

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

THE BRIAD RESTAURANT GROUP, LLC

and

Case 22-CA-165746

OUTTEN & GOLDEN, LLP

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF TO
THE NATIONAL LABOR RELATIONS BOARD**

Submitted by,

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I. PROCEDURAL STATEMENT

The Charge in this proceeding was filed by Outten & Golden (“Charging Party”) against The Briad Restaurant Group, LLC (“Respondent”) on December 8, 2015, a copy of which was served by regular mail on Respondent on December 10, 2015. The First Amended Charge in this proceeding was filed by the Charging Party against Respondent on February 23, 2016, a copy of which was served by regular mail on Respondent on February 25, 2016. A Complaint and Notice of Hearing (“Complaint”) in the instant matter issued on March 28, 2016, a copy of which was served on Respondent by certified mail on April 1, 2016. (Joint Exhibit 9; Formal Papers Exh. 1(e)).¹ Respondent filed an Answer to the Complaint (“Answer”) on April 11, 2016. (Joint Exhibit 3).

On August 31, 2016, Counsel for the General Counsel (“General Counsel”), the Charging Party and Respondent filed a Joint Motion and Stipulation of Facts to submit this case to the Board on a stipulated record. On October 26, 2016, the Board issued an Order Approving Stipulation, Granting Motion, and Transferring Proceeding to the Board.

II. PRELIMINARY STATEMENT

The National Labor Relations Act (“NLRA” or the “Act”) protects employees’ rights to engage in concerted activities. *29 U.S.C. §157*. This right is the foundation for several rights, including the right to join together to pursue workplace grievances, including through litigation. *D.R. Horton, Inc.*, 357 NLRB 2277 (2012). Concerted legal action concerning wages, hours and working conditions is a well-established form of concerted activity undertaken for employees’ mutual aid and protection. *Id.*, citing *Eastex, Inc.*, 437 U.S. 556, 565-66 (1978).

The Board has long held that an employer cannot require its employees to waive their Section 7 rights as a condition of employment. *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944).

¹ The Parties’ Joint Motion and Stipulation of Facts exhibits are herein referred to as “Joint Exhibit”.

This, however, is exactly what Respondent has done since at least March 12, 2016, by requiring its employees, including Peter Palmisano (“Palmisano”) to, upon hire, sign the class action waiver contained in an Employment-at-Will and Arbitration Agreement, Non-California States – Hourly Employees (“Arbitration Agreement”). That agreement requires Palmisano and other employees to waive their right to bring a claim as a representative of a class of employees or to join or participate as a member of a class or collective action in a court or in arbitration.

The National Labor Relations Board (“Board” or “NLRB”) has a long-standing precedent and policy finding that arbitration is a favorable forum for resolving labor disputes. Here, however, Respondent’s mandatory Arbitration Agreement runs afoul of the NLRA because it prohibits workers from exercising their statutory right to engage in collective legal action to challenge their terms and conditions of employment. To wit, the illegality here is not in the requirement that claims be arbitrated but rather that such claims must be arbitrated individually. When such a requirement is a condition of employment it contravenes the substantive rights granted to employees by Section 7 of the Act. *D. R. Horton, Inc.* 357 NLRB at 2280. Even if such an agreement is entered into voluntarily, its prohibition still violates the Act. *On Assignment Staffing Services, Inc.*, 362 NLRB No. 189 (2015) (even assuming, . . . , that the opt-out provision renders the arbitration agreement not a condition of employment, it is still unlawful because it requires employees to prospectively waive their Section 7 right to engage in concerted activity.).

III. STIPULATED FACTS

The facts are undisputed. The Respondent is a New Jersey limited Liability Corporation engaged in the operation and ownership of multiple restaurant franchises located in New Jersey, Arizona, Connecticut, Nevada and New York, including a T.G.I. Fridays located at 3492 U.S.

Route 9 in Freehold, New Jersey. (Facts ¶ 3).² During the twelve months preceding the issuance of the Complaint Respondent, in conducting its business operations as described above, derived gross revenues in excess of \$500,000 and purchased and received goods valued in excess of \$5,000 directly from suppliers located outside the State of New Jersey. (Facts ¶ 3, 4, 5).

Since at least March 19, 2012, Respondent, on a corporate wide basis, promulgated, maintained and required many of its employees to sign, upon hire, an Arbitration Agreement as a condition of employment. (Facts, ¶ 7, 8, 9, Joint Exhibit 6). The Arbitration Agreement, at paragraph II. 2, states:

I accept and consent to binding arbitration as an alternative to civil litigation and agree to forego a trial by jury with respect to all claims covered by this Agreement. (Joint Exhibit 8).

The Arbitration Agreement, at paragraph II. 3, states:

The claims covered by this Agreement include, but are not limited to:

- claims for wages or other compensation (including but not limited to claims for salary, bonuses, severance pay, and vacation pay);
- claims alleging breach of any contract or covenant (express or implied);
- tort claims;
- defamation claims;
- claims alleging discrimination or harassment under federal, state or local law or regulation including, but not limited to, claims for discrimination based upon race, color, national origin, ancestry, religion, marital status, age, gender, sexual orientation, domestic partnership, veteran status, citizenship status, pregnancy, medical condition, or disability (including but not limited to claims under Title VII of the Civil Rights Act of 1964, the Civil Rights Act of 1991, The Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1990, The New Jersey Law Against Discrimination, and the New York State Human Rights Law and all amendments to any such statutes);

² The Parties' Joint Stipulation of Facts is herein referred to as "Facts".

- retaliation claims (including but not limited to claims under the New Jersey Conscientious Employee Protection Act (“CEPA”));
- claims alleging wrongful termination;
- claims alleging violation of any federal or state leave laws or regulations (including but not limited to the Family and Medical Leave Act, the New Jersey Family Leave Act, and the New Jersey Paid Family Leave Act);
- Claims for employee benefits including health care benefits or pension benefits (including but not limited to claims under the Consolidated Omnibus Budget Reconciliation Act, and the Employee Retirement Income Security Act);
- and any other claims alleging any violation of any federal, state, local or other governmental law, statute, regulation, or ordinance, except claims expressly excluded from arbitration in Paragraph 4 of this Agreement. (Joint Exhibit 8).³

The Arbitration Agreement, at paragraph II. 6, states:

Briad Restaurant Group, LLC and I agree that any and all claims subject to arbitration under this Agreement will be instituted only in an individual capacity, and not as a representative plaintiff on behalf of any purported class, collective or consolidated action. It is the parties’ intent to the fullest extent permitted by law to waive any and all rights to the application of class or collective action procedures or remedies to arbitration proceedings conducted under the Agreement, and it is expressly agreed between Briad Restaurant Group, LLC and me that any arbitrator adjudicating claims under this Agreement shall have no power or authority to adjudicate class, collective or consolidate claims. Furthermore, Briad Restaurant Group, LLC and I agree that neither can join or participate as a member of a class or collective action that may have been instituted in court or in arbitration by a third-party in order to

³ The Arbitration Agreement, at paragraph II. 4, states:

Any claims for workers’ compensation, unemployment compensation, or temporary disability benefits are not covered by this Agreement and are not subject to arbitration under this Agreement. Also, any claims seeking injunctive and/or equitable relief for any alleged unfair competition and/or the use and/or unauthorized disclosure of trade secrets or confidential information are not covered. Either party is free to seek and obtain such relief from a court of competent jurisdiction. (Joint Exhibit 8).

pursue any claims that are subject to arbitration under this Agreement. (Facts ¶ 8, Joint Exhibit 6).

The above-referenced clause in Respondent's Arbitration Agreement requires employees to waive their right to bring a class or collective action in any forum, arbitral or judicial, with respect to claims that are subject to arbitration as expressly set forth in the Arbitration Agreement. (Facts ¶ 10, Joint Exhibit 6).

On March 19, 2012, Respondent required Palmisano to sign the Arbitration Agreement when he was hired. (Facts ¶ 11, Joint Exhibit 6). On December 6, 2014 Respondent terminated Palmisano. (Facts ¶ 13).

On September 24, 2015, Charging Party Outten & Golden notified Respondent that it was bringing a claim against Respondent on behalf of Palmisano and similarly situated plaintiffs under the Fair Labor Standards Act and the New Jersey Wage and Hour Law. (Facts ¶ 14, Joint Exhibit 7). In response, Respondent informed the Charging Party that it was going to seek to apply the above-referenced Arbitration Agreement's class and collective claims waiver to compel Palmisano to bring his claim for relief individually. (Facts ¶ 15, Joint Exhibit 8).

IV. ARUGMENT

A. Collective Legal Action Related to Terms and Conditions Of Employment Is Concerted Activity Protected By Section 7 of the Act

The NLRB, Courts of Appeals, and the Supreme Court have long held that collective or concerted legal action regarding working conditions is activity protected by Section 7 of the Act. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-566 (1978); *Le Madri Restaurant*, 331 NLRB 269, 275 (2000) (filing of a civil suit by employees is protected activity); *Spandosco Oil & Royalty Co.*, 42 NLRB 942, 948-949 (1942) (holding that the filing of a FLSA suit by three employees seeking back wages was protected); *Brady v. National Football League*, 644 F.3d 661, 673 (8th Cir. 2011); *Mohave Elec. Co-op v. NLRB*, 206 F.3d 1183, 1189 (D.C. Cir. 2000); *Leviton Mfg.*

Co. v NLRB, 486 F.2d 686, 688 (1st Cir. 1976) (the filing of a labor related civil action by a group of employees is ordinarily a concerted activity protected by Section 7).

In *D.R. Horton* the Board again made clear that the right to engage in collective action, including collective legal action, around these types of issues is a fundamental right specifically protected by the NLRA and is “the foundation on which the Act and Federal labor policy rests.” *D.R. Horton*, 357 NLRB at 2286. In *Murphy Oil* the Board reaffirmed its *D.R. Horton* holding, stating that an employer violates Section 8(a)(1) of the Act by maintaining and enforcing a mandatory arbitration agreement that requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment related claims in all forums, whether arbitration or judicial. *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014).

In both *D.R. Horton* and *Murphy Oil* the Board, citing to prior Board and federal court decisions, emphasized that the right to engage in collective action, including the right to engage in collective legal action, is not merely a procedural right, but is the core substantive right protected by Section 7 of the Act. *D. R. Horton*, 357 NLRB at 2278-80; *Murphy Oil*, 361 NLRB slip op. at 1, 5, 8-9. The Board clarified that, while Section 7 did not grant employees a right to class certification or the equivalent, it did give employees the right to pursue their claims on a concerted or collective basis. *Murphy Oil*, 361 NLRB at slip op. 2, 5 n.30.

In both *D.R. Horton* and *Murphy Oil* the Board held unlawful employer-imposed individual agreements that prohibited employees from exercising rights which have long been held to be protected by the Act. To make its point the Board cited, in particular, to the Supreme Court’s early decisions in *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940), and *J.I. Case Co. v NLRB*, 321 U.S. 332 (1944). *D.R. Horton*, 357 NLRB at 2280; *Murphy Oil*, 361 NLRB slip op at fn. 5, 46. The Board also found support for its rationale in provisions of the Norris-LaGuardia

Act (29 U.S. C. §§ 102-104), which the NLRA had built upon and expanded when enacted. *D.R. Horton*, 357 NLRB at 2281-82; *Murphy Oil*, 361 NLRB slip op at 10. In addition, the Board also reasoned that finding unlawful mandatory arbitration agreements that prohibit employees from bringing class or collective claims in any forum does not conflict with the Federal Arbitration Act or undermine its policies. *D.R. Horton*, 351 NLRB at 2283-2288; *Murphy Oil*, slip op. at 7-10.

In its carefully reasoned rationale, the Board concluded that employer imposed mandatory arbitration agreements that preclude employees from filing employment related claims on a collective or class basis in any forum is an impermissible restraint on employees' core section 7 rights and, therefore, violates section 8(a)(1) of the Act. Several recent Board decisions have reaffirmed the Board's *D.R. Horton* and *Murphy Oil* reasoning and found such agreements and policies unlawful. *See, e.g., Bristol Farms*, 364 NLRB No. 34 (2016); *Grill Concepts Services*, 364 NLRB No. 36 (2016); *SJK, Inc. d/b/a Fremont Ford*, 364 NLRB No. 29 (2016); *Lincoln Eastern Management Corp.*, 364 NLRB No. 16 (2016); *Jack in the Box, Inc.*, 364 NLRB No. 12 (2016); *Adecco USA, Inc.*, 364 NLRB No. 9 (2016); *Beena Beauty Holding, Inc.*, 364 NLRB No. 3 (2016); *Hobby Lobby Stores, Inc.*, 363 NLRB No. 195 (2016); *CVS RX Services, Inc.*, 363 NRB No. 180 (2016); *Network Capital Funding Corp.*, 363 NLRB No. 106 (2016).

Although the United States Circuit Court of Appeals for the Fifth Circuit declined to enforce the Board's *D.R. Horton* and *Murphy Oil* decisions, two other federal circuit courts of appeals have this year agreed with the Board's interpretation of the Act and determined that the maintenance of arbitration agreements that prohibit employees from joining together to vindicate their statutory rights in all forums violates the Act. *See Morris v. Ernst & Young, LLP*, 834 F.3d

975 (9th Cir. 2016); *Lewis v. Epic Systems*, 823 F.3d 1147 (7th Cir. 2016). As explained below, application of the above precedent demonstrates that Respondent's maintenance and application of its Arbitration Agreement violates Section 8(a)(1) of the Act as alleged in the Complaint.

B. Respondent Unlawfully Requires its Employees to Sign its Arbitration Agreement's Class and Collective Claims Waiver In Order to Prohibit Class Action FLSA and NJ Wage and Hour Claims

It is uncontested that Respondent conditioned its employees continued employment upon their agreement to waive the right to participate in a class or collective action in all forums. Moreover, when informed that the Charging Party was bringing a wage claim on behalf of Palmisano and other similarly situated plaintiffs, Respondent stated that it would seek to apply the class and collective claims waiver in its Arbitration Agreement and compel Palmisano to arbitrate his claim individually. (Facts ¶ 14-15). As *D.R. Horton*, *Murphy Oil* and other the cases cited above clearly establish, an employee's right to pursue such claims on a class or concerted basis is one of the core rights protected by the Act. Therefore, by requiring Palmisano and other employees to sign the Arbitration Agreement or sacrifice their employment, and subsequently compelling Palmisano to bring his claim individually, Respondent used its Arbitration Agreement to unlawfully interfere with Palmisano's and other employees' core right to collectively pursue an action related to their terms and conditions of employment. As stated above, that basic right is protected by the Act and, therefore, Respondent's actions constitute an impermissible restraint in violation of Section 8(a)(1) of the Act.

C. Respondent's Arbitration Agreement Violates the Act Because Employees Would Reasonably Understand It to Prohibit Their Right to Engage in Section 7 Activity

Any argument that the policy in Respondent's Arbitration Agreement does not run afoul of the Act because it does not interfere with the employees' right to engage in protected, concerted activity must fail. In evaluating the appropriateness of challenged rules and policies,

including mandatory arbitration agreements like the one at issue here, the Board uses the framework set forth in *Lutheran Heritage Village. Lutheran Heritage Village-Livonia* 343 NLRB 646 (2004). Under the *Lutheran Heritage Village* test, if a challenged rule, policy, or agreement explicitly restricts protected activity, the Board will find the rule unlawful. Alternatively, if the rule does not explicitly restrict Section 7 activity, the Board will find it unlawful if (1) employees would reasonably construe the language to prohibit section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. *Id.* at 646-647; *U-Haul of California*, 347 NLRB 375, 377 (2006), *enfd.* 255 F. Appx. 527 (D.C. Cir. 2007). Mere maintenance of a rule that fails scrutiny under *Lutheran Heritage Village*, even in the absence of specific enforcement or application, is coercive and a violation of Section 8(a)(1). See, *NLRB v. Northeastern Land Servs., Ltd.*, 645 F.3d 475, 478, 481-83 (1st Cir. 2011) (applying *Lutheran Heritage Village* to a provision of an employment contract); *Cintas Corp. v. NLRB*, 482 F.3d 463, (D.C. Cir. 2007); *U-Haul Co.*, 347 NLRB at 377-378.

A review of Respondent's Arbitration Agreement clearly shows that it requires employees to waive their right to file class or collective claims regarding any employment related matter in any forum. Section II, Paragraph 1 of the Agreement informs employees that "Any claim ... arising from or relating to my employment or the termination of my employment with Briad Restaurant Group, LLC... shall be settled by binding arbitration". Section II., Paragraph 2 states that the employee "consents to binding arbitration as an alternative to civil litigation and agree[s] to forgo a trial by jury with respect to all claims covered by this Agreement". *Id.* Section II., Paragraph 3 goes on to identify all potential employment related claims that an employee could bring against Respondent, therein citing, inter alia, to Title VII of

the Civil Rights Act of 1964, the Civil Rights Act of 1991, the Age Discrimination in Employment Act of 1967, the Americans with Disabilities Act of 1990, the New Jersey Law Against Discrimination and the New York State Human Rights Law and all amendments to any such statute. *Id.* Finally, and most importantly, Section II., Paragraph 6 informs employees “that any and all claims subject to arbitration under this agreement will be instituted only in an individual capacity”. (Joint Exhibit 6).

The plain purpose of Respondent’s Arbitration Agreement is to insure that its employees do not engage in collective action, a restriction that violates Section 7 of the Act. On those grounds alone the Arbitration Agreement is unlawful under *Lutheran Heritage Village*. Even if Respondent had not sought to enforce its Arbitration Agreement, it still runs afoul of the first and third prongs of the Board’s *Lutheran Heritage Village* test. In regard to the first prong, it is reasonable to assume that Respondent’s employees would read the explicit language included in the Arbitration Agreement as prohibiting them from joining together in a collective action, thereby violating Section 7 of the Act. In terms of the *Lutheran Heritage Village* third prong, Respondent violated the Act when it informed the Charging Party that it would seek to apply the class and collective action prohibition in its Arbitration Agreement to compel Palmisano to bring his legal claims individually. Clearly, applying the Board’s reasoning in *Lutheran Heritage Village*, Respondent’s maintenance and application of its Arbitration Agreement violates Section 8(a)(1) of the Act.

D. The Board’s Holdings in *D.R. Horton* and *On Assignment Staffing* Apply to the Instant Case

Respondent may argue that the waiver in its Arbitration Agreement is not of substantive rights but, rather, of procedural rights. That argument misses the mark. Respondents’ Arbitration Agreement, as enforced, prohibits employees from exercising their protected Section 7 right to

engage in concerted activity. The right to engage in concerted activity is a substantive right which, as the Supreme Court held in *Eastex*, includes employees “seek[ing] to improve working conditions through resort to administrative and judicial forums”. *Eastex, Inc.*, 437 U.S. at 566. On that basis, Respondent’s Arbitration Agreement’s clear interference with employees’ substantive right to engage in collective legal action stands in violation of Section 8(a)(1) of the Act. When such a requirement is a condition of employment, it contravenes the substantive rights granted by Section 7 of the NLRA. *D.R. Horton*, 357 NLRB at 2286.

Even assuming, *arguendo*, that Respondent’s Arbitration Agreement was entered into voluntarily and is not a mandatory condition of employment it still violates Section 7 of the Act because “an arbitration provision/agreement precluding collective action in all forums is unlawful even if entered into voluntarily because it require[s] employees to prospectively waive their section 7 right to engage in concerted activity. *Valley Health Sys., LLC*, 363 NLRB No. 178, slip op. 4 (2016); see *On Assignment Staffing Services*, 362 NLRB No. 189, slip op. at 1, 4-5 (2015); see also *Nijjar Reality, Inc.*, 363 NLRB No. 38 (2015). The Board’s holding in *On Assignment Staffing* removes any question as to whether a voluntary prospective waiver of rights guaranteed under Section 7 is lawful. A prospective waiver of rights protected by the Act, whether a mandatory term of employment or voluntary, stands in violation of Section 7 of the Act.

E. The Federal Arbitration Act Does Not Preclude Finding A Violation

A finding that Respondent’s Arbitration Agreement is unlawful under the Act does not conflict with the Federal Arbitration Act (“FAA”) because the FAA makes clear that an arbitration agreement may be set aside on “grounds that exist at law or in equity for the revocation of any contract”. 9 U.S.C § 2.

As the Board stated in *D.R. Horton*, “holding that an employer violates the NLRA by requiring employees, as a condition of employment, to waive their right to pursue collective legal redress in both judicial and arbitral forums accommodates the policies underlying both the NLRA and the FAA to the greatest extent possible”. *D.R. Horton*, 357 NLRB at 2284. The Board reached this conclusion because Section 2 of the FAA provides that arbitration agreements may be invalidated in whole or in part for the same reasons that any contract may be invalid, including if the agreement is unlawful or contrary to public policy. *Id.* The *D.R. Horton* Board also emphasized that finding arbitration agreements with collective action waivers unlawful does not conflict with the FAA because “the intent of the FAA was to leave substantive rights undisturbed”. *Id.* at 2286. Inasmuch as the Arbitration Agreement as enforced here is unlawful under the NLRA, against public policy as stated therein, and interferes with employee’s substantive right to engage in collective action it should not be saved by the FAA.

Here, as was also the case in *D.R. Horton*, *Murphy Oil* and their progeny, the Board’s concern is not with the FAA or with arbitration. Board Law includes extensive precedent favoring arbitration as a forum for resolving labor disputes. That the Board recognizes arbitration as an integral aspect of the NLRA’s statutory scheme is well documented and in keeping with the spirit and intent of the FAA. The Board, however, is clearly troubled by arbitration agreements that require employees to waive their core right to engage in concerted activity for mutual aid and protection by prohibiting all class or collective action in any forum.

Respondent’s Arbitration Agreement is exactly the type of contractual arrangement that the Board is concerned with. *D.R. Horton*, *Murphy Oil* and their progeny teach that arbitration agreements such as the one Respondent requires its new hires to sign and sought to enforce against Palmisano and other employees are not aligned with the policy prescriptions of the Act

because they prohibit employees from exercising their statutory collective rights. Simply stated, Respondent's Arbitration Agreement stands in violation of Section 8(a)(1) of the Act not because it requires that claims be arbitrated, but rather because it requires that such claims must be arbitrated *individually* and, thus, prohibits employees from exercising their Section 7 rights to engage in *collective* legal activity in any forum.

V. CONCLUSION AND REMEDY

In light of the above and the stipulated record and exhibits as a whole, General Counsel requests that the Board find that Respondent violated the National Labor Relations Act as alleged in the complaint and issue an appropriate remedial order.

It is respectfully requested that an order issue requiring the Respondent:

- (i) Post a Notice at all locations in the United States where the Arbitration Agreement was and/or is in effect;
- (ii) Cease and desist from maintaining and enforcing mandatory arbitration agreements that prohibit collective and class litigation in all forums, arbitral and judicial;
- (iii) Cease and desist from requiring employees to sign mandatory arbitration agreements that prohibit collective and class litigation in all forums, arbitral and judicial;
- (iv) Rescind the unlawful provision[s] of the Arbitration Agreement that prohibits employees from participating in collective and class litigation in all forums, arbitral and judicial; and to explicitly inform its employees that the agreement does not constitute a waiver of their right in all forums to maintain class or collective actions and does not restrict employees' right to file charges with the National

Labor Relations Board; and further notify its employees of the revised agreement, including providing them with a copy of the revised agreement or specific notification that the noted provisions of the agreement have been rescinded;

The General Counsel further seeks all other relief as may be just and proper to remedy the unfair labor practices alleged.

Dated at Newark, New Jersey, this 8th day of December, 2016.

Respectfully submitted

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CERTIFICATION

This is to certify that copies of the foregoing brief on Behalf of the General Counsel to the National Labor Relations Board has been duly served on the Board on December 8, 2016 and on Briad Restaurant Group's counsel and Charging Party counsel on December 8, 2016 as follows:

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