the California Supreme Court has ruled that under California law class action waivers are enforceable, and because the lower state court (California Superior Court) was responsible for the ruling that the ATA’s silence regarding class actions must be interpreted as prohibiting such actions.⁵ This argument is not valid, for a couple of reasons. First, in *Iskanian* (see fn. 5, below), the California Supreme Court indicated that its ruling finding class action waivers enforceable was mandated by the U.S. Supreme Court’s ruling in *AT&T Mobility LLC v. Concepcion*, ___ U.S. ___, 131 S.Ct. 1740 (2011) (*Concepcion*), which pursuant to the Federal Arbitration Act (FAA) reversed a prior California Supreme Court ruling that had restricted class action waivers in arbitration agreements. Thus, it is incorrect to suggest, as Respondent does, that its actions are mandated by California law in contravention of the Board’s *D. R. Horton* and *Murphy Oil* rulings. In both *Horton* and *Murphy Oil* the Board explains why the U.S. Supreme Court’s ruling in *Concepcion* is inapplicable to situations involving employees in the exercise of Section 7 rights. Simply put, California law or its interpretation by the California courts has nothing to do with the legality of Respondent’s conduct, which in this case is subject to federal labor laws.⁶ Thus, Board law is controlling in this instance, and to the extent that California law conflicts with federal law in

⁴ A possible exception to the likelihood of this outcome involves situations where employees are allowed to “opt out” of arbitration agreements, so that those who choose not to opt out can be said to have voluntarily agreed to such arbitrations. This possibility was raised by the Board in fn. 28 of its *Horton* decision, where it indicated that a “more difficult question” would be posed where an employer and employee entered into an arbitration agreement that was not a condition of employment to resolve either a particular dispute or all potential disputes through nonclass arbitration rather than litigation in court. The Board has yet to answer its own question, but at least two administrative law judge decisions have addressed this issue, finding that these types of voluntary agreements do not violate the Act. See, e.g., *Bloomingtondale’s, Inc.*, JD (SF)-29-13 (May 25, 2013); and *Valley Health System LLC*, JD(SF)-08-15 (March 18, 2015). Other administrative law judges have disagreed—See, e.g., *Kenai Drilling Limited*, JD (SF)-13-15 (April 13, 2015); *RPM Pizza*, JD (ATL)-20-14 (July 11, 2014).

⁵ Respondent cites the California Supreme Court’s ruling in *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348, 366-374 (2014).

⁶ Thus, the fact that the California Supreme Court, in *Iskanian*, agreed with the Fifth Circuit’s ruling on *D. R. Horton* and rejected the Board’s rationale in that case is of little consequence, since a state court’s rulings carry no weight on matters of Federal labor law.

this matter, federal law preempts California law, which was the very basis for the *Concepcion* ruling.

Secondly, regarding Respondent’s argument that it was the lower state court (California Superior Court) which ruled that the ATA’s silence on the issue of class arbitrations amounted to a prohibition of such class actions—thus implying that Respondent had no choice in the matter—, such ruling was again mandated by an earlier U.S. Supreme Court decision in *Stolt-Nielsen S.A. v. Animal Feeds International Corp.*, 559 U.S. 662 (2010), a ruling which was followed by the California Court of Appeal in *Nelsen v. Legacy Partners Residential, Inc.*, 207 Cal.App.4th 1115, 1128 (2012). Indeed, this is pointed out by Respondent in its Memorandum of Points and Authorities in support of its Motion to Compel (SOF Exhibit C, p. 12-13). Thus, Respondent knew, or should have known, as early as 2010, when the Supreme Court decided *Stolt-Nielsen*, and certainly by 2012, when the California Court of Appeal decided *Nelsen*, that an arbitration agreement’s silence on the issue of class arbitration meant that such class actions would be precluded.⁷ When Respondent proffered Lujan the job application containing the ATA on October 22, 2012, for him to sign, it knew, or should have known, that the ATA’s silence sealed the fate of class arbitrations, as a matter of Federal and State law. Respondent could have proffered Lujan an arbitration agreement that explicitly did not preclude class action, or at least allowed him to “opt out” of any restrictive arbitration agreement, but did not do so. Respondent thus knew it was forcing Lujan and others into individual arbitrations when it proffered the application form, including the ATA, to its job applicants. Accordingly, Respondent’s attempt to divert responsibility for its conduct to the state of California fails, and it is not necessary to join California, or any of its political subdivisions, as an “indispensable” party, because they are not.

For the above reasons, I conclude that Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory arbitration provision, as alleged in paragraphs 5(a), 5(b), and 8 of the complaint.

3. Whether Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory arbitration provision that restricts access to the Board and its processes

I now turn to the question of whether the language of the ATA restricted Lujan, or other employees, from access to the Board’s processes in violation of Section 8(a)(1) of the Act. Pursuant to the Board’s ruling in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), I must first determine if the ATA explicitly restricts activities protected by Section 7. If so, the ATA is unlawful. If the ATA does not explicitly restrict Section 7 rights, I must examine the following criteria: (1) whether employees would reasonably construe the language to prohibit (or restrict) Section 7 activity; (2) whether the ATA was promulgated in response to union activity; (3) whether the ATA has been applied to restrict the exercise of Section 7 rights. *Lutheran Heritage*, at 647. See also *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), *enfd.* 255 Fed.Appx. 527 (D.C. Cir. 2007); *D. R. Horton*, *supra*.

⁷ *Nelsen* was decided on July 18, 2012.

As discussed previously, the ATA is silent on the question of class action preclusion, and does not explicitly prohibit filing charges with the Board or explicitly restrict other Section 7 activity—except, as will be discussed below, with regard to the confidentiality of the arbitration process. Additionally, there is no evidence that the ATA was promulgated in response to union activity, so criteria number 2, above, is not applicable. Finally, there is no evidence that Respondent applied the ATA to restrict employee access to the Board's processes, so criteria number 3 is likewise not applicable. The question of whether the ATA restricts access to the Board's processes thus turns on the answer to the first criteria above, namely whether employees could reasonably interpret or construe the ATA's language to restrict access to the Board's processes.

I conclude that given the breadth of the ATA's initial language, which mandates arbitration "for any claims that arise between me and Taco Bell . . . (w)ithout limitation, such claims would include any concerning compensation, employment (SIC) including, but not limited to, any claims of sexual harassment or discrimination, or termination of employment" (emphasis supplied), employees could reasonably and likely interpret or construe it to restrict access to the Board's processes. Respondent argues that the phrase that immediately precedes the above-quoted language, which states "I agree to confidential arbitration, instead of going to court, for any claims" (emphasis added) negates any unlawful inference, because going to the Board is not the same as going to court. The Board has rejected similar arguments, however, noting that typical "nonlawyer employees" do not have specialized legal knowledge to making the fine distinction between administrative and judicial processes. *2 Sisters Food Group, Inc.*, 357 NLRB No. 168 slip op. at 2 (2011); *U-Haul Co. of California*, 347 NLRB at 377–378.⁸ Thus, any non-legally trained employee—which, presumably includes most employees of Taco Bell—could reasonably conclude that the above-cited language of the ATA would preclude them from seeking any legal remedy prior to submitting to arbitration, including filing charges with the Board. The same holds true for the language on subsection (iii) of the ATA which follows the above-quoted broad language, which states that prior to going to arbitration, the employee must "complete any external administrative remedy (such as with the Equal Employment Opportunity Commission." This language is similar to other "savings clauses" that have been held insufficient by the Board in light of the broader and sweeping mandatory arbitration language in the rest of the agreement, including *Murphy Oil*, where the savings clause actually appeared to permit employees to proceed to the NLRB. See also *Bill's Electric, Inc.*, 350 NLRB 292, 296 (2007); *Cellular Sales*, 362 NLRB No. 27 fn. 4. Moreover, such a clause at best creates an ambiguity which must be construed against Respondent as the ATA's drafter. *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), enf. 203 F.3d 52 (D.C. Cir. 1999).

Accordingly, for the above reasons, I conclude that the ATA violates Section 8(a)(1) of the Act by interfering with employ-

⁸ Indeed, the arbitration agreement found unlawful by the Board in *Murphy Oil*, supra, used similar language requiring employees to use arbitration instead of suing in court.

ees' right to access the Board's processes.

4. Whether the ATA violates Section 8(a)(1) of the Act by requiring employees to keep any arbitration proceedings "confidential"

As described above, the language of the ATA requires employees to use "confidential" arbitration to resolve any employment-related disputes. This language explicitly commands that any arbitration proceedings be kept confidential, which reasonably implies that employees cannot discuss with each other the facts, circumstances, history, tactics, justification, motivation or outcome regarding any arbitration proceeding they are compelled by the ATA to use in order to vindicate their employment-related rights. The right of employees to discuss these matters with each other lies at the very core of Section 7, which protects—and encourages—concerted activity for their mutual aid and protection. It is well-settled that any work rules that prohibit, or can reasonably be interpreted to prohibit, employees from discussing their wages, hours, or working conditions which each other are unlawful. *Fresh & Easy Neighborhood Market*, 361 NLRB No. 8, slip op. at 2–3 (2014); *Lily Transportation Corp.*, 362 NLRB No. 54 fn. 2 (2015); *Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999).

Accordingly, I conclude that by maintaining an arbitration policy, which I have previously concluded was a mandatory condition of employment, that requires that any arbitration used by employees be kept confidential, Respondent violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent at all times material herein has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory arbitration agreement that mandates individual arbitration and precludes class actions by employees for wage and hour claims or other employment-related claims in any forum, arbitral or judicial.
3. Respondent violated Section 8(a)(1) of the Act by filing a Motion to Compel Arbitration on an Individual Basis in California Superior Court in Case No. BC513815 on or about October 24, 2013.
4. Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory arbitration agreement that employees could reasonably construe to preclude filing of charges with the Board.
5. Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory arbitration agreement that requires employees to keep any arbitration confidential.

REMEDY

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

As I have concluded that the Agreement to Arbitrate (ATA) is unlawful, Respondent must revise or rescind the ATA and advise their employees in writing that the ATA has been revised or rescinded. Further, Respondent shall post notices in all

locations where the ATA was in effect informing employees of the revision or rescission of the ATA, and shall provide said employees with a copy of any revised agreement. Any revision should clarify that such agreement does not bar or restrict employees from seeking class wage and hour actions or any other type of class employment-related actions in any forum, and specifically does not bar or restrict employees from filing charges with the NLRB. Additionally, any such revised agreement shall inform employees that they are not barred or restricted from communicating or discussing with each other any matters regarding their wages, hours or working conditions, including any such matters covered by arbitration.

Respondent shall further be ordered to notify the State Court in Case No. BC513815 that it no longer opposes the plaintiffs' claims on the basis of the ATA, which has been rescinded or revised because it was found unlawful, and to move the court to vacate its order compelling individual arbitration on the basis of the ATA.⁹ Respondent shall also be ordered to reimburse Charging Party Lujan for all reasonable expenses and legal fees, with interest, incurred in opposing Respondent's unlawful petition to compel individual arbitration in a collective action. Interest shall be computed as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

Upon the entire record, I issue the following recommended.¹⁰

ORDER

Respondent, Century Fast Foods, Inc., a corporation with an office and principal place of business in Chatsworth, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory and binding arbitration agreement that require employees, as a condition of employment, to waive their right to pursue class or collective claims in all forums, whether arbitral or judicial.

(b) Maintaining a mandatory and binding arbitration agreement that employees would reasonably believe bars or restricts employees' rights to file unfair labor practice charges with the National Labor Relations Board or to access the Board's processes.

(c) Maintaining a mandatory and binding arbitration agreement that requires employees to keep confidential any arbitration proceedings undertaken as the result of such agreement.

(d) Filing a petition to enforce its Agreement to Arbitrate to thereby compel individual arbitration and preclude employees from pursuing employment-related disputes with the Respondent on a class or collective basis in any forum.

⁹ Pursuant to the Board's *D. R. Horton* and *Murphy Oil* rulings, Respondent is free to oppose class certification on any basis other than an unlawful arbitration agreement compelling employees to arbitrate employment disputes on an individual basis. As the Board observed, employees have Section 7 rights to seek class actions, not to have such class actions approved.

¹⁰ 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.

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

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

(a) Rescind the mandatory and binding arbitration agreements in all of its forms, or revise them in all of its forms to make clear to employees that the arbitration agreement does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums, whether arbitral or judicial; that they do not restrict employees' right to file charges with the National Labor Relations Board or to access the Board's processes; and that they do not restrict employees' right to discuss arbitration proceedings with each other.

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

(c) Within 14 days after service by the Region, notify the Superior Court of the State of California in Case No. BC513815 that it has rescinded or revised the mandatory arbitration agreement upon which it based, its motion to dismiss William Lujan's collective action and to compel individual arbitration of his claim, and inform the court that it no longer opposes the action on the basis of the arbitration agreement.

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

(e) Within 14 days after service by the Region, post at all its locations in California where notices to employees are customarily posted, copies of the attached notice marked "Appendix."¹¹ Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities 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 October 22, 2012.

¹¹ If this Order is enforced by a judgment of the 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."

Exhibit A

CENTURY FAST FOODS, INC.

13

(f) Within 21 days after service by the Region, file with the Regional Director for Region 31, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: Washington, D.C. April 24, 2015

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 mandatory and binding arbitration agreement that our employees reasonably would believe bars or restricts their 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 and binding 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 maintain and/or enforce an arbitration agreement that prohibits employees from discussing arbitration proceedings with each other.

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

WE WILL rescind the mandatory and binding Arbitration Agreement in all of its forms, or revise it in all of its forms to make clear that the arbitration agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums; that it does not restrict your right to file charges with the National Labor Relations Board or to access the Board's processes; and does not prohibit you from discussing arbitrations with each other.

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

WE WILL notify the court in which William Lujan filed his collective wage claim that we have rescinded or revised the mandatory Agreement to Arbitrate upon which we based our petition to dismiss his collective wage claim and compel individual arbitration, and

WE WILL inform the court that we no longer oppose William Lujan's collective claim on the basis of that agreement.

WE WILL reimburse William Lujan for any reasonable attorneys' fees and litigation expenses that he may have incurred in opposing our motion to dismiss his collective wage claim and compel individual arbitration.

CENTURY FAST FOODS INC.

Exhibit A

JAN 28 2016

CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of Contra Costa County, California. I am over the age of 18 and not a party to the within action. My business address is One Embarcadero Center, Suite 2050, San Francisco, CA 94111.

On March 10, 2016, I served the foregoing document entitled **PETITION FOR REVIEW** on all the appearing and/or interested parties in this action by:

- [by **ELECTRONIC SERVICE**] Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the documents to be sent to the persons at the electronic notification address listed below.

<p>Olivia Garcia Regional Director National Labor Relations Board, Region 21 888 S. Figueroa St., Ninth Floor Los Angeles, CA 90017-5449 Olivia.Garcia@nlrb.gov</p> <p>William Pate Regional Attorney National Labor Relations Board, Region 21 888 S. Figueroa St., Ninth Floor Los Angeles, CA 90017-5449 William.Pate@nlrb.gov</p>	<p>Ari E. Moss, Esq. Law Offices of Ari Moss 15300 Ventura Blvd Sherman Oaks, CA 91403-3103 Phone Number: (310) 982-2984 Fax Number: (310) 861-0389 ari@arimoss.com</p>
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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on March 10, 2016

/s/ Wendy M. Coats