UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

DE NOVO LEGAL LLC D/B/A
EPIQ DOCUMENT REVIEW SOLUTIONS

and **Case No. 02-CA-182019**

TIMOTHY TANNER, an Individual

ANSWER TO ORDER TO SHOW CAUSE AND CROSS MOTION FOR SUMMARY JUDGMENT

For its Answer to the Order to Show Cause filed by the National Labor Relations Board ("NLRB"), Respondent De Novo Legal LLC d/b/a Epiq Document Review Solutions ("De Novo"), submits the following response and moves for Summary Judgment in its favor.

De Novo does not agree that there are no material facts in dispute. Further, the General Counsel's conclusory allegation in the Motion to Transfer Case to the Board and for Summary Judgment (the "Motion") that the class action waiver in the De Novo Employment, Confidential Information and Arbitration Agreement and Release ("Employment Agreement") violates 8(a)(1) is unsupported by any persuasive legal precedent and wrong as a matter of law. The Employment Agreement is attached to the Motion as Exhibit 5.[1] As the Employment Agreement contains is a legal agreement to arbitrate, De Novo did not commit any unfair labor practice by seeking to have the agreement signed and enforce it according to its terms. Further, the confidentiality provision of the Employment Agreement does not violate 8(a)(1) nor does the Employment Agreement preclude or restrict employee access to NLRB processes. As the

[1] The Motion erroneously states that the Employment Agreement is Exhibit 4, however De Novo's Answer to Complaint is Exhibit 5.

General Counsel has failed to establish any violation of the National Labor Relations Act (the "NLRA"), the General Counsel is not entitled to any remedy and the Motion for Summary Judgment should be denied and the complaint filed against De Novo dismissed.

A. Undisputed Facts

De Novo offered Mr. Tanner employment as a limited duration employee in the role of an attorney performing document review work in connection with litigation discovery. Mr. Tanner had previously been employed with De Novo in January 2015. When De Novo hires limited duration employees, the individuals are hired for the duration of a specific project, and then once that project ends their employment with De Novo also ends. On or about August 5, 2016, a recruiter for De Novo reached out to Mr. Tanner regarding a Portuguese language review project starting on August 9, 2016. The recruiter provided Mr. Tanner with the project details, including location, start date, expected duration, hours and pay rate. The recruiter also included the conflict information and a few questions for Mr. Tanner to answer to confirm he was qualified for the project. Mr. Tanner responded to the recruiter expressing interest in the project. Mr. Tanner was then hired for the project with an August 9, 2016 start date. Per De Novo's normal process, the required onboarding tasks were to be completed in a system called Workday before the start of a project. The onboarding materials were sent to Mr. Tanner on August 8. Mr. Tanner did not complete the required onboarding tasks before he started the project. Part of the required tasks was to sign the Employment Agreement. De Novo's HR Department followed up with Mr. Tanner several times on August 9 and 10 to complete the required tasks, but Mr. Tanner refused to complete the mandatory tasks. Since he refused to complete the required tasks, namely acknowledging and agreeing to the Employment Agreement, Mr. Tanner was notified

that he was being terminated from the project, effective immediately, on the evening of August 10, 2016.

B. Discussion

1. The "Waiver" provision does not violate the Act.

The General Counsel argues that the Employment Agreement violates Section 8(a)(1) of the Act because it includes an overbroad waiver because NLRA claims may not be waived. The case law cited by the General Counsel, however, cites to several cases pointing out that negotiated release terms that release past claims may certainly be valid under the Act. Employment with De Novo is not a matter of right, but rather is a negotiated agreement between De Novo and the individual. For the most part, the employees of De Novo are licensed attorneys, who are professionals capable of making informed decisions regarding the contents of the Employment Agreement and whether they voluntarily agree to such provisions in order to voluntarily take up employment with De Novo. Also, it should be pointed out that the release only releases past claims, not future claims, which would be unlawful. In essence, if someone previously worked for De Novo, and is returning to work for De Novo again, that is an indication by them that they are affirmatively choosing to work for De Novo based on their prior employment experience. Requiring someone to release any claims based on their prior employment with De Novo to be reemployed with De Novo is not improper or unlawful. If an individual has a claim that they would like to pursue against De Novo, they have every right to decide to pursue that claim, and once they pursue that claim they can then reapply at De Novo.[2]

[2] It should be noted that Mr. Tanner had previously been employed with De Novo in early 2015 and filed a charge with the NLRB based on his prior employment with De Novo. The unfair labor practice charge was settled by the parties. As evidenced by the fact that De Novo

2. The "Confidential Epiq Information" provision does not violate the Act.

Despite the hyperbole engaged in by the General Counsel, the section of the Employment Agreement titled "Confidential Epiq Information" does not restrict an employee's Section 7 rights, nor can it reasonably be construed to do so. General Counsel's argument has a very glaring hole—there is nothing in the provision that defines confidential information as information about employees of De Novo, wage and benefit information or information about terms and conditions of employment. Yes, the provision is detailed, but the very fact of its specificity completely refutes the General Counsel's conclusion (without basis in the language) that the policy is "reasonably construed to prohibit employee to employee communications of information related to terms and conditions of employment." In fact, reading the language, the impression of the confidentiality provision is just the opposite. The provision is very specific as to what is confidential information and there is no provision that impinges on terms and conditions of employment. The lack of a prohibition on discussing or disclosing information on terms and conditions of employment is glaring and unmistakable. The case law cited by General Counsel is inapposite—stating general principles but adding no incite or analysis to the issue at hand. General Counsel's conclusory argument is not well taken and without basis in the Employment Agreement confidentiality language.

3. The "Arbitration" provision Does Not Violate the Act.

a. The NLRB's Decisions in *D.R. Horton* and *Murphy Oil* do not Apply.

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not only rehired Mr. Tanner, but actually affirmatively contacted him for the position, despite previously filing a charge with the NLRB, De Novo does not retaliate against those candidates that have previously brought claims.

In paragraph 10 of the Motion the General Counsel asserts that the NLRB decisions in *In re D. R. Horton*, 357 N.L.R.B. No. 184, 2012 NLRB LEXIS 11 (Jan. 3, 2012), *enforcement denied in part*, 737 F.3d 344 (5th Cir. 2013) and in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014) establish precedent that entitles the General Counsel to summary judgment. These cases do not provide authority that is relevant to the present case. In *D. R. Horton* and *Murphy Oil* the NLRB held that mandatory arbitration agreements containing class action waivers that are imposed on employees as a condition of their employment violate an employee's right to engage in concerted activities within the meaning of the NLRA. The NLRB's position had been rejected previously by both the Fifth and Eighth Circuits. *See e.g., D.R. Horton v. NLRB*, 737 F.3d 344 (5th Cir. 2013), *Murphy Oil USA, Inc. v. NLRB.*, 808 F.3d 1013, 1015 (5th Cir. 2015), and *Cellular Sales of Missouri, LLC v. NLRB*, 824 F.3d 772 (8th Cir. 2016). Joining these Federal Circuit Courts, the Second Circuit has rejected the holdings in *D. R. Horton* and *Murphy Oil. See Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2nd Cir. 2013). Within the Second Circuit a mandatory arbitration agreement containing a class action waiver does not violate Section 8(a)(1) of the Act.

b. <u>The Class Action Waiver is Consistent with Section 7 Rights.</u>

An employee deciding to accept an arbitration agreement that waives the right to bring class action claims is not a violation of protected rights of employees under the NLRA. The NLRA protects equally the rights of employees to decide to refrain from, or engage in, protected concerted activity. Section 7 of the NLRA provides that employees "shall also have the right to refrain from any and all such [concerted] activities." 29 U.S.C. § 7. In 1947, when Congress enacted the Taft Hartley Act and amended the NLRA, Section 7 was revised to specifically protect an employee's "right to refrain from any and all . . . [concerted] activities." *Chamber of*

Commerce v. Brown, 554 U.S. 60, 67 (2008). Following the amendment to Section 7, the Supreme Court and the Circuit Courts have consistently affirmed the employees' freedom to refrain from engaging in protected concerted activities under Section 7. *See, e.g., NLRB v. Magnovox Co. of Tenn.*, 415 U.S. 322, 324 (1974 ("[e]mployees have the right . . .'to form, join, or assist labor organizations' or 'to refrain' from such activities"); *Pattern Makers' League v. NLRB*, 724 F.2d 57, 59, 60 (7th Cir. 1983) ("[t]he overriding policy of labor law" is to ensure "employees [remain] free to choose whether to engage in concerted activities"); *Booster Lodge No. 405 v. NLRB,* 459 F. 2nd 1143, 1153 (D.C. Cir. 1972 ("an employee [has the right] to refrain from any and all of the concerted activities guaranteed employees under the Act"). The decision as to whether to waive the right to bring a class or collective action is entirely consistent with the rights guaranteed by the NLRA.

Moreover, employees are not waiving substantive legal rights—they are making a decision to engage or not to engage in a collective or class claim forum. Such a waiver is not a Section 8(a)(1) violation. To the contrary, it is simply the exercise of their Section 7 rights under the Act. The General Counsel's arguments also appear to presuppose that the act of agreeing to a particular forum for dispute resolution is somehow a waiver of a core legal right—the same discredited argument that has been made countless times by individuals seeking to overturn arbitration agreements and proceed to court on a wide variety of legal claims--that a class action waiver is a waiver of core substantive rights. This proposition has been refuted by the district courts and the Supreme Court. The Supreme Court has made clear that proceeding as a class or collective action is a procedural, not a substantive right, ever since *Gilmer v. Interstate/Lane Johnson Corp.,* 500 US 20 (1991) (by agreeing to arbitrate a statutory claim, a party does not

forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.)

c. The GC's Positon Conflicts with the Controlling Federal Authority

The General Counsel's argument relating to the class action waiver conflicts with the weight of Federal Circuit Court decisions on the subject, numerous other district court cases and administrative decisions. Moreover, it conflicts with the Second Circuit's decision in *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2nd Cir. 2013). Upon review of the NLRB decision in *D. R. Horton*, the Fifth Circuit rejected the NLRB's ruling that mandatory arbitration agreements containing class action waivers imposed on employees as a condition of their employment violate an employee's right to engage in concerted activities within the meaning of the NLRA. The Fifth Circuit, in rejecting the ruling, relying on the Supreme Court's decisions construing the FAA, for, among other reasons: (i) failure to give "proper weight" to the FAA's mandate to enforce arbitration agreements as written, including those containing class action waivers, 737 F.3d 344, 348; (ii) improperly relying on the "savings clause" in § 2 of the FAA–which allows for the invalidation of an arbitration agreement on the same "grounds as exist at law or in equity for the revocation of any contract"—to invalidate the arbitration agreement's class action waiver because it would have the effect of "disfavor[ing] arbitration" in contravention of the FAA's purpose, *Id.* at 358-60; and (iii) ignoring that when enacting the NLRA, Congress did not manifest, either in the statute's text, legislative history or purpose, the requisite "contrary congressional command" necessary to override the FAA's mandate to enforce arbitration agreements as written. *Id.* at 360-62.

Indeed, three Federal Circuit Courts that have considered the issue have rejected the NLRB's *D. R. Horton* and its analysis. *In re D. R. Horton*, 737 F.3d 344 (5th Cir. 2013); *Owen*

v. Bristol Care, Inc., 702 F.3d 1050, 1055 (8th Cir. 2013); *Sutherland v. Ernst & Case*, 726 F.3d 290, 297-98, n.8 (2nd Cir. 2013). While two others have followed the *D. R. Horton* and *Murphy Oil* rationale, the controlling Federal Circuit case in the Second Circuit rejects those decisions and controls in this matter.

4. The Employment Agreement Does Not Restrict Access to the NLRB.

The General Counsel argues that employees would reasonably believe the Employment Agreement bars or restricts their right to file unfair labor practice charges. This is such a stretch that it collapses under its own weight. The Employment Agreement states that employees are free to pursue issues before federal agencies and the NLRB as a federal agency to which they may bring claims. Nothing could be clearer. The Employment Agreement directly and straight forwardly informs employee that they can access NLRB processes. These provisions are neither vague nor confusing, they are clear indications that the agreement does not impermissibly impinge upon the role of the NLRB nor does it constrain or interfere with the Section 7 rights of employees.

WHEREFORE , as the General Counsel has failed to establish any violation of the National Labor Relations Act (the "NLRA"), the General Counsel is not entitled to any remedy and De Novo respectfully requests that the General Counsel's Motion for Summary Judgment be denied and the complaint filed against De Novo dismissed.

Respectfully submitted this 27th day of February, 2017.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 28th day of February, 2017, a true and correct copy of the foregoing Answer to Order to Show Cause was served on Michael Bilik, Counsel for the General Counsel, NLRB Region 2, at Michael.Bilik@nlrb.gov and Mr. Timothy Tanner at tangotanner@yahoo.com.

Christine F. O'Connor

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