



**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing Petition for Review was served on the following by first-class U.S. mail on June 6, 2016:

Judy Chang  
Counsel for the General Counsel  
National Labor Relations Board  
Region 32  
1301 Clay Street, Suite 300N  
Oakland, CA 94612-5224

Kevin R. Allen  
Velton Zegelman P.C.  
525 W. Remington Dr. Ste. 106  
Sunnyvale, CA 94087  
*Counsel for Rajan Nanavanti, Charging Party*

/s/ Douglas D. Janicik  
Douglas D. Janicik  
STEPTOE & JOHNSON LLP  
201 East Washington St.  
Suite 1600  
Phoenix, AZ 85004  
*Counsel for Petitioner*

# **Exhibit A**

*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.*

**Adecco USA, Inc. and Rajan Nanavati.** Case 32–CA–142303

May 24, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

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

Pursuant to a charge filed by Rajan Nanavati on December 5, 2014, the General Counsel issued the complaint on May 29, 2015. The complaint alleges that since at least June 5, 2014, the Respondent has promulgated and maintained the Dispute Resolution and Arbitration Agreement for Consultants/Associates (the “Agreement”), and required its employees, at its San Bruno, California facility and nationwide, to execute the Agreement as a condition of employment. The complaint further alleges that the Agreement requires that the Respondent’s employees bring all disputes arising out of or related to their employment to individual binding arbitration.

The relevant portion of the Agreement reads as follows:

1. [T]he Company and Employee agree that any and all disputes, claims or controversies arising out of or relating to this Agreement, the employment relationship between the parties, or the termination of the employment relationship, shall be resolved by binding arbitration . . .

BY SIGNING THIS AGREEMENT, THE PARTIES HEREBY WAIVE THEIR RIGHT TO HAVE ANY DISPUTE, CLAIM OR CONTROVERSY DECIDED BY JUDGE OR JURY IN A COURT . . .

4. Regardless of any other terms of this Dispute Resolution Agreement, claims may be brought before an administrative agency if applicable law permits access to such an agency notwithstanding the existence of an

agreement to arbitrate. Such administrative claims may include without limitation claims or charges brought before the Equal Employment Opportunity Commission, the U.S. Department of Labor, the National Labor Relations Board, or the Office of Federal Contract Compliance Programs. Nothing in this Dispute Resolution Agreement shall be deemed to preclude or excuse a party from bringing an administrative claim before any agency in order to fulfill the party’s obligation to exhaust administrative remedies before making a claim in arbitration.

5. Although Employee will not be retaliated against, disciplined or threatened with discipline as a result of his or her exercising his or her rights under Section 7 of the National Labor Relations Act by the filing of or participation in a class, collective or representative action in any forum, the Company may lawfully seek enforcement of this Dispute Resolution Agreement including the following class, collective and/or representative action waivers under the Federal Arbitration Act and seek dismissal of such class, collective or representative actions or claims.

7. BY SIGNING THIS AGREEMENT, THE PARTIES AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN THEIR INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS AND/OR COLLECTIVE PROCEEDING.

8. FURTHERMORE, BY SIGNING THIS AGREEMENT, THE PARTIES AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER IN THEIR INDIVIDUAL CAPACITY AND NOT IN ANY REPRESENTATIVE PROCEEDING UNDER ANY PRIVATE ATTORNEY GENERAL STATUTE (“PAGA CLAIM”), UNLESS APPLICABLE LAW REQUIRES OTHERWISE . . .

The complaint alleges that, by promulgating and maintaining the Agreement, the Respondent interfered with employees’ Section 7 rights to engage in collective legal activity, by binding employees, including the Charging Party, to an irrevocable waiver of their rights to participate in collective, class, and private attorney general litigation.

The complaint additionally alleges that the Respondent violated the Act when it sought to enforce this Agreement on November 21, 2014,<sup>1</sup> by filing a motion to com-

<sup>1</sup> Although the complaint alleges that the Respondent sought enforcement of the Agreement on September 15, 2014, the Respondent

pel individual arbitration in a wage and hour class action lawsuit, which included a concerted representative claim under the California Private Attorneys General Act, filed by Charging Party Nanavati in California Superior Court.<sup>2</sup>

Finally, the complaint alleges that the Agreement contains language that employees would reasonably understand as prohibiting or restricting their right to file unfair labor practice charges with the Board.

On June 12, 2015, the Respondent filed an answer admitting all of the factual allegations in the complaint but denying the legal conclusions and asserting certain affirmative defenses.

On August 3, 2015, the General Counsel filed a Motion to Transfer Case to the Board and for Summary Judgment. On August 24, 2015, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On September 8, 2015, the General Counsel filed a response and the Respondent filed a response and cross-motion for summary judgment.

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

#### Ruling on Motion for Summary Judgment

In *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), the Board reaffirmed the relevant holdings in *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and found unlawful the maintenance and enforcement of a mandatory arbitration agreement requiring employees to waive the right to commence or participate in class or collective actions in all forums, whether arbitral or judicial. As stated, the Respondent's answer admits all of the factual allegations in the complaint. Specifically, the Respondent's answer admits that it required its current and former employees at its San Bruno facility and nationwide to execute the Agreement as a condition of employment and that the Agreement expressly requires that all employment-based claims be resolved through individual, binding arbitration. The Respondent's answer further admits that it sought to enforce the Agreement by filing a motion to compel individual arbitration in *Rajan Nanavati, et al. v. Adecco USA, Inc.*, in order to require individual

arbitrations of the class action wage and hour claims. We therefore find that there are no material issues of fact; nor has the Respondent raised any other issues warranting a hearing.

The Respondent contends in its answer that the unfair labor practices alleged in the complaint are barred by the 6-month statute of limitations set forth in Section 10(b) of the Act. As to the allegations that the Respondent unlawfully maintained and enforced the Agreement, we find no merit to this contention. It is well settled that regardless of when an unlawful rule was first promulgated, the Board will find a violation where the rule was maintained or enforced during the 6-month period prior to the filing of a charge. See, e.g., *PJ Cheese, Inc.*, 362 NLRB No. 177, slip op. at 1 (2015); *Neiman Marcus Group*, 362 NLRB No. 157, slip op. at 2 fn. 6 (2015); *Cellular Sales of Missouri*, 362 NLRB No. 27, slip op. at 1 (2015). Here, the Agreement was in effect at all relevant times, and the Respondent filed its motion to enforce the Agreement 2 weeks before the unfair labor practice charge was filed. Accordingly, we reject the Respondent's 10(b) affirmative defense as to the maintenance and enforcement allegations.

We reach a contrary finding, however, as to the 'promulgation' allegation. Notwithstanding that the Respondent admitted that it has promulgated the Agreement since at least June 5, 2014 (within the 10(b) period), the General Counsel's Motion for Summary Judgment makes clear that the Agreement was promulgated well outside the 10(b) period. As shown by Exhibit A to the General Counsel's motion, Nanavati himself signed the Agreement on January 21, 2014. Accordingly, we find merit to the Respondent's 10(b) defense in this respect and shall dismiss the unlawful promulgation allegation.

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

The Respondent also contends that the opt-out provision of its Agreement places it outside the scope of the prohibition against mandatory individual arbitration agreements under *Murphy Oil* and *D. R. Horton, Inc.* See *D. R. Horton*, slip op. at 13 fn. 28. Specifically, the opt-out provision states that:

subsequently clarified to the General Counsel by email dated June 23, 2015, that it filed its motion to compel arbitration on November 21, 2014. Thus, the date of the filing is not in dispute.

<sup>2</sup> The Respondent filed its motion in the United States District Court for the Northern District of California. *Rajan Nanavati, et al. v. Adecco USA, Inc.*, Case No. 5:14-CV-04145-BLF (United States District Court, Northern District of California). That court granted the Respondent's motion on April 13, 2015.

Within 30 days of signing this Agreement, Employee may submit a form stating that Employee wishes to opt out and not be subject to the Dispute Resolution Agreement . . . An Employee who opts out as provided in this paragraph will not be subject to any adverse employment action as a consequence of that decision and may pursue available legal remedies without regard to the Dispute Resolution Agreement. Should Employee not opt out of the Dispute Resolution Agreement in a timely manner, Employee and the Company will be deemed to have mutually accepted the terms of the Dispute Resolution Agreement.

The Board has rejected this argument, holding that an opt-out procedure still imposes an unlawful mandatory condition of employment that falls squarely within the rule of *D. R. Horton* and affirmed in *Murphy Oil*. See *On Assignment Staffing Services*, 362 NLRB No. 189, slip op. at 1, 4–5 (2015). The Board further held in *On Assignment Staffing Services*, slip op. at 1, 5–8, that even assuming that an opt-out provision renders an arbitration agreement not a condition of employment (or non-mandatory), an agreement precluding collective action in all forums is unlawful even if entered into voluntarily because it requires employees to prospectively waive their Section 7 right to engage in concerted activity. See also *Nijjar Realty, Inc. d/b/a Pama Management*, 363 NLRB No. 38 (2015).<sup>3</sup>

Additionally, we find that the Respondent unlawfully sought to enforce the Agreement. In *Murphy Oil*, the Board found that the employer’s motion to dismiss a collective FLSA action in Federal district court, and to

---

<sup>3</sup> Our dissenting colleague, relying on his dissenting position in *Murphy Oil*, 361 NLRB No. 72, slip op. at 22–35 (2014), would find that the Respondent’s Dispute Resolution and Arbitration Agreement does not violate Sec. 8(a)(1), especially because the Agreement contains an opt-out provision. He observes that the Act “creates no substantive right for employees to insist on class-type treatment” of such claims. This is surely correct, as the Board has previously explained in *Murphy Oil*, above, slip op. at 2, and *Bristol Farms*, 363 NLRB No. 45, slip op. at 2 & fn. 2 (2015). But what our colleague ignores is that the Act “does create a right to *pursue* joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint.” *Murphy Oil*, above, slip op. at 2 (emphasis in original). The Respondent’s Agreement is just such an unlawful restraint even considering its opt-out provision. See *On Assignment Staffing Services*, 362 NLRB No. 189, slip op. at 4, 8–9 & fns. 28, 29, and 31 (2015).

Likewise, for the reasons explained in *Murphy Oil* and *Bristol Farms*, there is no merit to our colleague’s view that finding the Agreement unlawful runs afoul of employees’ Sec. 7 right to “refrain from” engaging in protected concerted activity. See *Murphy Oil*, above, slip op. at 18; *Bristol Farms*, above, slip op. at 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*, above, slip op. at 17–18; *Bristol Farms*, above, slip op. at 2.

compel individual arbitration pursuant to its mandatory arbitration agreement, violated Section 8(a)(1) because that enforcement action unlawfully restricted employees’ exercise of Section 7 rights. 361 NLRB No. 72 slip op. at 19. As in *Murphy Oil*, the Respondent unlawfully enforced its arbitration agreement when it petitioned the United States District Court for the Northern District of California to compel employees to arbitrate their claims individually.<sup>4</sup>

Finally, we find that the Agreement independently violates Section 8(a)(1) by interfering with employees’ right to file charges with the Board. The Board applies its *Lutheran Heritage Village-Livonia* test to determine whether a reasonable employee would construe an agreement to prohibit the filing of Board charges, raising the prospect that the employee would be chilled from doing so. 343 NLRB 646, 647 (2004). In making that determination, the Board recognizes that “[r]ank-and-file employees do not generally carry lawbooks to work or apply legal analysis to company rules as do lawyers, and cannot be expected to have the expertise to examine company rules from a legal standpoint.” *Ingram Book Co.*, 315 NLRB 515, 516 fn. 2 (1994). As a result, the Board routinely has found insufficient language in workplace rules purporting to except, or “save,” employees’ legal rights from restrictions on their conduct. See *SolarCity Corp.*, 363 NLRB No. 83, slip op. at 5 and fn. 18 (and cases cited therein) (2015). This is so even where such exceptions referred to the “NLRA” or “the National Labor Relations Act.” See *id.* at 5 and fn. 19 (and cases cited therein). “The rationale underlying these decisions is that, absent language more clearly informing employees about the precise nature of the rights supposedly preserved, the rule remains vague and likely to leave employees unwilling to risk violating the rule by exercising Section 7 rights.” *Id.* at 5.

The Agreement here suffers from the same vagueness, even with the provision stating that the Agreement does not prohibit the filing of Board charges. See *ISS Facility Services, Inc.*, 363 NLRB No. 160, slip op. at 2–3 (2016). The Agreement specifically applies to “all dis-

---

<sup>4</sup> We reject the position of our dissenting colleague 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, 747 (1983), the Court identified two situations in which a lawsuit enjoys no such protection: where the action is beyond a State court’s jurisdiction because of Federal preemption, and where “a suit . . . has an objective that is illegal under federal law.” 461 U. S. at 737 fn. 5. Thus, the Board may properly restrain litigation efforts such as the Respondent’s motion to compel arbitration that have the illegal objective of limiting employees’ Sec. 7 rights and enforcing an unlawful contractual provision, even if the litigation was otherwise meritorious or reasonable. See *Murphy Oil*, supra, slip op. at 20–21; *Convergys Corp.*, 363 NLRB No. 51, slip op. at 2 fn. 5 (2015).

putes, claims or controversies arising out of or relating to this Agreement, the employment relationship between the parties, or the termination of the employment relationship,” and it requires employees to bring claims “only in their individual capacity, and not as a plaintiff or class member in any purported class and/or collective proceeding.” This language reasonably conveys to employees that, as a condition of employment, they must forfeit their substantive Section 7 right to file and pursue administrative charges with the Board, whether individually or collectively.

There is no merit to the Respondent’s contention that the Agreement does not interfere with employees’ right to file charges with the Board because it specifically states that filing charges with the Board is permitted. This contention overlooks confusing language in the Agreement stating that the filing of Board charges is permitted “if applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate.” In *SolarCity*, the Board found that a virtually identical caveat could not reasonably be understood by employees as having no effect on their right to file Board charges. See 363 NLRB No. 83, slip op. at 5 fn. 20. Additionally, the Agreement’s stated exception for filing Board charges appears to be illusory, because immediately following that statement, the Agreement plainly indicates that the filing and pursuit of a Board charge is permitted only to the extent necessary “to fulfill the party’s obligation to exhaust administrative remedies before making a claim in arbitration.” This additional language reasonably conveys that all employment-related claims ultimately still must be resolved only through arbitration, not the Board. See *Ralph’s Grocery Co.*, 363 NLRB No. 128, slip op. at 2–3 (2016). Thus, applying the *Lutheran Heritage* framework and for the reasons discussed above, we find that employees would reasonably understand the vague, unexplained Agreement language to be coercive and, as a result, would be restrained in exercising their Section 7 right to file charges with the Board.

Further, we find that even if an employee could determine from the Agreement that he could invoke the Board’s processes, an inherent ambiguity in the Agreement suggests that he must do so individually, and not in concert with other employees. The Agreement’s class, collective, or representative action waiver requires employees to bring claims “only in their individual capacity, and not as a plaintiff or class member in any purported class and/or collective proceeding.” As in *SolarCity*, this broad language clearly encompasses filing an unfair labor practice charge with the Board when that charge purports to speak to a group or collective action. 363 NLRB No. 83, slip op. at 6. And it would be unclear to the

reader, especially one without specialized legal knowledge, whether and to what extent the Agreement’s exception for filing charges with Federal agencies modifies the previous broad prohibition on pursuing any form of collective or representative activity, particularly since the exception does not clarify that such charges may be filed on an individual or collective basis. This ambiguity would lead a reasonable employee to question whether he may file an unfair labor practice charge, particularly when the charge is filed with or on behalf of other employees, and thus serves as another reason for finding the Agreement to unlawfully interfere with employees’ right to file charges with the Board.

Finally, our finding that the Agreement is unlawful effectuates the Congressional policy of vigorously safeguarding access to the Board’s processes. The Board and the courts have long recognized that “filing charges with the Board is a vital employee right designed to safeguard the procedure for protecting all other employee rights guaranteed by Section 7.” *Mesker Door, Inc.*, 357 NLRB 591, 596 (2011); see also *Ralph’s Grocery*, above, 363 NLRB No. 128, slip op. at 3. For this reason, the Board must take care to ensure that employer rules do not chill employees from filing charges with the Board and instead are clear that employees retain the “complete freedom” that Congress sought.<sup>5</sup> The Agreement fails in this fundamental respect.<sup>6</sup>

Accordingly, we grant the General Counsel’s Motion for Summary Judgment as to the allegations that the Respondent unlawfully maintained a mandatory arbitration agreement that employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board and that the Respondent unlawfully maintained and enforced a mandatory arbitration agreement that requires employees, as a condition of employment, to waive the right to maintain class, collective, or private attorney general actions in all forums, whether arbitral or judicial.

On the entire record, the Board makes the following

---

<sup>5</sup> *NLRB v. Scrivener*, 405 U.S. 117, 122 (1972).

<sup>6</sup> We disagree with our dissenting colleague’s conclusion that the Respondent’s Agreement does not unlawfully interfere with employees’ right to file unfair labor practice charges with the Board. We note that our colleague repeats an argument previously made, 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. As explained in *Ralph’s Grocery*, 363 NLRB No. 128, slip op. at 3, that argument is at odds with well-established Board law.

## FINDINGS OF FACT

## I. JURISDICTION

At all material times, the Respondent, a Delaware corporation with its corporate headquarters in Jacksonville, Florida and with a branch office in San Bruno, California, has been engaged in providing temporary employee staffing services to clients throughout the State of California and nationwide.

During the 12-month period ending December 31, 2014, the Respondent performed services valued in excess of \$50,000 in states outside the State of California.

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

## II. ALLEGED UNFAIR LABOR PRACTICES

Since at least June 5, 2014, the Respondent has required its current and former employees to sign the Agreement as a condition of employment. The Agreement contains the following language:

[T]he Company and Employee agree that any and all disputes, claims or controversies arising out of or relating to this Agreement, the employment relationship between the parties, or the termination of the employment relationship, shall be resolved by binding arbitration . . .

BY SIGNING THIS AGREEMENT, THE PARTIES AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN THEIR INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS AND/OR COLLECTIVE PROCEEDING.

FURTHERMORE, BY SIGNING THIS AGREEMENT, THE PARTIES AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER IN THEIR INDIVIDUAL CAPACITY AND NOT IN ANY REPRESENTATIVE PROCEEDING UNDER ANY PRIVATE ATTORNEY GENERAL STATUTE ("PAGA CLAIM"), UNLESS APPLICABLE LAW REQUIRES OTHERWISE.

On November 21, 2014, the Respondent sought to enforce the Agreement described above by filing a motion to compel individual arbitration rather than class-wide litigation of claims in a class action wage and hour complaint filed against the Respondent by the Charging Party in *Rajan Nanavati, et al. v. Adecco USA, Inc.*, Case No. 5:1-14-CV-269398 (Superior Court of California, Santa Clara County). On April 13, 2015, the United States District Court, Northern District of California granted the Respondent's motion.

## CONCLUSIONS OF LAW

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

2. By maintaining a mandatory and binding arbitration agreement that employees reasonably would believe bars or restricts them from filing charges with the National Labor Relations Board or from accessing the Board's processes, and by maintaining and enforcing a mandatory arbitration agreement that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act, and has violated Section 8(a)(1) of the Act.

## REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Consistent with our decision in *Murphy Oil*, supra, slip op. at 21, and the Board's usual practice in cases involving unlawful litigation, we shall order the Respondent to reimburse the Charging Party and any other plaintiffs for all reasonable expenses and legal fees, with interest, that they may have incurred in opposing the Respondent's unlawful motion to compel individual arbitration. See *Bill Johnson's Restaurants v. NLRB*, 361 U.S. 731, 747 (1983) ("If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorneys' fees and other expenses" and "any other proper relief that would effectuate the policies of the Act."). Interest shall be computed in the manner prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). See *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 835 fn. 10 (1991) ("[I]n make-whole orders for suits maintained in violation of the Act, it is appropriate and necessary to award interest on litigation expenses"), enfd. 973 F.2d 230 (3d Cir. 1992). We shall also order the Respondent to rescind or revise the Agreement, notify employees and the United States District Court for the Northern District of California that it has done so, and inform the court that it no longer opposes the lawsuit on the basis of the Agreement.

## ORDER

The Respondent, Adecco USA, Inc., San Bruno, 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 and/or enforcing a mandatory arbitration agreement that requires employees, as a condition of employment, to waive the right to maintain class, collective, or private attorney general 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 Dispute Resolution and Arbitration Agreement for Consultants/Associates (the "Agreement") in all of its forms, or revise it in all of its forms to make clear to employees that the Agreement does not constitute a waiver of their right to maintain employment-related joint, class, collective actions in all forums, and that it does not bar or restrict employees' right to file charges with the National Labor Relations Board.

(b) Notify all current and former employees who were required to sign or otherwise become bound to the 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 United States District Court for the Northern District of California in Case No. 5:14-CV-04145-BLF that it has rescinded or revised the arbitration agreement upon which it based its motion to compel individual arbitration in the wage and hour class action brought by Rajan Nanavati, 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 this decision, reimburse Rajan Nanavati and any other plaintiffs in Case No. 5:14-CV-04145-BLF for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing the Respondent's motion to compel individual arbitration.

(e) Within 14 days after service by the Region, post at its San Bruno, California facility copies of the attached notice marked "Appendix A," and at all other facilities where the unlawful agreement is or has been in effect, copies of the attached notice marked "Appendix B."<sup>7</sup> Copies of the notices, on forms provided by the Regional

Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix A" to all current and former employees employed by the Respondent at any time since June 5, 2014, and any former employees against whom the Respondent has enforced its mandatory arbitration agreement since June 5, 2014. If the Respondent has gone out of business or closed any facilities other than the one involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix B" to all current employees and former employees employed by the Respondent at those facilities at any time since June 5, 2014.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 32 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. May 24, 2016

\_\_\_\_\_  
Mark Gaston Pearce, Chairman

\_\_\_\_\_  
Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part.

In this case, my colleagues find that the Respondent's Dispute Resolution and Arbitration Agreement for Consultants/Associates (the Agreement) violates Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) because the Agreement waives the right to par-

<sup>7</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in each 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."

ticipate in class or collective actions regarding non-NLRA employment claims. Charging Party Rajan Nanavati signed the Agreement, and later he filed a class action lawsuit against the Respondent in federal court alleging wage and hour violations. In reliance on the Agreement, the Respondent filed a motion to compel individual arbitration, which the court granted. 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.*<sup>1</sup> My colleagues also find that the Agreement violated the Act by interfering with the right of employees to file unfair labor practice charges with the Board. For the reasons stated below, I respectfully dissent from this finding as well.<sup>2</sup>

### 1. The Class Action Waiver Does Not Violate the Act

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.<sup>3</sup> However, I disagree with my colleagues’ finding that Section 8(a)(1) of the NLRA prohibits agreements that waive class and collective actions, and I especially disagree with the Board’s finding here, similar to the Board majority’s finding in *On Assignment Staffing Services*,<sup>4</sup> that class-waiver agreements violate the NLRA even when they contain an opt-out provision. In my view, Sections 7 and 9(a) of the NLRA render untenable both of these propositions. 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.”<sup>5</sup> This aspect of Sec-

tion 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;<sup>6</sup> (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;<sup>7</sup> (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA);<sup>8</sup> and (iv) for the reasons stated in my dissenting opinion in *Nijjar Realty, Inc. d/b/a Pama Management*, 363 NLRB No. 38, slip op. at 3–5 (2015), the legality of such a waiver is even more self-evident

---

ployment, 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).

<sup>6</sup> 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.”).

<sup>7</sup> 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 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., 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).

<sup>8</sup> 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).

<sup>1</sup> 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).

<sup>2</sup> I join my colleagues in dismissing as untimely under NLRA Sec. 10(b) an allegation that the Agreement was unlawfully promulgated.

<sup>3</sup> 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).

<sup>4</sup> 362 NLRB No. 189, slip op. at 1, 4–5 (2015).

<sup>5</sup> *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 em-

when the agreement contains an opt-out provision, based on every employee's Section 9(a) right to present and adjust grievances on an "individual" basis and each employee's Section 7 right to "refrain from" engaging in protected concerted activities. 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 Agreement was lawful under the NLRA, I would find it was similarly lawful for the Respondent to file a motion in Federal court seeking to enforce the Agreement. It is relevant that the Federal district 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.<sup>9</sup> 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."<sup>10</sup> I also believe that any Board finding of a violation based on the Respondent's meritorious motion in Federal court to compel arbitration would improperly risk infringing on the Respondent's rights under the First Amendment's Petition Clause. See *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983); *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002); see also my partial dissent in *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 33–35. Finally, for similar reasons, I believe the Board cannot properly require the Respondent to reimburse the Charging Party and other plaintiffs for their attorneys' fees in the circumstances presented here. *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 35.

## 2. The Agreement Does Not Interfere with NLRB Charge Filing

My colleagues also find that the Respondent violated Section 8(a)(1) by maintaining the Agreement because, in their view, reasonable employees would read it as restricting them from filing unfair labor practice charges with the Board. See, e.g., *U-Haul Co. of California*, 347

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

<sup>10</sup> *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d at 1021.

NLRB 375, 377–378 (2006) (finding that employer violated the Act by maintaining an arbitration policy that employees would reasonably read as prohibiting them from filing unfair labor practice charges with the Board), *enfd. mem.* 255 Fed. Appx. 527 (D.C. Cir. 2007). My colleagues posit that the Agreement restricts NLRB charge filing because it broadly requires arbitration of all workplace disputes, and, in their view, language in the Agreement explicitly preserving the right to bring claims before an administrative agency, including the NLRB, is "confusing," "vague," "unexplained," and insufficient to avoid unlawful interference with Board charge filing. I respectfully disagree.

The Agreement broadly requires arbitration of all employment-related claims, including those arising under the NLRA,<sup>11</sup> but I do not believe the scope of the Agreement makes it violative of the Act. As I explained in *Ralph's Grocery*,<sup>12</sup> *GameStop Corp.*,<sup>13</sup> and *Applebee's Restaurant*,<sup>14</sup> decades of case law—including the Board's recent decision in *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014)—establish that parties may lawfully agree to submit NLRA claims to arbitration, provided that the agreement does not otherwise interfere with NLRB charge filing.<sup>15</sup> Such an agreement

<sup>11</sup> In pertinent part, the Agreement provides as follows:

[T]he Company and Employee agree that any and all disputes, claims or controversies arising out of or relating to this Agreement, the employment relationship between the parties, or the termination of the employment relationship, shall be resolved by binding arbitration . . .

BY SIGNING THIS AGREEMENT, THE PARTIES HEREBY WAIVE THEIR RIGHT TO HAVE ANY DISPUTE, CLAIM OR CONTROVERSY DECIDED BY JUDGE OR JURY IN A COURT . . .

Regardless of any other terms of this Dispute Resolution Agreement, claims may be brought before an administrative agency if applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate. Such administrative claims may include without limitation claims or charges brought before the Equal Employment Opportunity Commission, the U.S. Department of Labor, the National Labor Relations Board, or the Office of Federal Contract Compliance Programs. Nothing in this Dispute Resolution Agreement shall be deemed to preclude or excuse a party from bringing an administrative claim before any agency in order to fulfill the party's obligation to exhaust administrative remedies before making a claim in arbitration.

<sup>12</sup> 363 NLRB No. 128, slip op. at 6–8 (2016) (Member Miscimarra, concurring in part and dissenting in part).

<sup>13</sup> 363 NLRB No. 89, slip op. at 4–7 (2015) (Member Miscimarra, concurring in part and dissenting in part).

<sup>14</sup> 363 NLRB No. 75, slip op. at 3–5 (2015) (Member Miscimarra, concurring in part and dissenting in part).

<sup>15</sup> Although NLRA claims may lawfully be made subject to arbitration, the Board in all cases retains the right, under Sec. 10(a) of the Act, to independently review any allegations of unfair labor practices made in a charge filed with the Board. See, e.g., *GameStop Corp.*, above,

does not unlawfully prohibit the filing of charges with the NLRB, particularly when the right to do so is expressly stated in the agreement itself. In this case, the Agreement expressly provides that “claims may be brought before an administrative agency if applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate. Such administrative claims may include without limitation claims or charges brought before . . . the National Labor Relations Board. . . .” This language eliminates any possible uncertainty about the right of employees to file charges with the Board.<sup>16</sup> See *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d at 1020 (“[I]t would be unreasonable for an employee to construe the Revised Arbitration Agreement as prohibiting the filing of Board charges when the agreement says the opposite.”).

Accordingly, I respectfully dissent.  
Dated, Washington, D.C. May 24, 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

363 NLRB No. 89, slip op. at 4–5 fn. 10 (Member Miscimarra, concurring in part and dissenting in part).

<sup>16</sup> See *Applebee’s Restaurant*, above, slip op. at 4 (Member Miscimarra, concurring in part and dissenting in part). My colleagues advance several arguments in support of their conclusion that the Agreement unlawfully interferes with the right of employees to file charges with the Board. In at least three other cases, a Board majority has relied on the same arguments to reach the same conclusion regarding language virtually identical to the language in the Agreement at issue here. See *SolarCity Corp.*, 363 NLRB No. 83, slip op. at 4–6 (2015); *ISS Facility Services, Inc.*, 363 NLRB No. 160, slip op. at 2–3 (2016); *Securitas Security Services USA, Inc.*, 363 NLRB No. 182, slip op. at 3–5 (2016). In my separate opinions in those cases, I explained at length why I found the majority’s reasoning unpersuasive. See *SolarCity*, above, slip op. at 9–11 (Member Miscimarra, dissenting); *ISS Facility Services*, above, slip op. at 5–7 (Member Miscimarra, dissenting); *Securitas Security Services USA*, above, slip op. at 7–9 (Member Miscimarra, dissenting in part). For the same reasons I relied on in those cases, I find the majority’s reasoning unpersuasive here.

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 and/or enforce a mandatory arbitration agreement that requires our employees, as a condition of employment, to waive the right to maintain class, collective, or private attorney general actions in all forums, whether arbitral or judicial.

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

WE WILL rescind the Dispute Resolution and Arbitration Agreement for Consultants/Associates (the “Agreement”) in all of its forms, or revise it in all of its forms to make clear that the Agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict your right to file charges with the National Labor Relations Board.

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

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

WE WILL reimburse Rajan Nanavati and any other plaintiffs for any reasonable attorneys’ fees and litigation expenses that they may have incurred in opposing our motion to compel individual arbitration.

ADECCO USA, INC.

The Board’s decision can be found at [www.nlr.gov/case/32-CA-142303](http://www.nlr.gov/case/32-CA-142303) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Room 5011, Washington, D.C. 20570, or by calling (202) 273–1940.



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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

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

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

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

WE WILL rescind the Dispute Resolution and Arbitration Agreement for Consultants/Associates (the "Agreement") in all of its forms, or revise it in all of its forms to make clear that the Agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict your right to file charges with the National Labor Relations Board.

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

ADECCO USA, INC.

The Board's decision can be found at [www.nlr.gov/case/32-CA-142303](http://www.nlr.gov/case/32-CA-142303) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Room 5011, Washington, D.C. 20570, or by calling (202) 273-1940.

