UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LINCOLN EASTERN MANAGEMENT CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Case No.: _____

PETITION FOR REVIEW

Pursuant to Rule 15(a) of the Federal Rules of Appellate Procedure, Lincoln Eastern Management Corporation (herein "Petitioner"), hereby petitions the United States Court of Appeals of the Fifth Circuit for review of an Order of the National Labor Relations Board (herein "Respondent" or "NLRB") in the matter styled Lincoln Eastern Management Corporation and Alecia Winters, NLRB Case No. 28-CA-147123, reported in an Order at 364 NLRB No. 16, dated May 31, 2016. *See* Attachment "A." This Court has jurisdiction in this matter pursuant to Section 10(f) of the National Labor Relations Act because the NLRB's "Decision and Order" is a final order. 29 U.S.C. § 160(f). Petitioner is a party aggrieved by said Decision and Order. Petitioner transacts business within this judicial circuit, as defined in 28 U.S.C. § 41, by operating, managing, maintaining, and leasing multifamily rental properties in Texas. Petitioner also maintains its corporate headquarters in Texas.

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

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

DATED: June 10, 2016

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Lincoln Eastern Management Corporation *and* Alecia Winters. Case 28–CA–147123

May 31, 2016

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND MCFERRAN

Upon a charge filed February 26, 2015, by Alecia Winters, the General Counsel issued a complaint and notice of hearing on March 31, 2015, alleging that the Respondent has been violating Section 8(a)(1) of the Act by maintaining its "Arbitration Policy" and "Employee Handbook Acknowledgement and Agreement to Arbitrate."

On June 24, 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 November 4, 2015, the Board granted the parties' joint motion. Thereafter, the Respondent and the General Counsel filed briefs.

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 corporation with an office and place of business in Scottsdale, Arizona, has been engaged in the business of managing, maintaining, and leasing apartments and condominiums. In conducting its operations during the 12-month period ending February 26, 2015, the Respondent purchased and received at its facility, goods valued in excess of $50,000 directly from points outside the State of Arizona, and the Respondent derived gross revenues in excess of $500,000. 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. Facts

The Charging Party is a former employee of the Respondent. At all material times, the Respondent has maintained the "Arbitration Policy" (the Policy) and has required employees to sign a document entitled the "Employee Handbook Acknowledgement and Agreement to Arbitrate" (the Agreement). Both the Policy and Agreement are contained in the Respondent's employee handbook and employees are required to abide by the Policy and sign the Agreement as a condition of their employment. By signing the Agreement, each employee acknowledges receipt of the Policy and agreement to its terms. The Policy applies to all current and former employees hired since June 14, 2014. The Charging Party signed the Agreement during her employment with the Respondent.

The 3½ -page Policy states in relevant part:

- "Lincoln Property Company has a policy requiring arbitration of all claims or causes of action arising in any way from its (and its affiliates') employment relationships and, as a condition of employment, requires all employees to agree to arbitrate disputes." (Jt. Exh. 4, p. 49)

- "It is understood and agreed that any claims or causes of action between you and Company, or any of its employees or agents, that arise in any way from or relate in any way to your employment or termination from employment with the Company, or any of the terms or benefits related to your employment—excluding claims covered by workers' compensation or as otherwise specifically excluded below—will be determined exclusively by final and binding arbitration." (Jt. Exh. 4, p. 49-50)

- "This Arbitration Policy is intended to broadly cover the entire relationship between [the employee] and Company and includes, without limitation (except as specifically noted herein), . . . iii) any dispute, claim or controversy arising under any state or federal common law or any state, federal or local statute or ordinance . . . . This Arbitration Policy includes all claims arising at any time during Employee's employment with Company (including any preexisting claims), and also includes claims that [the employee] may bring against other employees or agents of Company that are based in whole or in part on the employment relationship between [the employee] and Company. *The arbitrator will only have authority to hear each employee's individual claims and will not have the authority to (i) consolidate the claims of other employees, (ii) fashion a proceeding as a class or collective action, or (iii) award relief to a group or class of employees in one arbitration proceeding. Neither Company nor you will pursue any claim against the other as a member or representative of a class. In addition, nothing in this policy is intended to prevent you from filing any claims for relief under the National Labor Relations Act with the*

EXHIBIT
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> *National Labor Relations Board or any other appropriate administrative agency related to your employment claims.* In fact, following the appropriate administrative processes including, but not limited to, proper procedure as required by the EEOC (or equivalent state commission) for obtaining a right to suit against Company, is a prerequisite to the filing of any related arbitration. In other words, this arbitration process is limited to disputes, claims or controversies that a court of law would be authorized to consider or would have jurisdiction over to grant relief." [emphasis in original] (Jt. Exh. 4, p. 50)

The Agreement states in relevant part: "I agree that I have read the Arbitration Policy and any claim, dispute or controversy between myself and my employer, Lincoln Property Company or any of its related affiliates shall be submitted to and determined exclusively by binding arbitration in accordance with [the] policy as described in the Handbook." (Jt. Exh. 4, p. 5.) Unlike the Policy, the Agreement does not specify that employees may file charges with the Board or other administrative agencies.

B. Discussion

The Board held in *D. R. Horton*, 357 NLRB 2277 (2012), enf. denied in rel. 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 rel. part 808 F.3d 1013 (5th Cir. 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." Additionally, an employer violates Section 8(a)(1) if employees would reasonably believe that its arbitration policy interferes with their ability to file a Board charge or to access the Board's processes. *U-Haul Co. of California*, 347 NLRB 375, 377–378 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007).

Here, we find that the Respondent violated Section 8(a)(1) by maintaining the Policy and the Agreement (collectively, the Respondent's arbitration policy). First, we find that the Respondent's arbitration policy is facially unlawful under *D. R. Horton* and *Murphy Oil*. Like the policies in those cases, the Respondent's arbitration policy 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.[1] See *Murphy Oil*, 361 NLRB No. 72, slip op. at 1; *D. R. Horton*, 357 NLRB at 2277.

Second, applying the test of *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), we find that the Respondent's arbitration policy violates Section 8(a)(1) because employees would reasonably believe that the arbitration policy interferes with their ability to file a Board charge or otherwise access the Board's processes. See *SolarCity*, 363 NLRB No. 83, slip op. at 4 (2015); *Murphy Oil*, supra, 361 NLRB No. 72, slip op. at 13, 19 fn. 98, 39 fn. 15; *D. R. Horton*, supra, 357 NLRB at 2278 fn. 2, 4; *Bill's Electric*, 350 NLRB 292, 296 (2007); *U-Haul Co. of California*, 347 NLRB at 377–378. "Preserving and protecting access to the Board is a fundamental goal of the Act," and so the Board must carefully examine employer rules that may interfere with this goal. *SolarCity*, supra, slip op. at 4. Furthermore, "the Board must recognize that 'rank-and-file employees . . . cannot be expected to have the same expertise to examine company rules from a legal standpoint.'" *Ralph's Grocery Co.*, 363 NLRB No. 128, slip op. at 1 (2016) (quoting *SolarCity*, supra, slip op. at 5). The Board construes ambiguity against the promulgator of the rule, but does not presume interference with Section 7 rights and does not read phrases in isolation. See *SolarCity*, supra, slip op. at 6; *Lutheran Heritage*, 323 NLRB at 646; *U-Haul Co. of California*, 347 NLRB at 377.

The Respondent's arbitration policy is ambiguous when read as a whole. The first two paragraphs of the Policy broadly require arbitration of "all claims or causes of action arising in any way from [the Respondent's] (and its affiliates') employment relationship." The following page, with the long paragraph including the purported NLRB exclusion, reiterates that the Policy is "in-

[1] 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 arbitration policy does not violate Sec. 8(a)(1). He observes that the Act does not "dictate" any particular procedures for the litigation of non-NLRA claims, and "creates no substantive right for employees to insist on class-type treatment of non-NLRA claims." This is surely correct, as the Board has previously explained in *Murphy Oil*, supra, slip op. at 2, 16 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*, slip op. at 2 (emphasis in original). The Respondent's arbitration policy is just such an unlawful restraint. Likewise, for the reasons explained in *Murphy Oil* and *Bristol Farms*, there is no merit to our colleague's view that finding the arbitration policy unlawful runs afoul of employees' Sec. 7 rights to "refrain from" engaging in protected activity. See *Murphy Oil*, slip op. at 18; *Bristol Farms*, 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 Section 7 rights to engage in concerted legal activity. *Murphy Oil*, slip op. at 17–18; *Bristol Farms*, slip op. at 2.

tended to broadly cover the entire [employment] relationship. . . and includes, without limitation (except as specifically noted herein) . . . any dispute, claim or controversy arising under any state or federal common law or any state, federal or local statute or ordinance." Further along in the same paragraph, italicized text emphasizes that the arbitrator only has the authority to hear claims and provide remedial relief on an individual basis and bars class or collective action, stating that "[n]either [the Respondent] nor [the employee] will pursue any claim against the other as a member or representative of a class." Such broad language might confuse employees about their ability to file unfair labor practice charges, as it "clearly encompasses filing an unfair labor practice charge with the Board when that charge purports to speak to a group or collective concern." *SolarCity*, supra, slip op. at 6. The purported NLRB exclusion follows that text, also stating in italics that "nothing in this policy is intended to prevent you from filing any claims for relief under the National Labor Relations Act with the National Labor Relations Board or any other appropriate administrative agency related to your employment claims." The next sentence, however, states that "following the appropriate administrative processes . . . is a prerequisite to the filing of any related arbitration." This statement seems to suggest that it is futile to file a charge with the Board because all disputes are ultimately resolved through arbitration. See *Ralph's Grocery Co.*, supra, slip op. at 2–3 (employer's arbitration policy could be reasonably read to suggest that the right to file charges with Board is futile; although the policy contains an NLRB exclusion, language in same paragraph dictates that disputes must nonetheless be resolved through arbitration per the policy). Considering the policy as a whole, we find that it is not written in a manner reasonably calculated to assure employees that their statutory right of access to the Board's processes remains unaffected. Accordingly, the Respondent's arbitration policy violates Section 8(a)(1) because employees would reasonably believe that it interferes with their right to file charges or to access the Board's processes. See *U-Haul Co. of California*, 347 NLRB at 377–378.[2]

[2] The Respondent argues that its arbitration policy includes an exemption allowing employees to file charges with administrative agencies such as the Board, and thus does not, as in *D. R. Horton*, and *Murphy Oil*, unlawfully prohibit them from collectively pursuing litigation of employment claims in all forums. In support of its argument, the Respondent argues that the arbitration policy does not bar all concerted employee activity in pursuit of employment claims because it permits employees to file charges with administrative agencies that could file suit on behalf of a class of employees. We reject the Respondent's argument for the reasons set forth above, pp. 5–6, and in *SolarCity Corp.*, 363 NLRB No. 83 (2015).

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 or restricts them from filing charges with the National Labor Relations Board or to access the Board's processes, and by maintaining a mandatory arbitration policy under which employees are required, as a condition of employment, to waive the right to maintain employment-related 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 Respondent to rescind or revise its arbitration policy and to notify employees that it has done so.

ORDER

The National Labor Relations Board orders that the Respondent, Lincoln Eastern Management Corporation, Scottsdale, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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

(b) Maintaining a mandatory arbitration policy that requires 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.

(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 "Arbitration Policy" (the Policy) and the "Employee Handbook Acknowledgement and Agreement to Arbitrate" (the Agreement) in all of their

In his dissent, our colleague repeats his argument 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 Co.*, supra, slip op. at 3, that argument is at odds with well-established Board law.

forms, or revise them in all of their forms to make clear to employees that they do not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums, and that they do 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 Policy and Agreement in any form that they have 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 Scottsdale, Arizona facility copies of the attached notice marked "Appendix," and at all other facilities where the unlawful arbitration policy is or has been in effect.[3] 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, 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 February 26, 2015.

(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. May 31, 2016

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

In this case, my colleagues find that the Respondent's "Arbitration Policy" (Policy) and the "Employee Handbook Acknowledgment and Agreement to Arbitrate" (Acknowledgment) violate Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) because they waive 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 also dissent from my colleagues' finding that the Policy and Acknowledgment unlawfully interfere with the right of employees to file charges with the Board.

1. Legality of the class action waiver

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] However, Section 8(a)(1) of the Act does not vest authority in the Board to dictate any particular procedures pertaining to the litigation of non-NLRA claims, nor does the Act render unlawful agreements in which employees waive class-type treatment of non-NLRA claims. To the contrary, as discussed in my partial dissenting opinion in *Murphy Oil*, NLRA Section 9(a) protects the right of every employee as an "individual" to "present" and "adjust" grievances "at any time."[3] This aspect of Section

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

[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).

[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 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).

[3] *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*

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;[4] (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;[5] and (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA).[6] 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.[7]

2. Interference with NLRB charge filing

My colleagues also find that the Respondent violated Section 8(a)(1) by maintaining the Policy and Acknowledgment because, in their view, reasonable employees would read the Policy and Acknowledgment as restricting them from filing unfair labor practice charges with the Board. See, e.g., *U-Haul Co. of California*, 347 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. (D.C. Cir. 2007). I respectfully disagree.

The Policy and Acknowledgment broadly require arbitration of all employment-related claims, including those arising under the NLRA,[8] but I do not believe the scope of these documents makes them violative of the Act. As I explained in *Ralph's Grocery Co.*,[9] *GameStop Corp.*,[10] and *Applebee's Restaurant*,[11] decades of case law—including the Board's recent decision in *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014)—

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).

[4] 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.").

[5] 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).

[6] 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).

[7] Because I disagree with the Board's decisions in *Murphy Oil*, above and *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and I believe the NLRA does not render unlawful arbitration agreements that provide for the waiver of class-type litigation of non-NLRA claims, I find it unnecessary to reach whether such agreements should independently be deemed lawful to the extent they "leave[] open a judicial forum for class and collective claims," *D. R. Horton*, 357 NLRB No. 184, slip op. at 12, by permitting the filing of complaints with administrative agencies that, in turn, may file class- or collective-action lawsuits on employees' behalf. See *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013).

[8] The Policy is contained in the Respondent's employee handbook. The Policy requires "arbitration of all claims or causes of action arising in any way from [the Respondent's] . . . employment relationships." The Policy further states that "any claims or causes of action between you and [the Respondent] . . . that arise in any way from or relate to your employment or termination from employment with [the Respondent] . . . will be determined exclusively by final and binding arbitration," and it reiterates that it is "intended to broadly cover the entire relationship between [the employee] and [the Respondent]," including "without limitation (except as specifically noted herein) . . . any dispute, claim or controversy arising under . . . any . . . federal . . . statute." The Acknowledgment, in turn, states: "I agree that I have read the Arbitration Policy and any claim, dispute or controversy between myself and my employer . . . shall be submitted to and determined exclusively by binding arbitration in accordance with [the] policy as described in the Handbook."

[9] 363 NLRB No. 128, slip op. at 6–8 (2016) (Member Miscimarra, concurring in part and dissenting in part).

[10] 363 NLRB No. 89, slip op. at 4–7 (2015) (Member Miscimarra, concurring in part and dissenting in part).

[11] 363 NLRB No. 75, slip op. at 3–5 (2015) (Member Miscimarra, concurring in part and dissenting in part).

establish that parties may lawfully agree to submit NLRA claims to arbitration, provided that the agreement does not otherwise interfere with NLRB charge filing.[12] Such an agreement 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 Policy expressly provides that "*nothing in this policy is intended to prevent you from filing any claims for relief under the National Labor Relations Act with the National Labor Relations Board*" (italics in Policy). This language eliminates any possible uncertainty about the right of employees to file charges with the Board.[13] See *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d at 1019-1020 (rejecting Board's finding that employer's Revised Arbitration Agreement, which stated that "'[n]othing in this Agreement precludes [employees] . . . from participating in proceedings to adjudicate unfair labor practice[] charges before the [Board],'" unlawfully interfered with Board charge filing: "it 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") (alterations in original).

Accordingly, as set forth above, I respectfully dissent from the majority's decision.

Dated, Washington, D.C. May 31, 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 mandatory arbitration policy that our employees would reasonably believe bars or restricts their right to file charges with the National Labor Relations Board.

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

WE WILL rescind the "Arbitration Policy" (the Policy) and the "Employee Handbook Acknowledgement and Agreement to Arbitrate" (the Agreement) in all of their forms, or revise them in all of their forms to make clear that the Policy and the Agreement do not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that

[12] 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, 363 NLRB No. 89, slip op. at 4–5 fn. 10 (Member Miscimarra, concurring in part and dissenting in part).

[13] See *Applebee's Restaurant*, above, slip op. at 4 (Member Miscimarra, concurring in part and dissenting in part) (finding that employer's Dispute Resolution Program eliminated any possible uncertainty about the right of employees to file charges with the Board by stating that the Program "will not prevent you from filing a charge with any

. . . federal administrative agency").

The Policy includes language expressly preserving Board charge filing, but the Acknowledgement does not. In *GameStop*, above, 363 NLRB No. 89, slip op. at 6–7, I found that the employer's long-form arbitration policy protected the right to file Board charges, but I concluded that the separate acknowledgment form unlawfully interfered with Board charge filing, where (i) the acknowledgment characterized the arbitration policy in a short-form manner, stating it was the employer's "procedure for resolving workplace disputes ending in final and binding arbitration," and (ii) the acknowledgment set forth a one-sentence agreement stating that the employee agrees "that all workplace disputes or claims will be resolved under" the arbitration policy. Thus, the acknowledgment form in *GameStop* appeared to include a free-standing agreement, without any qualification, that *all* workplace disputes would be resolved in final and binding arbitration, which would preclude Board charge filing. Here, by contrast, the Acknowledgment expressly describes the employee's agreement by reference to the Policy, which in turn makes clear that the employee retains the right to file charges with the NLRB. Thus, the Acknowledgment states the employee agrees that "any claim, dispute or controversy between myself and my employer . . . shall be submitted to and determined exclusively by binding arbitration *in accordance with [the] policy as described in the handbook*" (emphasis added). Because the Acknowledgment indicates that employees must refer to the Policy to determine the contours of the arbitration agreement they are entering into—and, as explained above in the text, the Policy preserves the right to file Board charges—I believe the Acknowledgment does not unlawfully interfere with Board charge filing.

they do 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 or otherwise become bound to the Policy and the Agreement in any of their forms that the Policy and the Agreement have been rescinded or revised and, if revised, WE WILL provide them a copy of the revised documents.

LINCOLN EASTERN MANAGEMENT CORPORATION

The Board's decision can be found at www.nlrb.gov/case/28–CA–147123 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.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LINCOLN EASTERN MANAGEMENT CORPORATION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Case No.: _____

CERTIFICATE OF SERVICE

I certify that the foregoing Petition for Review was served via electronic and First Class mail on June 10, 2016 to the following:

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