IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 16-1132

PRIME HEALTHCARE PARADISE VALLEY, LLC,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

UNDERLYING DECISION FROM WHICH APPEAL OR PETITION ARISES

Pursuant to the Court's May 3, 2016 Order, Petitioner Prime Healthcare Paradise Valley, LLC ("Prime Healthcare") hereby attaches hereto as **Exhibit 1** the Decision and Order of the National Labor Relations Board in NLRB Case Nos. 21-CA-133781, *et al.*, reported at 363 NLRB No. 169 (2016) and issued on or about April 22, 2016, and which is captioned *Prime Healthcare Paradise Valley, LLC and Richard Cardona and Stephene Ortega*.

Dated: June 2, 2016

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By /s David Gallacher

David Gallacher, Bar No. 49040
Sheppard, Mullin, Richter & Hampton, LLP
2099 Pennsylvania Avenue, N.W., Suite 100
Washington, DC 20006-6801
Telephone: (202) 747-1900
dgallacher@sheppardmullin.com

Counsel for Petitioner
Prime Healthcare Paradise Valley, LLC

CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2016, I caused a true and accurate copy of the foregoing Underlying Decision From Which Appeal or Petition Arises to be served via electronic delivery and/or First Class U.S. Mail, postage prepaid on the following persons:

Linda Dreeben, Deputy Associate General Counsel
National Labor Relations Board (NLRB)
Appellate and Supreme Court Litigation Branch
1015 Half Street, SE
Suite 8100
Washington, DC 20570

Counsel for Respondent National Labor Relations Board

Nicholas J. De Blouw, Esq.
Blumenthal Nordrehaug & Bhowmik
2255 Calle Clara
San Diego, CA 92037

Counsel for Charging Parties Richard Cardona and Stephene Ortega

Dated: June 2, 2016

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By /s David Gallacher

David Gallacher, Bar No. 49040
Sheppard, Mullin, Richter & Hampton, LLP
2099 Pennsylvania Avenue, N.W., Suite 100
Washington, DC 20006-6801
Telephone: (202) 747-1900
dgallacher@sheppardmullin.com

Counsel for Petitioner
Prime Healthcare Paradise Valley, LLC

EXHIBIT 1

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.

Prime Healthcare Paradise Valley, LLC *and* Richard Cardona *and* Stephene Ortega. Cases 21–CA–133781 and 21–CA–133783

April 22, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On May 8, 2015, Administrative Law Judge William Nelson Cates issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, and the Respondent filed a reply brief.

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

Applying the Board's decisions in *D. R. Horton*, 357 NLRB 2277 (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 in relevant part 808 F.3d 1013 (5th Cir. 2015), the judge found that the Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing mandatory arbitration agreements—first, the Mediation and Arbitration Agreement; subsequently, the Mutual Agreement to Arbitrate—that require 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. The judge also found that maintaining the Mediation and Arbitration 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.

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 parties stipulated that the Respondent maintained the Mediation and Arbitration Agreement[3] until approximately May 13, 2014, and that since May 13, 2014, the Respondent has required all employees to sign the Mutual Agreement to Arbitrate. Although the Respondent's Mediation and Arbitration Agreement does not explicitly restrict activities protected by Section 7, we agree with

[1] The Respondent argues that *D. R. Horton*, 357 NLRB 2277 (2012), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), were wrongly decided and should be overruled. We disagree and adhere to the findings and rationale in those cases.

Our dissenting colleague, relying on his dissenting position in *Murphy Oil*, above, slip op. at 22–35, would find that the Respondent's arbitration agreements do 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 arbitration agreements are 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 arbitration agreements 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.

[2] Consistent with our decision in *Murphy Oil*, above, slip op. at 21, we shall order the Respondent to reimburse the Charging Parties and any other plaintiffs for all reasonable expenses and legal fees, with interest, incurred in opposing the Respondent's unlawful petitions in state court to compel individual arbitration and strike class claims. See *Bill Johnson's Restaurants*, 461 U.S. 731, 747 (1983) ("If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorneys' fees and other expenses" as well as "any other proper relief that would effectuate the policies of the Act."). Interest shall be computed in the manner prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). See *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 835 fn. 10 (1991) ("[I]n make-whole orders for suits maintained in violation of the Act, it is appropriate and necessary to award interest on litigation expenses."), enfd. 973 F.2d 230 (3d Cir. 1992).

Finally, we shall modify the judge's recommended Order to conform to our findings, the amended remedy, the Board's standard remedial language, and *Excel Container, Inc.*, 325 NLRB 17 (1997). We shall substitute a new notice to conform to the Order as modified.

[3] For the reasons stated by the judge, we agree that employees reasonably would construe the Mediation and Arbitration Agreement to restrict their access to the Board's processes. In his analysis, the judge cited *Flex Frac Logistics, LLC*, 358 NLRB 1131 (2012), a case decided by a panel that included two persons whose appointments to the Board were not valid. See *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014). We find the judge's reliance on this case appropriate, however, because the panel's decision was enforced by the Fifth Circuit Court of Appeals. See 746 F.3d 205 (5th Cir. 2014). Although our colleague concurs in our finding that employees would reasonably believe that the Mediation and Arbitration Agreement limited their right 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 *Ralph's Grocery*, 363 NLRB No. 128, slip op. at 3 (2016).

The General Counsel does not allege that, because employees would reasonably construe that the Mutual Agreement to Arbitrate restricted their access to the Board's processes, the Mutual Agreement to Arbitrate violated the Act. Accordingly, we do not decide whether the Mutual Agreement to Arbitrate is unlawful for that reason. See *Citi Trends, Inc.*, 363 NLRB No. 74, slip op. at 1 (2015).

the judge in finding, based upon the parties' stipulation, that the Mediation and Arbitration Agreement has been enforced to compel arbitration on an individual rather than a class or collective basis. Consistent with our decision in *Countrywide Financial Corp.*, 362 NLRB No. 165, slip op. at 3–5 (2015), we find that the Respondent's filing of the petition to compel individual arbitration and strike Charging Party Richard Cardona's claims effectively denied Cardona his Section 7 right to all other forums where he could seek to litigate his collective claims, and that such conduct is precisely what the Board envisioned in *D. R. Horton* and *Murphy Oil*.[4] See also *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004) (a rule that does not expressly restrict protected activity is nevertheless unlawful if it has been applied to restrict protected activity).[5]

ORDER

The National Labor Relations Board orders that the Respondent, Prime Healthcare Paradise Valley, LLC, National City, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a Mediation and Arbitration Agreement that employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board.

(b) Maintaining and/or enforcing a Mediation and Arbitration Agreement or a Mutual Agreement to Arbitrate 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) Enforcing or applying a Mediation and Arbitration Agreement in a manner that deprives employees of the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(d) 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) To the extent it has not already done so, rescind the Mediation and Arbitration Agreement in all its forms, or revise it in all its forms to make clear to employees that the Mediation and Arbitration Agreement does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums and does not bar or restrict employees' right to file charges with the National Labor Relations Board.

(b) Notify all former employees who were required to sign or otherwise become bound to the Mediation and Arbitration Agreement in any form, and who were not employed by the Respondent on or after May 13, 2014, that the Mediation and Arbitration Agreement has been rescinded or revised, and, if revised, provide them a copy of the revised agreement, and further notify them that the Mediation and Arbitration Agreement will not be enforced in a manner that deprives them of their right to maintain employment-related joint, class or collection actions in all forums.

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

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

(e) In the manner set forth in this decision, reimburse Richard Cardona, Stephene Ortega, and any other plaintiffs in the class action lawsuit filed against the Respondent in California Superior Court, Case No. 37–2014–

[4] We also reject the position of our dissenting colleague that the Respondent's petitions to compel individual arbitration were 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 petitions to compel individual 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 *Convergys Corp.*, 363 NLRB No. 51, slip op. at 2 fn. 5 (2015); *Murphy Oil*, above, slip op. at 20–21.

[5] While the Respondent asserts that the Mediation and Arbitration Agreement is no longer operative, it filed its petition to compel individual arbitration of Cardona's claims based on the Mediation and Arbitration Agreement. Thus, it appears that the Respondent still views the Mediation and Arbitration Agreement as valid and enforceable, at least with respect to former employees, such as Cardona, who did not sign the Mutual Agreement to Arbitrate because they were not employed by the Respondent on or after May 13, 2014. Accordingly, we shall order the Respondent to rescind the Mediation and Arbitration Agreement to the extent it has not already done so, or to revise it to make clear to employees that it does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums and does not bar or restrict employees' right to file charges with the Board. We shall also order the Respondent to notify former employees who signed the Mediation and Arbitration Agreement and were not employed by the Respondent on or after May 13, 2014, that the Mediation and Arbitration Agreement has been rescinded or revised and, if revised, to provide them a copy of the revised agreement. To be clear, the revised agreement we refer to is a *lawful* revised agreement, not the unlawful Mutual Agreement to Arbitrate. We shall further order the Respondent to notify former employees that the agreement will not be enforced in a manner that deprives them of their right to maintain employment-related joint, class or collective actions in all forums.

00011240–CU–OECTL, for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing the Respondent's petition to compel individual arbitration and dismiss class claims.

(f) Within 14 days after service by the Region, post at its National City, California facility copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, 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" to all current employees and former employees employed by the Respondent at any time since January 29, 2014, and any former employees against whom the Respondent has enforced the Mediation and Arbitration Agreement or Mutual Agreement to Arbitrate since January 29, 2014.

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

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

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

MEMBER MISCIMARRA, concurring in part and dissenting in part.

In this case, my colleagues find that the Respondent's Mediation and Arbitration Agreement (M&AA) violates Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) because the Respondent has applied the M&AA to require individual arbitration of non-NLRA employment claims.[1] My colleagues also find that the Respondent's Mutual Agreement to Arbitrate (MAA) violates Section 8(a)(1) because the MAA waives the right to participate in class or collective actions regarding non-NLRA employment claims. Charging Party Stephene Ortega signed the MAA, and later she filed a class action lawsuit against the Respondent in state court alleging violations of the California Labor Code and the California Business and Professions Code. Charging Party Richard Cardona signed the M&AA and later joined Ortega's state court class action lawsuit as a named plaintiff. In reliance on the M&AA and the MAA, the Respondent filed petitions to compel individual arbitration and strike Cardona's and Ortega's class claims, which the court granted. My colleagues find that the Respondent thereby unlawfully enforced the M&AA and the 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

[1] The M&AA requires that employment claims be resolved through arbitration, but it does not expressly prohibit class or collective arbitration.

[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*, above, 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).

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 and the class-waiver agreement provisions of the M&AA were similarly lawful under the NLRA, I would find it was similarly lawful for the Respondent to file petitions in state court seeking to enforce the M&AA and MAA.[8] It is relevant that the state court that had jurisdiction over the non-NLRA claims *granted* the Respondent's petitions to compel arbitration. That the Respondent's petitions were reasonably based is also supported by the multitude of court decisions that have enforced similar

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

[8] The M&AA, which was signed by Charging Party Cardona, was silent as to whether arbitration may be conducted on a class or collective basis. In finding the Respondent's petition to compel individual arbitration of Cardona's claims unlawful, my colleagues rely on *Countrywide Financial Corp.*, 362 NLRB No. 165 (2015). In *Countrywide Financial*, a Board majority decided that the employer violated the Act by moving to compel individual arbitration based on an arbitration agreement that, like the Respondent's M&AA, was silent regarding the arbitrability of class and collective claims. For the reasons stated in Member Johnson's dissent in *Countrywide Financial*, however, id., slip op. at 8–10, the Board's decision in that case is 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. Animal 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 petition to compel individual arbitration of Cardona's claims was "well founded in the FAA as authoritatively interpreted by the Supreme Court." *Philmar Care, LLC d/b/a San Fernando Post Acute Hospital*, 363 NLRB No. 57, slip op. at 4 fn. 11 (2015) (Member Miscimarra, dissenting); see also *Employers Resource*, 363 NLRB No. 59, slip op. at 3 fn. 9 (2015) (Member Miscimarra, dissenting); *Countrywide Financial*, above, slip op. at 9 (Member Johnson, dissenting).

As explained in fn. 11 below, I concur in my colleagues' finding that the M&AA unlawfully interfered with the right of employees to allege a violation of the NLRA through the filing of an unfair labor practice charge with the NLRB. However, the unlawfulness of the M&AA in this regard is not material to the merits of the Respondent's state-court petition to compel Charging Party Cardona to arbitrate his non-NLRA claims. See *Fuji Food Products, Inc.*, 363 NLRB No. 118, slip op. at 4, 4–5 fn. 13 (2016) (Member Miscimarra, concurring in part and dissenting in part) (finding that employer lawfully enforced class-waiver agreement by filing motion to compel arbitration of non-NLRA claims, notwithstanding additional finding that agreement unlawfully interfered with Board charge filing).

agreements.[9] 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."[10] I also believe that any Board finding of a violation based on the Respondent's meritorious state court petitions 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 Parties and other plaintiffs 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,[11] I respectfully dissent.

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

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a Mediation and 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 and/or enforce a Mediation and Arbitration Agreement or a Mutual Agreement to Arbitrate that requires our employees, as a condition of employment, to waive the right to maintain employment-related class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT enforce or apply a Mediation and Arbitration Agreement in a manner that deprives our employees of 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.

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[9] 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; *Sutherland v. Ernst & Young LLP,* 726 F.3d 290 (2d Cir. 2013); *Owen v. Bristol Care, Inc.,* 702 F.3d 1050 (8th Cir. 2013).

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

[11] For the following reasons, I concur in my colleagues' finding that the M&AA unlawfully interfered with NLRB charge filing in violation of Sec. 8(a)(1). All new employees from at least July 25, 2012 until May 13, 2014 were required to sign the M&AA, which in pertinent part required employees to resolve by binding arbitration "all claims or controversies for which a federal . . . court would be authorized to grant relief," including "claims for violation of any federal . . . statute." 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 "all claims or controversies for which a federal . . . court would be authorized to grant relief," including "claims for violation of any federal . . . statute," must be resolved in binding arbitration and in this manner only. Although the Board is not a federal "court" (which might support an argument that this language does not apply to Board proceedings), the enforcement of all Board orders is effectuated by the federal courts of appeals. See Sec. 10(e). Moreover, a paragraph in the M&AA headed "Claims Not Covered by This Agreement" makes no mention of claims arising under the National Labor Relations Act, and the M&AA affirmatively states that "[f]or Claims covered by this Agreement, arbitration is the parties' exclusive legal remedy." These provisions of the M&AA, taken together, appear to preclude the filing of a Board charge, and nothing in the M&AA states otherwise. For these reasons, I join my colleagues in finding that the M&AA 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 (2015) (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 Food Products,* above, slip op. at 4 fn. 13 (2016) (Member Miscimarra, concurring in part and dissenting in part).

WE WILL, to the extent we have not already done so, rescind the Mediation and Arbitration Agreement in all its forms, or revise it in all its forms to make clear that the Mediation and Arbitration Agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums and does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all former employees who were required to sign or otherwise become bound to the Mediation and Arbitration Agreement in any form and who we stopped employing before May 13, 2014, that the Mediation and Arbitration Agreement has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement, and WE WILL further notify them that the Mediation and Arbitration Agreement will not be enforced in a manner that deprives them of their right to maintain employment-related joint, class or collective actions in all forums.

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

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

WE WILL reimburse Richard Cardona, Stephene Ortega, and any other plaintiffs in the class action lawsuit filed against us in California Superior Court, Case No. 37–2014–00011240–CU–OECTL, for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing our petition to compel individual arbitration and dismiss class claims.

PRIME HEALTHCARE PARADISE VALLEY, LLC

The Board's decision can be found at www.nlrb.gov/case/21-CA-133781 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.

Jean C. Libby, Esq., for the General Counsel.[1]
Robert Mussig, Esq., for the Respondent.[2]
Janette C. Lee, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM NELSON CATES, Administrative Law Judge. These cases were tried before me in San Diego, California, on February 23, 2015.[3] The charge initiating Case 21–CA–133781 was filed by Richard Cardona (Cardona) on July 29, and the charge initiating Case 21–CA–133783 was filed by Stephene Ortega (Ortega) that same date. After its investigation, the Government, on November 20, issued an order consolidating cases, consolidated complaint and notice of hearing, (the complaint). The complaint alleges the Hospital, since at least January 31, has maintained as a condition of employment for all its employees at its National City, California facility, an agreement entitled "Mediation and Arbitration Agreement" (Arbitration Agreement) that contains provisions requiring employees to resolve employment-related disputes exclusively through mediation and arbitration proceedings. Additionally, it is alleged that, since at least January 31, employees would reasonably conclude the provisions of the Arbitration Agreement would restrict access to the Board and its processes. It is alleged that, on or about July 25, 2012, Cardona, as a condition of his employment with the Hospital at its National City facility, signed the Arbitration Agreement. Further, it is alleged the Hospital, since April, has maintained as a condition of employment for all its National City facility employees, a revised arbitration agreement, entitled "Mutual Agreement to Arbitrate" (Updated Agreement) that contains provisions requiring employees to resolve employment-related disputes exclusively through individual arbitration proceeding and to relinquish any rights they have to resolve disputes through collective or class action. It is also alleged that since April, employees would reasonably conclude that the provisions of the Updated Agreement would preclude them from engaging in conduct protected by Section 7 of the National Labor Relations Act (the Act). On April 16, Ortega, as a condition of her employment with the Hospital, at its National City facility, signed the Updated Agreement. It is alleged that since on or about July 9, the Hospital has sought to enforce the Arbitration Agreement and the Updated Agreement by filing Petitions to Compel Arbitration on an Individual Basis

[1] I shall refer to counsel for the General Counsel as counsel for the Government and to the General Counsel as the Government.

[2] I shall refer to counsel for the Respondent as counsel for the Hospital and to the Respondent as the Hospital.

[3] All dates are 2014, unless indicated otherwise.

in San Diego County California Superior Court. It is alleged the actions set forth above constitute violations of Section 8(a)(1) of the Act.

The Hospital in its answer to the complaint, at trial and in its posttrial brief denies having violated the Act in any manner alleged in the complaint.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. The parties entered into a written 9 page, 19 paragraphs (with certain subparagraphs and attachments) stipulation of facts which was received into the record as an exhibit (Government Exh. 2) after which the Government and the Charging Parties rested. The Hospital called one witness and rested. I have studied the whole record, the posttrial briefs, and the authorities cited. I conclude and find the Hospital violated the Act substantially as alleged in the complaint.

FINDINGS OF FACT

I. JURISDICTION AND SUPERVISORY/AGENCY STATUS

It is stipulated the Hospital is a Delaware limited liability company, with an office and place of business located in National City, California, where it is engaged in the business of operating an acute care hospital located at 2400 East 4th Street. During the 12-month period ending on September 19, a representative period, the Hospital, in conducting its operations derived gross revenues in excess of $250,000 and purchased and received at its National City, California facility goods valued in excess of $50,000 directly from points outside the State of California. The parties stipulate and I find the Hospital is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

The parties stipulated Lorraine Villegas is, and since 2008 has been, the Hospital's regional human resources manager (HR Manager Villegas) and is a supervisor and agent of the Hospital within the meaning of Section 2(11) and (13) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

Facts

The operative facts, by stipulation of the parties and testimony of the one witness called, are not in dispute and are set forth below. In the stipulation of facts the parties provided, as attachments, the actual documents described in the stipulations, which documents were received in evidence.

The Hospital has, from at least July 25, 2012, until May 13, maintained, as a condition of employment, at the National City facility for all of its employees an agreement entitled "Mediation and Arbitration Agreement," that contains provisions requiring employees to resolve employment-related disputes as set forth in the "Mediation and Arbitration Agreement" exclusively through mediation and arbitration proceedings. The provisions in question follow:

> **2 Agreement to Arbitrate; Designated Claims**
>
> . . . . . Except as otherwise provided in this Agreement, the Company and the Employee hereby consent to the resolution by binding arbitration of all claims or controversies for which a federal or state court would be authorized to grant relief, whether or not arising out of, relating to or associated with the Employee's employment with the Company.
>
> Claims covered by this Agreement include, but are not limited to, claims for wages or other compensation due; claims for breach of any contract or covenant, express or implied; tort claims; claims for discrimination or harassment on bases which include but are not limited to race, sex, sexual orientation, religion, national origin, age, marital status, disability or medical condition; claims for benefits, (except as excluded in paragraph 9), and claims for violation of any federal, state or other governmental constitution, statute, ordinance, regulation, or public policy including but not limited to Title VII of the Civil Rights Act, Age Discrimination in Employment Act, The Americans with Disabilities Act, Family and Medical Leave Act, Equal Pay Act and their state equivalents. The purpose and effect of this Agreement is to substitute arbitration as the forum for resolution of the Claims; all responsibilities of the parties under the statutes applicable to the Claims shall be enforced.

The Hospital's employment complement has been approximately 1200 with an employee turnover rate of 01.8 percent annually. All new employees from 2010 until May 2014 have, as a condition of their employment, signed the Hospital's Arbitration Agreement. In 2014 the Hospital stopped using the Arbitration Agreement form and commenced using the Updated Agreement. Villegas stated Cardona was required to sign the Arbitration Agreement at the time he was hired in July 2012.

The human resources department handles all legal claims filed at the Hospital involving administrative charges. HR Manager Villegas never knew of the Hospital attempting to use the Arbitration Agreement to compel arbitration of a charge filed with the National Labor Relations Board (the Board) nor to discourage employees from filing such charges. The Hospital has never sought, during Villegas' tenure, to use the Arbitration Agreement to compel arbitration of any charge filed with administrative agency. According to HR Manager Villegas, there were six charges filed with administrative agencies, namely the Equal Employment Opportunity Commission (EEOC) and California's Department of Fair Employment and Housing, from 2010 until May 2014. Villegas was not sure if all six employees had signed the Arbitration Agreement, as it depended on when the employees were hired, but some had. Cardona and Ortega were not included in the six persons filing administrative charges; however, when they are included, four were represented by counsel and four were not. HR Manager Villegas testified the Hospital never posted any notices to employees at the Hospital informing them they were not forbidden from filing charges with the Board nor did the Hospital post anything about Board charges.

Cardona was employed as a patient account registrar by the Hospital at its National City facility from July 31, 2012, until he resigned effective March 8, and as a condition of his employment with the Hospital, on or about July 25, 2012, received and signed the "Mediation and Arbitration Agreement."

Since at least May 13, the Hospital has required all of its employees at the National City facility to sign, and has main-

tained as a condition of employment for all of its employees at the National City facility, a revised arbitration agreement, entitled "Mutual Agreement to Arbitrate [Updated Agreement]," requiring employees to resolve employment-related disputes as set forth in the "Mutual Agreement to Arbitrate" exclusively through individual arbitration proceedings and to waive any right they have to file, maintain or seek to resolve such disputes through class or collective action. The provisions in question follow:

> Section 4: **Claims Subject to Arbitration** The "Claims" covered by this Agreement include, but are not limited to. . . . the California Labor Code, and the California Wage Orders...
>
> Section 5 **Arbitration of Individual Claims Only**
> All Claims covered by this Agreement must be submitted on an individual basis. No claims may be arbitrated on a class, representative, or collective basis. The Parties expressly waive any right with respect to any covered Claims to submit, initiate, or participate in a representative capacity, or as a plaintiff, claimant or member in a class action, collective action or other representative or joint action, regardless of whether the action is filed in arbitration or in court.
>
> Section 5.1: **No Class Or Collective Action Claims**
> By signing this agreement, the parties agree that each may bring and pursue claims against the other only in their individual capacities, and may not bring, pursue, or act as a plaintiff or class member, in any purported class or collective proceeding.
>
> Section 5.2: **No Representative Action Claims**
> The parties further agree that neither party may bring, pursue, or act as a plaintiff or representative in any purported representative proceeding or action, including any claims under the California private attorneys general act, or otherwise participate in any such representative proceeding or action other than on an individual basis.
>
> Section 5.3: **NLRA Claims**
> Notwithstanding the unavailability of class, representative, or collective arbitration under this Agreement, nothing herein is intended to limit your rights under Section 7 of the National Labor Relations Act and you will not experience any retaliation for exercising such rights.

Since about 2007, Ortega has been employed as a respiratory care practitioner by the Hospital at the National City facility. About May 13, Ortega, as a condition of her employment with the Hospital, signed the "Mutual Agreement to Arbitrate."

About April 14, Ortega filed a class action complaint against the Hospital in San Diego County Superior Court, in the case Stephene *Ortega vs. Prime Healthcare Paradise Valley, LLC,* Civil Case No. 37–2014–00011240–CU–OECTL, alleging, inter alia, wage-and-hour claims under the California Labor Code, on behalf of herself and on behalf of a class or classes of purportedly similarly-situated current and former employees of the Hospital.

About June 20, Ortega and Cardona filed an amended complaint in the action described above which added Cardona as a named plaintiff and added other causes of action under the California Labor Code.

About July 10, the Hospital filed Petitions to Compel Individual Arbitration of the claims asserted by Ortega and Cardona in the first amended class action complaint, described above, in San Diego County Superior Court, Case No. 37–2014–00011240–CU–0E–CTL.

On November 6, Ortega and Cardona filed Oppositions to the Hospital's Petitions to Compel Individual Arbitration.

On November 14, the Hospital filed Reply Briefs in support of its Petitions to Compel Individual Arbitration.

On November 21, the San Diego County Superior Court issued a tentative ruling, granting Respondent's Petitions to Compel Individual Arbitration.

On November 21, the San Diego County Superior Court confirmed the tentative ruling described above in a minute order.

The parties also stipulated to the following brief position statements with additional positions covered in their posttrial briefs:

> The Government takes the position the Hospital enforced the provisions of the "Mediation and Arbitration Agreement" and the "Mutual Agreement to Arbitrate," described above, by filing the Petitions and supporting documents, alluded to above, in order to compel Cardona and Ortega to arbitrate their claims not on a class or collective basis but individually, and, in doing so violated Section 8(a)(1) of the Act, because it prohibited employees from filing, maintaining or seeking to resolve employment-related disputes through class or collective action.

The Hospital takes the position that the "Mediation and Arbitration Agreement" and the "Mutual Agreement to Arbitrate" are lawful under *AT&T Mobility LLC V. Concepcion* (2011), 131 S. Ct. 174; *Am. Express* Co. v. *Italian Colors Rest.* (2013), 133 S. Ct. 2304, *D.R. Horton, Inc. v. NLRB* (5th Cir. 2013), 737 F.3d 344; *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055, (8th Cir. 2013); *Sutherland v. Ernst & Young LLP* 726 F.3d 290 (2d Cir. 2013), and a host of other authorities, and that its actions taken to enforce these agreements in connection with Cardona and Ortega's lawsuit, including its filing of the Petitions and supporting documents described above, were not unlawful.

Additionally, the Government takes the position that the "Mediation and Arbitration Agreement" described above also violates Section 8(a)(1) of the Act because employees would reasonably believe it restricts their access to the Board and its processes.

The Hospital's position is that employees would not reasonably believe the "Mediation and Arbitration Agreement" restricts their access to the Board and/or its processes because it specifically states it only applies to claims and disputes that would otherwise be "litigated in a court or by jury trial," and therefore does not apply to administrative agency proceedings.

STATEMENT OF THE ISSUES

The Parties stipulate the following issues be decided by the Judge. Usually, the issues to be decided by the trial judge are framed by the pleadings; however, the Parties stipulated issues closely track those raised by the pleadings and I therefore will decide the issues that follow:

1. Whether the Hospital's maintenance of the "Mediation and Arbitration Agreement," as a condition of employment from at least January 31, until approximately May 13, violates Section 8(a)(1) of the Act because it prohibits employees from filing, maintaining, or seeking to resolve employment-related disputes through class or collective action.

2. Whether the Hospital's maintenance of the "Mediation and Arbitration Agreement," as a condition of employment from at least January 31, until approximately May 13, violates Section 8(a)(1) of the Act because employees would reasonably believe that it restricts their access to the Board and its processes.

3. Whether the Hospital's maintenance of the "Mutual Agreement to Arbitrate," as a condition of employment and continued employment from at least May 13, violates Section 8(a)(1) of the Act because it prohibits employees from filing, maintaining or seeking to resolve employment-related disputes through class or collective action.

4. Whether the Hospital violated Section 8(a)(1) of the Act by filing Petitions to Compel Arbitration in San Diego County Superior Court on July 9, so as to preclude Cardona and Ortega from pursuing, on a class or collective action basis, the claims alleged in their first amended class-action complaint filed in San Diego County Superior Court.

Analysis

As indicated elsewhere here, the Government alleges the Hospital violated Section 8(a)(1) of the Act by maintenance of its Arbitration Agreement, as a condition of employment, from at least July 25, 2012, to May 2014, because it prohibits employees from filing, maintaining, or seeking to resolve employment-related claims through class or collective action; and, separately that the Hospital's maintenance of its Arbitration Agreement violates Section 8(a)(1) of the Act, during the applicable period, because employees would reasonably believe it restricts their access to the Board and its processes. I agree, and find, both violations with respect to the Arbitration Agreement.

It is clear, from at least July 25, 2012, to May 2014, the Hospital maintained, as a condition of employment, its Arbitration Agreement. Patient account registrar employee Cardona signed the Arbitration Agreement on July 25, 2012.

Whether the Hospital's Arbitration Agreement violates Section 8(a)(1) of the Act involves an application of the Board's decisions in *D. R. Horton, Inc.*, 357 NLRB 2277 (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); *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014); and *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27 (2015). In these cases, and, as specifically stated in *D. R. Horton* (the Board reaffirmed the relevant holdings of *D. R. Horton* in *Murphy Oil*) the Board concluded an employer violates Section 8(a)(1) of the Act by maintaining and enforcing a mandatory and binding arbitration policy that waives the rights of employees to maintain class or collective actions in all forums, whether arbitral or judicial because "the right to engage in collective action—including collective *legal* action—is the core substantive right protected by the NLRB and is the foundation on which the Act and Federal labor policy rests" *D. R. Horton*, 357 NLRB 2277, 2286 (emphasis in original). The Board in *Murphy Oil* clearly explained it was protecting a *substantive right*:

> For almost 80 years, Federal labor law has protected the right of employees to pursue their work-related legal claims *together*, i.e., with one another, for the purpose of improving their working conditions. The core objective of the National Labor Relations Act is the protection of workers' ability to act in concert, in support of one another. Section 7 of the Act implements that objective by guaranteeing employees the "right . . . to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection." Our national labor policy—aimed at averting "industrial strife and unrest" and "restoring equality of bargaining power between employers and employees"—has been built on this basic premise. In protecting a substantive right to engage in collective action—the basic premise of Federal labor policy—the National Labor Relations Act is unique among workplace statutes.

Murphy Oil. at 2277 [footnotes omitted].

Section 7 of the Act protects the right of employees to file charges with the Board or otherwise access the Board's processes. *Bill's Electric, Inc.*, 350 NLRB 292, 296 (2007); *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. mem. 255 Fed. Appx. 527 (D.C. Cir 2007); *D. R. Horton*, 357 NLRB 2277, 2278. Although the Arbitration Agreement here does not specifically state employees may not file charges with the Board, a rule which does not explicitly restrict Section 7 rights may, nevertheless, violate the Act if employees would reasonably construe the language to prohibit Section 7 activity. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004).

I find the language of the Arbitration Agreement prohibits employees from filing, maintaining or seeking to resolve employment-related claims through class or collective action and also would reasonably be construed by employees to prohibit or restrict their Section 7 right to file an unfair labor practice charge. The language broadly mandates arbitration of "all claims or controversies for which a federal or state court would be authorized to grant relief" and includes, but is not limited to, "claims for wages or other compensation due," "claims for discrimination," and "claims for violation of any federal, state or other governmental constitution, statute, ordinance, regulation, or public policy including but not limited to Title VII of the Civil Rights Act, Age Discrimination in Employment Act, the Americans with Disabilities Act, Family and Medical Leave Act, Equal Pay Act and their state equivalents." I note, in agreement with the Government, that its reach is not limited to claims that originate or arise in Federal or State court, but, rather applies to all claims for which a Federal or State court is authorized to grant relief notwithstanding where the claims were originally filed.

Board decisions are enforced by United States courts of appeal and that fact alone places employees in a position where they could construe the Arbitration Agreement as precluding them from filing charges with the Board. Further, it is from the

all-inclusive language of the Arbitration Agreement, that employees reasonably could construe it to cover unfair labor practice claims arising from their employment relation. *Cellular Sales of Missouri, LLC,* 362 NLRB No. 27, slip op. at 1 fn. 4 (2015) (work rule reasonably construed to interfere with ability to file charges with Board even if rule did not expressly prohibit access to Board). The Board noted, in *Flex Frac Logistics, LLC*, 358 NLRB 1131, 1132 (2012), long before it restated same in *Murphy Oil,* slip op. at 19, that Board law is settled that ambiguous employer rules, including those in arbitration agreements, are construed against the employer that crafted the rules.

The Hospital's contention the Arbitration Agreement does not apply to administrative charges filed with an agency, such as the Board, because it "only applies to claims that would be asserted in a court" and "[a]ny suggestion that a 'reasonable person' would not know the difference [between a court and an administrative agency] insults the intelligence of the Hospital's employees and contradicts the facts established at trial" does not save the Arbitration Agreement rule here. The Board does not assume employees have specialized legal knowledge which could be employed in understanding such clauses, to exclude NLRB claims. For instance, the Board found language limiting a compulsory arbitration rule to claims "that may be lawfully resolve[d] by arbitration" would not be reasonably understood by employees to exclude unfair labor practice charges from the scope of the agreement. *2 Sisters Food Group,* 357 NLRB 1816, 1816–1817, 22 (2011); see also *U-Haul,* supra, 347 NLRB at 377–378.

The fact HR Manager Villegas never knew of the Hospital attempting to compel arbitration of a charge filed with the Board, nor, knew of the Hospital attempting to discourage employees from filing charges with the Board does not save the rule. The issue is whether a reasonable employee would construe the rule as prohibiting access to the Board. The fact some employees filed charges with the Equal Employment Opportunity Commission and California's Department of Fair Employment and Housing does not require a different conclusion than I reach here. The fact the Hospital may never have intended its Arbitration Agreement to apply to administrative proceedings does, in no way, save the rule as there is no evidence such was ever communicated to the employees.

In summary, I find the Hospital violated Section 8(a)(1) of the Act by maintenance of its Arbitration Agreement, as a condition of employment, from at least July 25, 2012, to May 2014, because it prohibits employees from filing, maintaining, or seeking to resolve employment-related claims through class or collective action; and, separately the Hospital's maintenance of its Arbitration Agreement violates Section 8(a)(1) of the Act because employees would reasonably believe it restricts access to the Board and its processes. I will hereinafter address more fully the Hospital's defenses to the class action portion of its agreements, rather than doing so twice—once here—and again in the next section of my decision.

As indicated elsewhere here, the Government alleges the Hospital is in violation of Section 8(a)(1) of the Act by maintaining, from at least May to the present, its Updated Agreement, as a condition of employment for all its employees, because it prohibits employees from filing, maintaining, or seeking to resolve employment-related claims through class or collective action.

Respiratory care practitioner employee Stephene Ortega, as a condition of her employment, signed, on May 13, the Updated Agreement. As demonstrated by the provisions of the Updated Agreement, set forth elsewhere here, the agreement *expressly* prohibits class or collective litigation. Additionally, the parties stipulated the Updated Agreement requires "employees to resolve employment related disputes as set forth in the 'Mutual Agreement to Arbitrate' exclusively through individual arbitration proceedings and to waive any right they have to file, maintain or seek to resolve such disputes through class or collective action."

Again a brief summary of portions of the parties' positions on this specific issue is helpful at this point.

The Hospital contends that the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq., preempts any National Labor Relations Act rule prohibiting class or collective action waivers in arbitration agreements such as at issue here. The Hospital notes, citing *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 669 (2012), the FAA proclaims a strong policy in favor of arbitration, and quotes the Supreme Court in *AT&T Mobility LLC v. Concepcion,* 131 S.Ct. 1740, 1749 (2011), that "the FAA was designed to promote arbitration." The Hospital contends the FAA requires enforcement of arbitration agreements according to their terms citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985). The Hospital further contends where the FAA's goals clash with those of another Federal statute the FAA's mandate in favor of arbitration prevails unless it "has been overridden by a contrary congressional command." *American Express v. Italian Colors Rest.,* 133 U.S. S.Ct. 2304 (2013). The Hospital notes the U.S. Court of Appeals for the Fifth Circuit rejected the Board's *Horton* decision, *D. R. Horton, Inc. v. NLRB,* 737 F 3d 344 (5th Cir. 2013), and the Board's *Horton* decision has been viewed as unpersuasive, in decisions of the Second (*Sutherland v. Ernst & Young, LLP*, 726 F.3d 290 (2d Cir. 2013)), and Eighth (*Owens v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir, 2013)), circuits. The Hospital references more than 40 other cases of courts across the nation which have examined the same issue as here and "virtually all" concluded class or collective action waivers enforceable. The Hospital urges "class action waivers are entirely permissible under binding U.S. Supreme Court authority" and the Board's *D. R. Horton* and *Murphy Oil* decisions are inconsistent with that authority and must be disregarded. The Hospital urges I find the arbitration agreements here valid and binding.

The Government contends the Hospital's requiring its employees, as a condition of employment, to waive filing joint, class, or collective claims addressing their wages, hours, or other working conditions in any forum, such as the case here, violates Section 8(a)(1) of the Act. The Government asserts, for the reasons explained in *D. R. Horton, Inc.* and *Murphy Oil*, the Board has concluded there is no conflict between the Federal Arbitration Act and the National Labor Relations Act because § 2 of the FAA "provides that arbitration agreements may be invalidated in whole or in part" for the same reason any con-

tract may be invalidated, including they are unlawful or contrary to public policy. The Government urges the arbitration agreements here are unlawful under the Act, against public policy, and, should not be enforceable under the FAA. The Government contends the Board, in its two-above cases, emphasized that an arbitration policy which prohibits collective or class action is unlawfully, does not conflict with the FAA, because the "intent of the FAA was to leave substantive rights undisturbed." Thus the Government urges the arbitration agreements here, as enforced, are unlawful because they prohibit employees from exercising their Section 7 right to engage in concerted activity, a substantive right, which the Supreme Court in *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567 (1978), held includes "seek[ing] to improve working conditions through resort to administrative and judicial forums."

The Government specifically notes the concern here is not with the FAA or with arbitration. The Government points out Board rulings neither evince nor or they motivated by any hostility to arbitral resolution of disputes, nor does the Government take the position employees cannot be required to arbitrate their work-related disputes. The Government contends the illegality here is that such work-related claims must be arbitrated individually, and when such a requirement is insisted upon, as a condition of employment, it contravenes substantive rights protected by Section 7 of the Act.

Further guidance from the Board's *Murphy Oil* case is appropriate at this point. In its decision the Board concluded "an employer violates the National Labor Relations Act 'when it requires employees covered by the Act, as condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial'" [footnote omitted]. The Board held:

> The Board reached this result relying on the substantive right, at the core of the Act, to engage in collective action to improve working conditions. It did so "notwithstanding the Federal Arbitration Act (FAA), which generally makes employment related arbitration agreements judicially enforceable," finding no conflict, under the circumstances, between Federal labor law and the FAA. "Arbitration [under the FAA] is a matter of consent, not coercion," and a valid arbitration agreement may not require a party to prospectively waive its "right to pursue statutory remedies." But arbitration agreements that are imposed as a condition of employment, and that compel NLRA-covered employees to pursue workplace claims against their employer individually, *do* require those employees to forfeit their substantive right to act collectively—and so nullify the foundational principle that has consistently informed national labor policy as developed by the Board and the courts. To be clear, the NLRA does not create a right to class certification or the equivalent, but as the *D. R. Horton* Board explained, it does create a right to *pursue* joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint. This case turns on the issue decided in *D. R. Horton*. The Respondent urges us to overrule that decision, which has been rejected by the U.S. Court of Appeals for the Fifth Circuit and viewed as unpersuasive in decisions of the Second and Eighth Circuits (although the analysis by those courts was abbreviated). Scholarly support for the Board's approach, by contrast, has been strong. We have independently reexamined *D. R. Horton*, carefully considering the Respondent's arguments, adverse judicial decisions, and the views of our dissenting colleagues. Today we reaffirm that decision. Its reasoning and its result were correct, as we explain below, and no decision of the Supreme Court speaks directly to the issue we consider here. "The substantive nature of the right to group legal redress is what distinguishes the NLRA from every other statute the Supreme Court has addressed in its FAA jurisprudence," and the Fifth Circuit itself acknowledged the "force of the Board's efforts to distinguish the NLRA from all other statutes that have been found to give way to requirements of arbitration." Having reaffirmed the *D. R. Horton* rationale, we apply it here to find that the Respondent has violated Section 8(a)(1) of the Act by requiring its employees to agree to resolve all employment-related claims through individual arbitration, and by taking steps to enforce the unlawful agreements in Federal district court when the Charging Party and three other employees filed a collective claim against the Respondent under the Fair Labor Standards Act. [footnotes omitted]

As can be seen from the above, the Board, in card parlance, "doubled down" on its *D. R. Horton*, supra, case rationale. The Board in *Murphy Oil*, supra, clearly and expressly reaffirmed *D. R. Horton*, concluding it's decision was straightforward, clearly articulated and well supported and noted, with due respect to the courts that have rejected its *D. R. Horton* rationale, it would adhere to it and protect workers' core *substantive* rights under the Act. The Board in *Murphy Oil* expressly concluded an employer violates Section 8(a)(1) of the Act by requiring, as is the case here, employees to waive their *substantive* right to collectively pursue employment-related claims in all forums, arbitral and judicial. The Board also concluded its views and rationale were consistent with well-established interpretation of the Act and not in conflict with the Federal Arbitration Act. The Board specifically explained its rationale in light of the decision of the Fifth Circuit, the only Federal appellate court to have examined *D. R. Horton* directly on review, and, to have articulated its view the Board erred in *D. R. Horton*. The Board opined the Fifth Circuit understood *D. R. Horton* as simply another in a series of cases to be decided under the established framework of the Supreme Court's Federal Arbitration Act jurisprudence, and not as a case presenting novel questions. The Board expressed it could not accept the Fifth Circuit's conclusion that the pursuit of legal claims concertedly under Section 7 of the Act is not a protected substantive right. The Board stated "we think the *D. R. Horton* Board was clearly correct when it observed that the 'right to engage in collective action—including collective legal action—is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest.'"

In summary, I find the Hospital has violated and continues to violate Section 8(a)(1) of the Act by maintaining its arbitration

agreements that requires all its employees to waive their substantive right to collectively pursue employment-related claims in all forums, arbitral and judicial.

I also find the Hospital violated Section 8(a)(1) of the Act by filing petitions to compel individual arbitration by Ortega and Cardona in response to class action claims filed on April 14 by Ortega and Cardona in San Diego County Court alleging wage-and-hour claims against the Hospital under the California Labor Code. It is well established an employer's enforcement of an unlawful rule, such as the mandatory arbitration agreement rules at issue here, independently violates the Act. *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, slip op at 2 (2015) (an employer's enforcement of an unlawful rule, including a mandatory arbitration policy independently violates Section 8(a)(1)).

CONCLUSIONS OF LAW

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

2. By maintaining a mandatory arbitration agreement that employees reasonably would believe bars them from filing charges with the National Labor Relations Board, and by maintaining and/or enforcing its mandatory arbitration agreements under which employees are compelled, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial, the Hospital 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 the Hospital has engaged in certain unfair labor practices, I recommend it be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Consistent with the Board's usual practice in cases involving unlawful litigation, I recommend the Hospital be ordered to reimburse Cardona and Ortega for all reasonable expenses and legal fees, with interest, incurred in opposing the Hospital's unlawful motion to dismiss their collective wage-and-hour claims under the California Labor Code and to compel individual arbitration. See *Bill Johnson's Restaurants, Inc. v. NlRB*, 461 U.S. 731, 747 (1983) ("If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorneys' fees and other expenses" as well as "any other proper relief that would effectuate the policies of the Act."). Interest shall be computed in the manner prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). See *Teamsters Local 776 (Rite Aid Corp.)*, 305 NLRB 832, 835 fn. 10 (1991), enfd. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993) ("[I]n make-whole orders for suits maintained in violation of the Act, it is appropriate and necessary to award interest on litigation expenses."), I recommend the Hospital also be ordered to rescind or revise its Mediation and Arbitration Agreement and its Mutual Agreement to Arbitrate and to notify employees and the San Diego California Superior Court that it has done so, and to inform the Court that it no longer opposes Cardona's and Ortega's claims on the basis of either or both of the arbitration agreements.

ORDER

The Hospital, Prime Healthcare Paradise Valley, LLC, National City, 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 Board.

(b) Maintaining and/or enforcing mandatory arbitration agreements that require 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 Mediation and Arbitration Agreement and the Mutual Agreement to Arbitrate in all of its forms, or revise all of its forms to make clear to employees that the Mediation and Arbitration Agreement and/or the Mutual Agreement to Arbitrate do not constitute waivers 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 Board.

(b) Notify all applicants and current and former employees who were required to sign the Mediation and Arbitration Agreement and/or the Mutual Agreement to Arbitrate that the agreements have been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) Notify the San Diego County California Superior Court, in the case *Stephene Ortega and Richard Cardona vs. Prime Healthcare Paradise Valley LLC*, Case No. 37–2014–00011240–CU–OE–CTL, that it has rescinded or revised its Mediation and Arbitration Agreement and its Mutual Agreement to Arbitrate upon which it based its motion to compel arbitration on an individual rather than classwide basis of Ortega's and Cardona's claims, including their wage-and-hour claims under the California Labor Code, and inform the Court that it no longer opposes Ortega's and Cardona's actions on the basis of one or both of those arbitration agreements.

(d) In the manner set forth in the remedy section of this decision, reimburse Ortega and Cardona for any reasonable attorneys' fees and litigation expenses they may have incurred in opposing the Hospital's motion to compel arbitration on an individual rather than classwide basis.

(e) Within 14 days after service by the Region, post at its National City, California facility, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by

[4] 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."

the Hospital's authorized representative, shall be posted by the Hospital and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Hospital customarily communicates with its employees by such means. Reasonable steps shall be taken by the Hospital 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 Hospital has gone out of business or closed the facility involved in these proceedings, the Hospital shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix" to all current employees and former employees employed by the Hospital at any time since January 31, 2014.

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

Dated, Washington, D.C. May 8, 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 arbitration agreement that our employees would reasonably believe bars or restricts their right to file charges with the Board.

WE WILL NOT maintain and/or enforce our Mediation and Arbitration Agreement and/or the Mutual Agreement to Arbitrate 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 our Mediation and Arbitration Agreement and the Mutual Agreement to Arbitrate in all of its forms, or revise it in all of its forms to make clear that the Mediation and Arbitration Agreement and the Mutual Agreement to Arbitrate do 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 Board.

WE WILL notify all applicants and current and former employees who were required to sign our Mediation and Arbitration Agreement and/or our Mutual Agreement to Arbitrate forms that the forms have been rescinded or revised and, if revised, provide them a copy of the revised agreement.

WE WILL notify the San Diego County California Superior Court, in the case *Stephene Ortega and Richard Cardona vs. Prime Healthcare Paradise Valley LLC,* Case No. 37–2014–00011240–CU–OE–CTL, that we have rescinded or revised our Mediation and Arbitration Agreement and our Mutual Agreement to Arbitrate, upon which we based our motion to compel arbitration on an individual rather than a class-wide basis the claims therein, including the wage-and-hour claims under the California Labor Code, and WE WILL inform the court we no longer oppose Ortega's and Cardona's claims based on those arbitration agreements.

WE WILL reimburse Ortega and Cardona for any reasonable attorneys' fees and litigation expenses they may have incurred in opposing our motion to compel arbitration on an individual rather than a classwide basis their claims, including their wage-and-hour claims under the California Labor Code.

PRIME HEALTHCARE PARADISE VALLEY, LLC