

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

RGIS, LLC,)	
)	
Petitioner/Cross-Respondent)	
)	No. 16-60129
v.)	
)	
NATIONAL LABOR RELATIONS)	
)	
Respondent/Cross-Petitioner)	

**PETITIONER/CROSS-RESPONDENT RGIS, LLC’S MOTION
TO STAY BRIEFING AND FOR SUMMARY DECISION**

To the Honorable, the Judges of the United States
Court of Appeals for the Fifth Circuit:

Petitioner/Cross-Respondent RGIS, LLC (“Petitioner”), by counsel, respectfully moves this Court to stay briefing in this appeal and to enter a summary decision in Petitioner’s favor, granting its Petition for Review and denying the National Labor Relations Board’s (“NLRB’s” or “Board’s”) Cross-Application for Enforcement with respect to the NLRB’s Decision and Order in *RGIS, LLC and Clara Harris*, Case No. 28-CA-136313, reported at 363 NLRB No. 132, dated February 23, 2016. See Exhibit A. In support of this Motion, Petitioner states:

1. This case is one of many involving a conflict between the Board and federal and state courts over the lawfulness of employment arbitration agreements waiving class and collective action procedures. In 2012, a two-member panel of the Board issued *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012) (“*D.R. Horton I*”), holding for the first time that the National Labor Relations Act (“NLRA”) prohibits employers from requiring “employees covered by the Act, as a 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.” *D.R. Horton I, supra*, slip op. at 1.

2. Following the NLRB’s issuance of *D.R. Horton I*, scores of federal and state courts have rejected the NLRB’s reasoning, typically in the context of enforcing employment arbitration agreements waiving class and collective action procedures. *See Murphy Oil*, 361 NLRB No. 72 at 36 n.5 (“*Murphy Oil I*”) (Member Johnson, dissenting) (collecting citations to dozens of federal and state courts rejecting *D.R. Horton I*); *see also Richards v. Ernst & Young, LLP*, 744 F.3d 1072 (9th Circ. 2013) (noting “that the only court of appeals, and the overwhelming majority

of the district courts, to have considered the issue have determined that they should not defer to the NLRB's decision in *D.R. Horton* because it conflicts with the explicit pronouncements of the Supreme Court concerning the policies undergirding the Federal Arbitration Act”); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013) (stating that the court owed no deference to and declined to follow *D.R. Horton I*); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013) (refusing to follow *D.R. Horton I*).¹

3. This Court directly reviewed *D.R. Horton I* on the employer's petition for review and the NLRB's cross-application for enforcement. *See D.R. Horton, Inc. v. N.L.R.B.*, No. 12-60031 (5th Cir. filed Jan. 13, 2012). This Court heard not only from the parties but also received extensive briefing from numerous amici, including the Service Employees International Union (SEIU), the American Federation of Labor-Congress of Industrial Organizations (AFL-CIO), the National Employment Lawyers Association, Public Justice, the U.S. Chamber of Commerce, the National Retail Federation, the Coalition for a Democratic Workplace, the National Association of Manufacturers, the

¹ As an outlier, the Seventh Circuit, in contrast to nearly every other decision on the matter, adopted the Board's reasoning in *Lewis v. Epic Systems Corporation*, --- F.3d ---, 2016 WL 3029464 (7th Cir. May 26, 2016).

Equal Employment Advisory Council, the Council on Labor Law Equality, the Society for Human Resource Management, and the National Federation of Independent Business, among others. *Id.* The Court also received and reviewed a law review article, which presented “[a] thorough explanation of the strongest arguments in favor of the Board’s decision.” *D.R. Horton v. N.L.R.B.*, 737 F.3d 344, 362 n. 11 (5th Cir. 2013) (“*D.R. Horton II*”).

4. After considering all of the arguments advocated by the parties, amici, and legal scholars, this Court, like nearly every other court to consider the issue, similarly rejected the NLRB’s reasoning regarding class action waivers in arbitration agreements and declined to enforce *D.R. Horton I* in relevant part. *See id.*

5. The NLRB petitioned this Court for en banc review of *D.R. Horton II*, which the Court denied on April 16, 2014. *D.R. Horton v. N.L.R.B.*, No. 12-60031 (5th Cir. Apr. 16, 2014). The NLRB failed to petition the Supreme Court for a writ of certiorari.

6. Following this Court’s issuance of *D.R. Horton II*, the NLRB takes the position that it need not and will not acquiesce to any court decision that rejects *D.R. Horton I*. *See Murphy Oil I, supra*, slip op. at

2 n.17 (declining to follow *D.R. Horton II*). Instead, the NLRB re-affirmed its commitment to *D.R. Horton I* in *Murphy Oil I*. *Id.*

7. This Court also reviewed *Murphy Oil I* on the employer's petition for review and the NLRB's cross application for enforcement. *Murphy Oil USA v. NLRB*, No. 14-60800 (5th Cir. Nov. 17, 2014). In light of the fact *D.R. Horton II* is binding authority within this Circuit, the NLRB moved the Court for en banc review at the outset to seek to overturn *D.R. Horton II*. The Court denied the Board's request for such en banc review. *Murphy Oil USA v. NLRB*, No. 14-60800 (5th Cir. June 24, 2015).

8. On October 26, 2015, a panel of this Court unanimously rejected *Murphy Oil I* and affirmed the Court's adherence to *D.R. Horton II*. *Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013 (5th Cir. 2015) ("*Murphy Oil II*").

9. This Court again rejected the Board's *D.R. Horton I* theory in a third case in *Chesapeake Energy Corp. v. N.L.R.B.*, 633 Fed. App'x 613, 2016 WL 573705, at *2 (5th Cir. Feb. 12, 2016) ("The parties also agree that enforcement of the remainder of the Board's order is precluded by this court's decision in *D.R. Horton, Inc. v. NLRB*.")

denying enf. in relevant part, Chesapeake Energy Corp., 362 NLRB No. 80 (2015).

10. On May 13, 2016, the Court also denied the Board's second petition for en banc review in *Murphy Oil. Murphy Oil USA v. NLRB*, No. 14-60800 (5th Cir. May 13, 2016).

11. Despite the repeated rejection by federal and state courts of the Board's interpretation of the NLRA as banning class action waivers in arbitration agreements and this Court's thrice rejecting that reasoning on direct review in *D.R. Horton II*, *Murphy Oil II*, and *Chesapeake Energy*, the NLRB continues to vigorously pursue its policy of non-acquiescence. In recent months, the Board has issued several dozen decisions applying and expanding *D.R. Horton I*. Many of these new decisions have generated petitions for review in this and other Courts of Appeals. See, e.g., *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27 (Mar. 16, 2015), *enf. den'd in relevant part, Cellular Sales of Missouri, LLC v. NLRB*, --- F.3d ----, 2016 WL 3093363, at *2 (8th Cir. June 2, 2016); *The Neiman Marcus Group Inc.*, 362 NLRB No. 157 (Aug. 4, 2015) (pending in the Fifth Circuit as case number 15-60572); *Countrywide Financial Corp.*, 362 NLRB No. 165 (Aug. 14, 2015)

(pending in Ninth Circuit as case number 15-72700); *PJ Cheese, Inc.*, 362 NLRB No. 177 (Aug. 20, 2015) (pending in the Fifth Circuit as case number 15-60610); *Leslie's Poolmart, Inc.*, 362 NLRB No. 184 (Aug. 25, 2015) (pending in the Fifth Circuit as case number 15-60627); *Hoot Winc, LLC and Ontario Wings, LLC*, 363 NLRB No. 2 (Sept. 1, 2015) (pending in Ninth Circuit as case number 15-72839); *Prof'l Janitorial Serv. of Houston, Inc.*, 363 NLRB No. 35 (Nov. 24, 2015) (pending in the Fifth Circuit as case number 15-60858); *Nijjar Realty, Inc.*, 363 NLRB No. 38 (Nov. 20, 2015) (pending in the Ninth Circuit as case number 15-73921); *Amex Card Servs. Co.*, 363 NLRB No. 40 (Nov. 10, 2015) (pending in the Fifth Circuit as case number 15-60830); *U.S. Xpress Enterprises, Inc., & U.S. Xpress, Inc. & Justin L. Swidler*, 363 NLRB No. 46 (Nov. 30, 2015) (pending in the Fifth Circuit as case number 15-60871); *Price-Simms, Inc. D/B/A Toyota Sunnyvale And Richard Vogel*, 363 NLRB No. 52 (Nov. 30, 2015) (pending the D.C. Circuit as case number 15-1457); *Brinker Int'l Payroll Co. L.P.*, 363 NLRB No. 54 (Dec. 1, 2015) (pending in the Fifth Circuit as case number 15-60859); *Citigroup Tech., Inc. & Citicorp Banking Corp. (Parent), A Subsidiary of Citigroup, Inc. & Andrea Smith*, 363 NLRB No. 55 (Dec. 1, 2015)

(pending in the Fifth Circuit as case number 15-60856); *Philmar Care, LLC d/b/a San Fernando Post Acute Hospital and Juan Cortes*, 363 NLRB No. 57 (Dec. 11, 2015) (pending in the Ninth Circuit as case number 16-70069); *Kmart Corp.*, 363 NLRB No. 66 (Dec. 16, 2015) (pending in the Fifth Circuit as case number 15-60897); *Advanced Services Inc.*, 363 NLRB No. 71 (Dec. 22, 2015) (pending in the Eighth Circuit as case number 15-3988); *Citi Trends Inc.*, 363 NLRB No. 73 (Dec. 22, 2015) (pending in the Fifth Circuit as case number 15-60909); *The Rose Group d/b/a Applebee's Restaurant*, 363 NLRB No. 75 (Dec. 22, 2015) (pending in the Third Circuit as case number 15-4092); *Domino's Pizza LLC*, 363 NLRB No. 77 (Dec. 22, 2015) (pending in the Fifth Circuit as case number 15-60914); *Ross Stores Inc.*, 363 NLRB No. 79 (Dec. 23, 2015) (pending in the Fifth Circuit as case number 15-60916); *MasTec Services Co.*, 363 NLRB No. 81 (Dec. 24, 2015) (pending in the Fifth Circuit as case number 16-60011); *RPM Pizza LLC*, 363 NLRB No. 82 (Dec. 22, 2015) (pending in the Fifth Circuit as case number 15-60909); *Solar-City Corp.*, 363 NLRB No. 83 (Dec. 22, 2015) (pending in the Fifth Circuit as case number 16-60001); *24 Hour Fitness USA Inc.*, 363 NLRB No. 84 (Dec. 24, 2015) (pending in the Fifth

Circuit as case number 16-60005); *GameStop Corp., et al, and Michelle Krecz-Gondor*, 363 NLRB No. 89 (Dec. 31, 2015) (pending in the Fifth Circuit as case number 16-60031).

12. The NLRB likewise applied *D.R. Horton I* in this case in disregard of this and other courts' repeated rejection of the NLRB's theories underlying that decision.

13. In this appeal, RGIS petitions this Court for review of the NLRB's order finding that it violated the NLRA pursuant to *D.R. Horton I* and *Murphy Oil I*.

14. The NLRB concedes this case is controlled by this Court's decisions in *Dr. Horton II* and *Murphy Oil II*. See, e.g., NLRB's Motion to Hold Case in Abeyance ¶ 4 ("The Board Decision and Order under review here presents identical issues to those in *Murphy Oil*.").

15. On June 6, 2016, this Court granted a Motion for Summary Reversal in *On Assignment Staffing Services, Inc. v. NLRB*, Case No. 15-60642. That case, like this one, involved a petition for review of one of the NLRB's numerous decisions continuing to apply its *D.R. Horton I* and *Murphy Oil I* decisions. See *On Assignment Staffing Servs., Inc.*, 362 NLRB No. 189 (Aug. 27, 2015). This Court did not require full

briefing from the parties. Rather, it appears the Court granted the Motion for Summary Reversal because there was no dispute that the outcome was controlled by this Court's decisions in *D.R. Horton II* and *Murphy Oil II*.

16. Petitioner respectfully submits that the same reasoning should apply here. There is no dispute that the sole issue to be presented on appeal is already settled under the law of this Circuit. There has been no intervening change in statutory law or Supreme Court precedent. *Cf. Jacobs v. Nat'l Drug Intelligence Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008) ("It is a well-settled Fifth Circuit rule of orderliness that one panel of our court may not overturn another panel's decision, absent an intervening change in the law, such as by a statutory amendment, or the Supreme Court, or our en banc court."). Moreover, as set forth above, this Court has already declined on at least three occasions to reconsider *D.R. Horton II* on en banc review.

17. Granting this Motion for Summary Decision would conserve the resources of the Court and the parties by avoiding full briefing on issues that are already settled.

18. Accordingly, Petitioner respectfully moves the Court to grant this Motion for Summary Decision, summarily granting its Petition for Review and denying the NLRB's Cross-Application for Enforcement based on this Court's decisions in *D.R. Horton II*, *Murphy Oil II*, *Chesapeake Energy*, and *On Assignment Staffing*. Petition also respectfully moves the Court to stay further briefing in this appeal pending the Court's decision on this Motion.

Dated: June 10, 2016

Respectfully submitted,

s/ Ron Chapman Jr.

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CERTIFICATE OF SERVICE

I certify that on this 10th day of June, 2016, I caused this PETITIONER/CROSS-RESPONDENT RGIS, LLC'S MOTION TO STAY BRIEFING AND FOR SUMMARY DECISION to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

s/Ron Chapman, Jr.

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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.

RGIS, LLC and Clara Harris. Case 28-CA-136313

February 23, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

Upon a charge filed September 8, 2014, by Clara Harris, the General Counsel issued a complaint and notice of hearing on March 9, 2015, alleging that the Respondent has been violating Section 8(a)(1) of the Act by maintaining the rules set forth in the documents entitled “RGIS Dispute Resolution Program” at all material times.

On June 15, 2015, the Respondent, the Charging Party, and the General Counsel filed a joint motion to waive a hearing and a decision by an administrative law judge and to transfer this proceeding to the Board for a decision based on a stipulated record. On October 8, 2015, the Board granted the parties’ joint motion. Thereafter, the Respondent and the General Counsel filed briefs, and the Respondent filed an answering brief.

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

On the entire record and briefs, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a limited liability company with an office and place of business in Mesa, Arizona, has been engaged in providing inventory services. In conducting its operations during the 12-month period ending September 8, 2014, the Respondent performed services valued in excess of \$50,000 in states outside the State of Arizona. The Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Stipulated Facts

At all material times, the Respondent has maintained the “RGIS Dispute Resolution Program” (the Program). The Program provides, in relevant part

... [Y]ou and the Company mutually agree to be bound by its terms and to resolve all claims covered by the Program through mandatory, final and binding arbitration instead of through litigation in Court.

* * *

Except as otherwise stated in this Program, all claims between you and the Company that involve legally protected rights are subject to arbitration. . . . This includes any claims . . . for compensation . . . termination, discrimination , retaliation under the Civil Rights Act of 1964, the Americans with Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Genetic Information Non-Discrimination Act, and other federal . . . statutes.

* * *

The Program is not intended to limit or expand substantive legal rights that you are entitled to under the law. Nor does the Program limit or restrict in any way your legal right to file claims or charges with federal administrative agencies, such as the National Labor Relations Board (“NLRB”) or the Equal Employment Opportunity Commission (“EEOC”), or other similar state or local administrative agencies.

* * *

THE . . . PROGRAM IS THE SOLE MEANS OF RESOLVING EMPLOYMENT-RELATED DISPUTES BETWEEN YOU AND THE COMPANY OR YOU AND ANOTHER EMPLOYEE, INCLUDING DISPUTES FOR LEGALLY PROTECTED RIGHTS SUCH AS FREEDOM FROM DISCRIMINATION, RETALIATION OR HARASSMENT.

You are still free to consult or file a complaint with any appropriate state or federal agency, such as the EEOC, regarding your legally protected rights. . . . If an employee files a lawsuit involving claims covered by the Program, the Company will ask the court to dismiss the lawsuit and refer it to arbitration.

* * *

YOU AND RGIS AGREE TO BRING ANY DISPUTE IN ARBITRATION ON AN INDIVIDUAL BASIS ONLY, AND NOT ON A CLASS, COLLECTIVE, REPRESENTATIVE OR PRIVATE ATTORNEY GENERAL BASIS. THERE WILL BE NO RIGHT OR AUTHORITY FOR ANY DISPUTE TO BE BROUGHT, HEARD OR ARBITRATED AS A CLASS, COLLECTIVE, REPRESENTATIVE OR PRIVATE ATTORNEY GENERAL PROCEEDING, INCLUDING WITHOUT LIMITATION PENDING BUT NOT

CERTIFIED CLASS ACTIONS (“CLASS ACTION WAIVER”).¹

Each employee is automatically enrolled in the Program as a condition of employment and remains subject to the Program unless the employee exercises the option to be excluded by submitting the “Dispute Resolution Program Exclusion Form” (Exclusion Form) within 60 days of hire.

The Program applies to all employees hired since December 24, 2011, who did not opt out of coverage.

B. Discussion

The Board held in *D. R. Horton*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and reaffirmed in *Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. at 1 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir., Oct. 26, 2015), that an employer violates Section 8(a)(1) “when it requires employees covered by the Act, as a 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.” 357 NLRB at 2277.²

Here, we find that the Respondent violated Section 8(a)(1) by maintaining the “RGIS Dispute Resolution Program.” Like the policies in *D. R. Horton* and *Murphy Oil*, the Respondent’s Program requires employees, as a condition of their employment, to submit their employment-related legal claims to individual arbitration, thereby compelling employees to waive their Section 7 right to pursue such claims through class or collective action in all forums, arbitral and judicial. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 1; *D. R. Horton*, 357 NLRB at 2277.³

¹ Bolded and capitalized as in the Program.

² The Respondent argues that *D. R. Horton* and *Murphy Oil* were wrongly decided and should be overruled. We disagree and adhere to the findings and rationale in those cases.

³ We reject the Respondent’s argument that the Program is lawful to the extent that it prevents an individual employee from filing a class or collective action because that individual employee is not engaged in protected concerted activity. As the Board made clear in *Beyoglu*, 362 NLRB No. 152 (2015), “the filing of an employment-related class or collective action by an individual is an attempt to initiate, to induce, or to prepare for group action and is therefore conduct protected by Section 7.” *Id.*, slip op. at 2. See also *D. R. Horton*, 357 NLRB at 2279.

We also reject the Respondent’s argument that the Exclusion Form makes the Program lawful. 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). Further, even assuming that an opt-provision renders the Program not a condition of employment (or nonmandatory), the Program remains unlawful because it requires employees to prospectively waive their

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 “RGIS Dispute Resolution Program” under which employees are required, 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. We shall also order the

Sec. 7 right to engage in concerted activity. *Id.*, slip op. at 1, 5–8. See also *Bristol Farms*, 363 NLRB No. 45, slip op. at 1–2 (2015).

Our dissenting colleague, relying on his dissenting position in *Murphy Oil*, 361 NLRB No. 72, slip op. at 22–35 (2015), would find that the Respondent’s Program does not violate Sec. 8(a)(1), especially because the Program contains an opt-out provision. 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 Program 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, 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 Program 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.

Although the General Counsel’s Statement of Position alludes to the Program’s interference with employees’ access to the Board and its processes, other than repeating that bare statement in its brief to the Board, the General Counsel offered no supporting argument. In its brief, the Respondent argued that the Program was not unlawful under this theory of a violation. The General Counsel did not file an answering brief responding to the Respondent’s argument. In these circumstances, we find that the General Counsel did not litigate this theory of a violation, and we therefore do not determine whether the Program is independently unlawful because employees would reasonably believe that it bars or restricts their right to file charges with the Board. See *Citi Trends, Inc.*, 363 NLRB No. 74, slip op. at 1 (2015) (reversing judge’s finding of violation under *U-Haul of California*, 347 NLRB 375 (2006), enf. 255 Fed.Appx. 527 (D.C. Cir. 2007), where General Counsel did not litigate that theory of violation).

Respondent to rescind or revise its Program and to notify employees that it has done so.

ORDER

The National Labor Relations Board orders that the Respondent, RGIS, LLC, Mesa, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a "RGIS Dispute Resolution Program" that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed 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 "RGIS Dispute Resolution Program" in all of its forms, or revise it in all of its forms to make clear to employees that the Program does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums.

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

(c) Within 14 days after service by the Region, post at its Mesa, Arizona facility copies of the attached notice marked "Appendix."⁴ Copies of the notice, on forms provided by the Regional Director for Region 28, 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" to all current employees and former employees employed by the Respondent at any time since March 8, 2014.

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."

(d) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. February 23, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part.

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

I agree that an employee may engage in "concerted" activities for "mutual aid or protection" in relation to a claim asserted under a statute other than NLRA.² How-

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

I agree with my colleagues that the issue of whether the Program interferes with the right to file charges with the Board is not presented here. The General Counsel's Statement of Position alluded to this theory of a violation by asserting that the Program "interferes with employees' access to the Board and its processes," and the General Counsel stated that this theory would "be expanded upon by brief." On brief, however, the General Counsel simply repeated this bare assertion and offered no supporting argument. In its brief, the Respondent argued that the Program did not interfere with Board charge filing, and the General Counsel did not file an answering brief. Accordingly, I agree that the General Counsel did not litigate this theory of a violation and it is not before us for decision. See *Citi Trends, Inc.*, 363 NLRB No. 74, slip op. at 1 (2015).

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

ever, 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*,³ 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."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 (iii) en-

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). Thus, I agree with the Respondent that an individual employee does not engage in protected concerted activity by filing a class or collective action. See my dissent in *Beyoglu*, above.

³ 362 NLRB No. 189, slip op. at 1, 4–5 (2015).

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

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

⁶ The Fifth Circuit has twice denied enforcement of Board orders invalidating a mandatory arbitration agreement that waived class-type

enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA),⁷ 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 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.

Accordingly, with respect to this issue, I respectfully dissent.

Dated, Washington, D.C. February 23, 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

treatment of non-NLRA claims. See *Murphy Oil, Inc., USA v. NLRB*, above; *D. R. Horton, Inc. v. NLRB*, above. The overwhelming majority of courts considering the Board's position have likewise rejected it. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 34 (Member Miscimarra, dissenting in part); *id.*, slip op. at 36 fn. 5 (Member Johnson, dissenting) (collecting cases); see also *Patterson v. Raymours Furniture Co., Inc.*, 96 F. Supp. 3d 71 (S.D.N.Y. 2015); *Nanavati v. Adecco USA, Inc.*, 99 F. Supp. 3d 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).

RGIS, LLC

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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 "RGIS Dispute Resolution Program" (the Program) that requires you, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

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

WE WILL rescind the Program in all of its forms, or revise it in all of its forms to make clear that the Program does not constitute a waiver of your right to maintain

employment-related joint, class, or collective actions in all forums.

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

RGIS, LLC

The Board's decision can be found at www.nlr.gov/case/28-CA-136313 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.

