

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

HANDY TECHNOLOGIES, INC. and MAISHA EMMANUEL, AN INDIVIDUAL	CASE 01-CA-158125
HANDY TECHNOLOGIES, INC. and MYETIA VAUGHAN, AN INDIVIDUAL	CASE 01-CA-158144

**RESPONDENT HANDY TECHNOLOGIES, INC.’S MOTION TO DISMISS
PART OR ALL OF THE COMPLAINT OR ALTERNATIVELY TO HOLD THE
ENTIRE COMPLAINT IN ABEYANCE PENDING FURTHER REVIEW**

INTRODUCTION

Pursuant to 29 C.F.R. 102.24(b) of the Board’s Rules and Regulations, Handy Technologies, Inc. (“Respondent” or “Handy”) moves to dismiss part or all of the Complaint or alternatively to hold the entire Complaint in abeyance pending further review by the new General Counsel and/or the Board. The parties have already agreed to hold in abeyance the allegations of the Complaint pertaining to Respondent’s class waiver arbitration requirement, because that issue is about to be resolved by the U.S. Supreme Court in the *Murphy Oil* case.¹ The present Motion addresses the remaining allegations of the Complaint, none of which state a claim on which relief can be granted under the Act as a matter of law.

¹ See General Counsel’s Request for Special Appeal dated Oct. 24, 2017, at p. 2, n.1, describing the parties’ agreement to hold the *Murphy Oil* arbitration issue in abeyance.

More specifically, this Motion seeks dismissal of the following allegations of the Complaint:

- The allegation of Paragraph 11, and related allegations of Paragraphs 7, 8, 9, and 10, in which the General Counsel alleges that the Respondent's mere expression of the view that cleaning service providers who make use of Respondent's internet platform are independent contractors, somehow constitutes an independent violation of Section 8(a)(1). The Board has never so held under any set of facts in the history of the Act.
- The allegations of Paragraphs 7, 8, and 9, in which the General Counsel alleges that Respondent's request that independent cleaning service providers acknowledge their independent contractor status as part of their contractual agreements with Respondent, somehow constitute independent violations of Section 8(a)(1) of the Act. Again, the Board has never so held.
- The allegations of Paragraph 7, in which the General Counsel alleges that requiring cleaning service providers to accept "terms of use" directed to all consumer users of an internet website somehow constitutes an independent violation of Section 8(a)(1). Again, the Board has never so held.

As a matter of law, therefore, this case should not be allowed to proceed to trial and the Board should at a minimum issue a notice to show cause as to why the case should not be dismissed, or alternatively should simply hold the entire case in abeyance pending the outcome of the Supreme Court's consideration of the *Murphy Oil* arbitration cases.²

STATEMENT OF THE CASE

Handy is a technology company that offers a web and smartphone-based communications platform to connect individual contractors with potential customers.

The contractors at issue in the Complaint, also known as "service providers," are engaged

² Respondent does not contend in this Motion that any of the foregoing allegations of the Complaint are barred by *Jefferson Chemical*, 200 NLRB 992 (1972). Rather, Respondent contends that none of the above referenced allegations of the Complaint states an actionable claim under the Act as a matter of law, regardless of whether the cleaning service providers at issue are employees or independent contractors.

in home cleaning services. They use Handy's technology platform to make contact with potential consumers of such cleaning services. For each service booked by a customer through the platform, Handy receives a referral fee. Handy does not itself perform any cleaning services. *See* the complete Terms of Use and Service Professional Agreements, which are published on the internet at www.handy.com. Incomplete excerpts of these documents are referred to in the Complaint, at Par.'s 7, 8, and 9. *See* Attachment 1 to this Motion. *See also* Handy's Answer to the Complaint, attached as Attachment 2.

In 2015, some of the service providers who agreed to use Handy's platform filed a class and collective action against Handy in federal district court. Complaint, Par. 10. Handy responded by filing a motion to compel arbitration. *Id.* The plaintiffs in the lawsuit filed unfair labor practice charges with Region 1 alleging Handy's enforcement of their arbitration agreement violated the National Labor Relations Act. *Id.*, Par. 1. Handy responded that the arbitration class waiver was legal under *Murphy Oil* and related cases that are now pending at the U.S. Supreme Court. *See* Answer to Complaint, Par. 1 and 10. Handy also asserted that the service providers who signed the arbitration agreements are not employees within the meaning of the Act because they are independent contractors. *Id.*, Affirmative Defenses.

The Complaint was issued on August 28, 2017 and is attached as Attachment 1. Handy filed its Answer on September 18, 2017. *See* Attachment 2. By order of the Administrative Law Judge, the trial date was postponed to December 11, 2017. The present motion is being timely filed with the Board no later than 28 days prior to the start of the scheduled hearing date. 29 U.S.C. 102.24(b).

As noted above, the gravamen of the Complaint is that Handy's class action arbitration waiver agreements with its service providers violate the Act. Handy's Answer presents multiple defenses to this claim, including the defense that its service providers are independent contractors and not employees within the meaning of the Act. However, the General Counsel and Respondent have mutually recognized that the Supreme Court's *Murphy Oil* decision should be dispositive of the class waiver arbitration question, and they have agreed to hold the arbitration issue in abeyance pending the Supreme Court's ruling.

This Motion concerns the remaining allegations of the Complaint, which allege in principal part that, independent of the arbitration question, Handy's mere expression of its view that its service providers are independent contractors somehow constitutes an independent violation of the Act. Complaint, Par. 11. Similarly, the Complaint alleges that Handy's request that its service providers sign an acknowledgement that they are independent contractors, and related acknowledgements, again constitute independent violations of the Act. *Id.* at Par.'s 8 and 9. Finally, the Complaint alleges that "Terms of Use" applicable to all consumer users of Respondent's internet platform somehow constitute independent violations of the Act. *Id.* at Par. 7.

As further discussed below, the foregoing allegations, which form the sole remaining grounds for the Complaint against Respondent once the class waiver arbitration issue is held in abeyance, do not state any claims for which relief can be granted under the Act, as a matter of law. Indeed, *the Board has never before found an unfair labor practice to have occurred based on such minimal facts.* Absent dismissal or at least holding the remaining aspects of the Complaint in abeyance pending further

review by the new General Counsel and/or the Board, the parties will be required to waste government and private resources litigating the independent contractor status of Handy's service providers based on radical legal theories put forward by the former General Counsel, theories that the Board has never before adopted and that are contrary to Section 8(c) of the Act. The Complaint against Handy should therefore be dismissed or should at a minimum be held in abeyance together with the class waiver aspects of the Complaint, pending further review.

The Board has previously granted motions to dismiss or issued notice to show cause under analogous circumstances. *See Wonder Bread, A Division of Interstate Brands Corp.*, 343 NLRB No. 14 (2004) (granting Respondent's motion to dismiss over 10(b) issue); *John Morell and Co.*, 304 NLRB No. 116 (1991) (granting Respondent's motion for summary judgment over deferral to arbitration issue); *see also Mercy St. Vincent Medical Center*, 2015 WL 4760345 (2015) (issuing notice to show cause on motion for partial summary judgment regarding previously untested social media policies and work rules and transferring case to the Board); *U.S. Postal Service*, 311 NLRB No. 35 (1993) (issuing notices to show cause in response to cross-motions over jurisdictional issue).

ARGUMENT

I. THE GENERAL COUNSEL’S NOVEL THEORY THAT MISCLASSIFICATION OF EMPLOYEES AS INDEPENDENT CONTRACTORS, WITHOUT MORE, VIOLATES THE ACT, IS ITSELF A VIOLATION OF SECTION 8(C) AND IS UNSUPPORTED BY ANY BOARD AUTHORITY.

Paragraph 11 of the Complaint, together with related allegations in Paragraphs 7, 8, and 9, contends that an employer violates the National Labor Relations Act (the “Act”) simply by expressing the view that its service providers are properly classified as independent contractors rather than as employees. *The Board has never so held.*³ The General Counsel’s theory contravenes the protections of Section 8(c) of the Act and the Board’s own test for finding independent contractor status. This entire aspect of the Complaint must therefore be dismissed without wasting the parties’ resources in a meaningless trial.

A. Mere Expression Of The View That Workers Are Independent Contractors Cannot Violate the Act Because of the Protection Afforded by Section 8(c).

Section 8(c) of the Act protects the expression of the view that a worker should be contractually classified as an independent contractor, and bars use of any such expression of views as evidence of any unfair labor practice. Section 8(c) specifically provides:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

³ The General Counsel conceded as much in an Advice Memorandum captioned *Pacific 9 Transportation, Inc.*, Case 21-CA-150875, at p.8 (Dec. 18, 2015) (hereafter “*Pacific 9*”). (“[T]he Board has never held that an employer’s misclassification of statutory employees as independent contractors in itself violates Section 8(a)(1).”).

29 U.S.C. 158(c). The Supreme Court expounded on the meaning of section 8(c) in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969) (“*Gissel Packing*”):

[A]n employer’s free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the board. Thus, [8(c)] merely implements the First Amendment by requiring that the expression of ‘any views, argument, or opinions’ shall not be ‘evidence of an unfair labor practice,’ so long as such expression contains ‘no threat of reprisal or force or promise of benefit’ in violation of §8(a)(1).

Id. at 617. Notably, the protection of section 8(c) is broadly defined to include “any” view, argument, or opinion, including legal positions. *See, e.g., Children’s Center for Behavioral Development*, 347 NLRB 35, 36 (2006) (finding employer’s memo protected under 8(c) and holding: “Although the [employer’s] position has now been rejected, there is nothing unlawful in stating a legal position, even if it is later rejected.”). At worst, misclassifying workers constitutes a misapplication of the law, not a misstatement of settled legal *doctrine* that insinuates adverse legal consequences for engaging in Section 7 rights. *See also North Star Steel Co.*, 347 NLRB 1364, 1367 n.13 (2006) (“8(c) does not require fairness or accuracy”). Paragraph 11 of the Complaint, and the other related allegations, clearly violates the plain language of Section 8(c) and should be dismissed on this ground.

B. The General Counsel’s Novel Theory Of Liability Violates The Longstanding Test For Independent Contractor Status Which Requires The Board To Give Weight To The Expressed Intent Of The Parties.

In addition to violating the plain language of the Act, the present complaint against Handy also contradicts the common law of agency test for independent contractor status, which the Board is bound to apply. *See United Insurance Co. of America*, 390 U.S. 254 (1968); *see also FedEx Home Delivery v. NLRB*, 849 F.3d 1123 (D.C. Cir.

2017). Under that test, as currently applied by the Board, determining whether a worker is an independent contractor requires the balancing of multiple distinct factors, one of which reads as follows: “whether the employer and worker believe they are creating an employer-employee relationship.” *Id.* quoting Restatement (second) sec. 220(2). *See also Pennsylvania Interscholastic Athletic Association, Inc.*, 365 NLRB No. 107 (July 11, 2017) (applying the same factor, albeit as part of a slightly different standard that was vacated by the D.C. Circuit in *FedEx*).⁴ It would be arbitrary and capricious in the extreme for the Board to hold here that the expression of intent to classify workers as independent contractors, one of the common law factors that the Board has long considered significant in determining independent contractor status, in and of itself somehow constitutes a violation of the Act. For this reason as well, the Complaint must be dismissed.

C. The General Counsel’s Theory of Liability Lacks Any Legal Basis.

In light of the plain language of Section 8(c) and the Board’s own test for independent contractor status, it is not surprising that the Board has never before held that misclassification of an employee as an independent contractor, standing alone, violates Section 8(a)(1) of the Act. As noted above, the General Counsel conceded as much in the 2015 *Pacific 9* Advice Memorandum, p.8. (“[T]he Board has never held that an employer’s misclassification of statutory employees as independent contractors in itself violates Section 8(a)(1).”).

⁴ It is unnecessary for purposes of this Motion to reach the question whether the current Board standard for independent contractor status is lawful. The same factor relying on expressions of the intent of the parties is cited in both *FedEx* and *PIAA*.

Remarkably, notwithstanding the absence of any Board authority for this proposition, the General Counsel in *Pacific 9* cobbled together “indirect” support for a novel theory of liability, on which the present Complaint is apparently based. The General Counsel first looked to *Parexel International, LLC*, 356 NLRB No. 82 (2011) for the notion that “the Board has held that an employer violates Section 8(a)(1) when its actions operate to chill or curtail future Section 7 activity of statutory employees.” *Pacific 9* Memo at 8. Nothing in *Parexel International*, however, supports the General Counsel’s assertion that the mere alleged misclassification of employees, without more, violates the Act. The violation in *Parexel International* stemmed from the employer’s *termination* of an employee, who had been engaging other employees in discussions concerning wages, as a “preemptive strike” against potential future protected activity “to nip it in the bud.” *Id.* at n.21; *Parexel International, LLC*, 356 NLRB 516, 519 (2011). Also in *Parexel International*, the employer did not merely misclassify employees but, rather, took decisive action specifically aimed at curtailing an employee’s ongoing protected concerted activity after learning the employee was potentially engaged in such activity. The misclassification of workers as independent contractors at the inception of the alleged employment relationship differs fundamentally from targeted action taken in response to an employer’s belief that employees have engaged in protected concerted activity.⁵

⁵ The same rationale distinguishes similar Board precedent upon which the General Counsel relied in *Pacific 9* for the proposition that “the chilling of future protected activity violates the Act.” Memo p. 9; n. 25. See *United States Service Industries, Inc.*, 314 NLRB 30, 31 (1994) (“[A]ctions taken by an employer against an employee based on the employer’s belief the employee engaged in or intended to engage in protected concerted activity are unlawful even though the employee did not in fact engage in or intend to engage in such activity.” (internal quotation marks omitted)), *enforced*, 80 F.3d

Second, the General Counsel's *Pacific 9* theory of liability relies on *Sisters' Camelot*, 363 NLRB No. 13 (2015), for the proposition that "employer statements to employees that engaging in Section 7 activity would be futile violate Section 8(a)(1)." In *Sisters' Camelot*, the Board found that the employer misclassified certain employees as independent contractors, but did not conclude that the employer's misclassification alone violated the Act. Rather, the Board found that the employer violated the Act by affirmatively informing the misclassified employees "it would never accept a 'boss/employee relationship'" with them. *Id.* As such, *Sisters' Camelot* does not support the General Counsel's conclusion that misclassification alone violates the Act. On the contrary, the absence of such a finding in *Sisters' Camelot* strongly suggests that mere misclassification, without affirmative statements of futility, does not violate the Act.⁶

Finally, the General Counsel's *Pacific 9* Memorandum asserted "the Board has also found misstatements of law to constitute an unlawful interference with employees' Section 7 rights if the statement reasonably insinuates adverse consequences for engaging in Section 7 activity." *Pacific 9* Memo at 10. But none of the precedents upon which the General Counsel relied comes close to establishing that mere alleged misclassification,

558 (D.C. Cir. 1996) (unpublished table decision); *Metropolitan Orthopedic Associates, P.C.*, 237 NLRB 427, 427 n.3 (1978) ("The discharge of 4 employees in a unit of 13 employees because of Respondent's belief, albeit mistaken, that the[y] had engaged in protected concerted activities is an unfair labor practice which goes to the very heart of the Act").

⁶ The remaining precedent the General Counsel cites in *Pacific 9* for this proposition is equally inapposite. See *M.D. Miller Trucking & Topsoil, Inc.*, 361 NLRB No. 141, slip op. 1 (Dec. 16, 2014) (concluding that employer's statement that employees' grievance would go nowhere constituted unlawful threat of futility); *North Star Steel Co.*, 347 NLRB 1364, 1365 (2006) (employer's statement that collective bargaining would not result in employees obtaining benefits other than what the employer chose to give them and unionization would lead employer to choose to give them less violated Section 8(a)(1), because employees "could reasonably infer futility of union representation.").

without more, violates the Act. Instead, each decision upon which the General Counsel relied found a violation based not on the employer's classification of employees, but on the employer's affirmative misrepresentation of settled law.⁷ Indeed, in *Pacific 9 itself*, the General Counsel premised this theory of liability not merely on the employer's misclassification, but rather on its representation to employees that they were independent contractors after "the Region already determined that its drivers are statutory employees." *Pacific 9*, Memo at 11.

Thus, none of the various precedents upon which the General Counsel relied in *Pacific 9* establishes that mere misclassification, without more, violates the Act. Not only does *Pacific 9* itself repeatedly articulate that something more than mere misclassification is needed to find a Section 8(a)(1) violation, but the precedent upon which the General Counsel relied to contemplate a violation in that case underscores that

⁷ See, e.g., *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB 614, 617, 618, n.22 (2007) (employer's flyer that misled employees by creating the impression that employees would have to give up customary wage increases as a "lawful and ineluctable consequence" of bargaining violated Section 8(a)(1)); *Fern Terrace Lodge*, 297 NLRB 8, 8–9 (1989) (statement that permanently "replaced striker is not automatically entitled to his job back just because the strike ends" unlawful, because economic strikers are automatically entitled to their jobs back, or, if their job is unavailable, preferential hiring to similar openings); *Larson Tool*, 296 NLRB 895, 895–96 (1989) ("you could lose your job to a permanent replacement," without further explanation, unlawful); *Hajoca Corp.*, 291 NLRB 104, 106 (1988) (informing employees they would be permanently replaced and would "no longer have jobs" if they went on an economic strike held unlawful), *enforced*, 872 F.2d 1169, 1177 (3d Cir. 1989); *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 799 n.2 (1980) (misstating law by implying that union would have right to demand that employees pay union fines and assessments and accede to contractual dues checkoff in order to retain their jobs, unlawful in context of other threats), *enforced*, 679 F.2d 900 (9th Cir. 1982) (table).

point. *Pacific 9*, therefore, does not support the conclusion that an employer's mere misclassification of workers as independent contractors, without more, violates the Act.⁸

It must also be noted that the *Pacific 9* Advice Memorandum is limited to a unique set of facts not present here. See *Pacific 9* Memo at 4 (“[I]n the circumstances here, . . . the Employer’s misclassification of its drivers as independent contractors interfered with and restrained the drivers in their exercise of Section 7 rights) (emphasis added); *Pacific 9* Memo at 12 (“on these facts, the Employer’s misclassification of its employees . . . acts to interfere with and restrain . . .”) (emphasis added).

Specifically, in *Pacific 9* unlike here, the complaint alleged numerous discrete violations of Section 8(a)(1) for threats and interrogation, following which the employer agreed to a settlement of such charges. Subsequently, the employer breached the settlement agreement by distributing a memorandum stating that its drivers were not employees and otherwise disavowing the agreed upon settlement language. Only in this context, as part of the determination whether to issue a complaint for breach of the settlement agreement, did the General Counsel conclude, on those facts, that the employer’s act of continued misclassification of individuals previously determined by the Region to be employees violated the Act. *Id.* at 1, 4, 12. Here, there has been no settlement agreement, and certainly no breach of such an agreement; nor has Handy been alleged to have threatened or interrogated its service providers in any way. Again, as a matter of law, this aspect of the Complaint must be dismissed.

⁸ So far as Respondent is aware, the General Counsel’s *Pacific 9* theory has been upheld by only a single Administrative Law Judge. See *Velox Express, Inc.*, Case No. 15-CA-184006 (Amchan, ALJ), exceptions filed October 28, 2017.

II. THE BOARD SHOULD ALSO DISMISS PARAGRAPH 9 OF THE COMPLAINT, WHICH IMPROPERLY ALLEGES THAT MERELY ASKING SERVICE PROVIDERS TO ACKNOWLEDGE THEIR INDEPENDENT CONTRACTOR STATUS CONSTITUTES AN INDEPENDENT VIOLATION OF THE ACT.

Just as the Board has never held that the mere misclassification of workers as independent contractors violates the Act, it has similarly never found a violation based solely on a putative employer's requirement that workers sign an acknowledgement concerning their status as independent contractors. For example, in *Green Fleet Systems, LLC*, 2015 NLRB LEXIS 260 (April 9, 2015) adopted 2015 NLRB LEXIS 505 (NLRB June 30, 2015), the ALJ examined an independent contractor acknowledgement as potential evidence of certain drivers' independent contractor status. Although the ALJ concluded that the workers were employees and not independent contractors, he did not find that requiring workers to sign such an acknowledgement violated the Act.⁹ *See also*, e.g., *Columbus Green Cabs, Inc.*, 237 NLRB 1132 (1978) (drivers misclassified as independent contractors required to sign an acknowledgement, neither misclassification nor acknowledgement found to violate the Act).

The nearest analog for the General Counsel's novel contention here is the ALJ's opinion in *American Red Cross Arizona Blood Services*, 2012 NLRB LEXIS 43 (February 01, 2012). There, ALJ Meyerson concluded that the employer violated the Act by requiring employees to sign an acknowledgement of their at-will employment status, which also included the statement "I further agree that the at-will employment relationship cannot be amended, modified or altered in any way." *Id.* at *40. Because

⁹ The General Counsel in *Green Fleet* appears not to have even alleged that merely requiring workers to sign an independent contractor acknowledgement form violated the Act, because it does not.

the parties in *American Red Cross* subsequently settled, the Board never reviewed ALJ Meyerson's conclusions.

However, the General Counsel has since substantially limited the reach of *American Red Cross*. In advice memoranda in *Rocha Transportation*, Case No. 32-CA-086799 (October 31, 2012), *Mimi's Café*, Case No. 28-CA-084365 (October 31, 2012), and *Lionbridge Technologies*, Case No. 19-CA-115285 (March 31, 2014), the General Counsel concluded that a mere requirement that employees execute an at-will acknowledgement did not violate the Act. Rather, the General Counsel concluded, the violation in *American Red Cross* turned on the inclusion of specific language informing employees that the at-will relationship could not be changed because such language violates their Section 7 rights. Ultimately, the *Rocha Transportation*, *Mimi's Café*, and *Lionbridge Technologies*' advice memoranda stand for the proposition that the mere requirement of an acknowledgement of a worker's current at-will status does not violate the Act.

The same rationale applies here. According to Paragraph 9, while Respondent required workers to acknowledge their status as independent contractors, nothing in Respondent's acknowledgements can be reasonably interpreted to restrict a worker's Section 7 right to engage in concerted attempts to change his or her employment status. As in *Mimi's Café*, "the provision does not require employees to refrain from seeking to change their at-will status or to agree that their at-will status cannot be changed in any way." *Mimi's Café*, Memo at 3. On the contrary, as the Complaint allegations admit, Respondent's acknowledgements expressly instruct workers to notify Respondent if workers believe the status of the relationship has changed. The necessary implication of

such language is that the relationship could change. Therefore, the acknowledgements at issue here, like those in *Rocha Transportation*, *Mimi's Café*, and *Lionbridge Technologies* do not restrict workers' Section 7 rights. Most importantly, the Board itself has never held otherwise, and for this reason, the Complaint must be dismissed as a matter of law.

Moreover, as explained above, Section 8(c) of the Act protects an employer's right to classify workers as independent contractors and to communicate that classification to those workers. That protection applies with equal force to employer requirements that workers acknowledge their employment status, so long as those communications do not otherwise infringe on workers' Section 7 rights. As further noted above, one of the fundamental signifiers of an independent contractor relationship is "[w]hether the parties believe they are creating an independent contractor relationship." *Pennsylvania Interscholastic Athletic Association, Inc., supra*. If an employer risks violating the Act by requiring workers to acknowledge their status as independent contractors, it will impermissibly chill the right of employers and service providers to express their intent to create an independent contractor relationship.

III. The Allegations of Paragraph 7 of the Complaint Must Also Be Dismissed As A Matter of Law Because the "Terms Of Use" Of A Consumer-Facing, Publicly Accessible Internet Site Do Not Establish Workplace Policies In Violation Of Section 8(a)(1).

The allegations of Paragraph 7, in which the General Counsel alleges that requiring cleaning service providers to accept "terms of use" directed to all consumer users of an internet website somehow constitutes an independent violation of Section 8(a)(1). Again, the Board has never so held. The terms of use for the public internet website are not workplace policies. Any consumer who wants to use the web platform

must accept the same terms of use as the service providers. Indeed, such terms of use are standard in millions of websites and have nothing to do with Section 7 rights.

It is well settled under *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), that in analyzing whether putative employees would “reasonably construe” a Company’s policies as prohibiting protected activity, the Board is supposed to examine the context in which the policies are written. *Id* at 646. *See also T-Mobile USA, Inc. v. NLRB*, 865 F.3d 265, 272 (5th Cir. 2017) (“To a reasonable employee, context matters in the interpretation of these rules.”); *Adtranz ABB Daimler-Benz Transportation*, 253 F.3d 19, 28 (D.C. Cir. 2001); *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998) (holding that the Board considers the “realities of the workplace” when analyzing work rules); *Fresh & Easy Neighborhood Mkt.*, 361 NLRB No. 8, slip op. *5 (July 31, 2014).

In the present case, the context of the Respondent website’s “terms of use” is that these terms do not constitute work rules at all. Rather, they are standard terms for the use of the website by the public at large, not substantively different from the internet terms of use that can be found on millions of websites around the world. In particular, as noted above, the same terms of use apply to the consumers of cleaning service providers as to the service providers themselves. Under such circumstances, the Complaint must be dismissed to the extent that it treats public website terms of use in the same manner as employee work rules. Again, the Board has never found a public website’s terms of use to constitute a violation of anyone’s Section 7 rights.

CONCLUSION

For each of the reasons set forth above, Handy respectfully requests the Board to dismiss the non-arbitration related allegations of the Complaint and/or to hold the entire case in abeyance pending further review.

Respectfully submitted,

/s/Maurice Baskin

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion to Dismiss electronic email on the following this 13th day of November, 2017:

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Attachment 1

Complaint

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 01**

HANDY TECHNOLOGIES, INC.

and

MAISHA EMMANUEL, AN INDIVIDUAL

Case 01-CA-158125

HANDY TECHNOLOGIES, INC.

and

MYETIA VAUGHAN, AN INDIVIDUAL

Case 01-CA-158144

**ORDER CONSOLIDATING CASES,
CONSOLIDATED COMPLAINT AND NOTICE OF HEARING**

Pursuant to Section 102.33 of the Rules and Regulations of the National Labor Relations Board (the Board) and to avoid unnecessary costs or delay, IT IS ORDERED THAT Case 01-CA-158125 and Case 01-CA-158144, which are based on charges filed by Maisha Emmanuel, an Individual (Emmanuel), and Myetia Vaughan, an Individual, (Vaughan), respectively, against Handy Technologies, Inc. (Respondent), are consolidated.

This Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, which is based on these charges, is issued pursuant to Section 10(b) of the National Labor Relations Act (the Act), 29 U.S.C. § 151 et seq., and Section 102.15 of the Board's Rules and Regulations, and alleges Respondent has violated the Act as described below.

1. (a) The charge in Case 01-CA-158125 was filed by Emmanuel on August 17, 2015, and a copy was served on Respondent by U.S. mail on August 18, 2015.

(b) The first amended charge in Case 01-CA-158125 was filed by Emmanuel on February 21, 2017, and a copy was served on Respondent by U.S. mail on February 23, 2017.

(c) The second amended charge in Case 01-CA-158125 was filed by Emmanuel on August 17, 2017, and a copy was served on Respondent by U.S. mail on August 21, 2017.

(d) The charge in Case 01-CA-158144 was filed by Vaughan on August 17, 2015, and a copy was served on Respondent by U.S. mail on August 18, 2015.

2. At all material times, Respondent, a Delaware corporation with an office and place of business located at 33 West 19th Street, 6th Floor, New York, New York 10011 (the New York facility), has been engaged in the business of providing residential cleaning and repair services to customers nationwide.

3. Annually, Respondent, in conducting its business operations described above in paragraph 2, derives gross revenues in excess of \$500,000.

4. Annually, Respondent, in conducting its business operations described above in paragraph 2, provides residential cleaning and repair services valued in excess of \$50,000 in States other than the State of New York.

5. Annually, Respondent, in conducting its operations described above in paragraph 2, purchases and receives at its New York facility goods valued in excess of \$50,000 directly from points outside the State of New York.

6. At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

7. Since February 18, 2015, and continuing to date, Respondent has promulgated and/or maintained the following provisions in the versions of its Terms of Use identified below:

(a) Terms of Use effective January 26, 2015:

These Terms of Use include:

- Your agreement that either party may compel binding arbitration for most types of disputes, and your agreement to submit to an informal dispute resolution process for at least 30 days prior to the initiation of any claim (Section 16).
- Your agreement that no claims can be adjudicated on a class basis (Section 16).

7. Rules for Use of the Handy Platform. You shall NOT use the Handy Platform (including but not limited to any Community Areas) to do any of the following:

(f) Publish, post, upload, distribute or disseminate any profane, defamatory, false, misleading, fraudulent, threatening or unlawful topics, names, materials or information, or any materials, information or content that involve the sale of counterfeit or stolen items.

8. Employment and Withholding. Users do not have authority to enter into contracts or commitments, whether written or oral, implied or express, on behalf of Handy. You acknowledge that we do not supervise, direct, or control a Professional's work or Services performed in any manner. Professionals may wear a Handy badge or other Handy insignia purely for the purpose of identifying themselves as a service person contacted through the Handy Platform. Handy is not an employment service and does not serve as an employer of any User. As such, we will not be liable for any tax or withholding, including but not limited to unemployment insurance, employer's liability, social security or payroll withholding tax in connection with your use of Services. You understand and agree that if we are found to be liable for any tax or withholding tax in connection with your use of Services, then you will immediately reimburse and pay to us an equivalent amount, including any interest or penalties thereon. You further agree to indemnify, hold harmless and defend us from any and all claims that a Professional was misclassified as an independent contractor or an employee (including, but not limited to, taxes, penalties, interest and attorney's fees), any claims that we were an employer or joint employer of a Professional, and any claims under any employment-related laws, such as those relating to employment termination, employment discrimination, harassment or retaliation, overtime pay, sick leave, holiday or vacation pay, retirement benefits, worker's compensation benefits, unemployment benefits, or any other employee benefits.

16. Mutual Arbitration Agreement.

(b) Arbitration. If a Dispute is not resolved through Informal Negotiations, you and Handy agree to resolve any and all Disputes (except those Disputes expressly excluded below)

through final and binding arbitration ("Arbitration Agreement"). This Arbitration Agreement shall be governed by the Federal Arbitration Act and evidences a transaction involving commerce. The arbitration will be commenced and conducted before a single arbitrator under the Commercial Arbitration Rules (the "AAA Rules") of the American Arbitration Association ("AAA") and, where appropriate, the AAA's Supplementary Procedures for Consumer Related Disputes ("AAA Consumer Rules"), both of which are available at the AAA website (www.adr.org). Your arbitration fees and your share of arbitrator compensation will be governed by the AAA Rules (and, where appropriate, limited by the AAA Consumer Rules). If you are unable to pay such costs, Handy will pay all arbitration fees and expenses. Each party will pay the fees for his/her or its own attorneys, subject to any remedies to which that party may later be entitled under applicable law. The arbitrator will make a decision in writing. Additionally, the arbitrator, and not any federal, state, or local court or agency, shall have the exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this Arbitration Agreement. However, the preceding sentence shall not apply to the "Class Action Waiver" described in Section d below.

d. WAIVER OF RIGHT TO BE A PLAINTIFF OR CLASS MEMBER IN A CLASS ACTION. You and Handy agree to bring any Dispute in arbitration on an Individual basis only, and not as a class or collective action. There will be no right or authority for any Dispute to be brought, heard or arbitrated as a class or collective action ("Class Action Waiver"). Regardless of anything else in this Arbitration Agreement and/or the applicable AAA Rules or AAA Consumer Rules, the interpretation, applicability, enforceability or formation of the Class Action Waiver may only be determined by a court and not an arbitrator.

19. General Provisions. No agency, partnership, joint venture, employer-employee or franchiser-franchisee relationship is intended or created by this Agreement.

(b) Terms of Use effective February 17, 2017:

Terms of Use/User Agreement

To the extent permitted and except where prohibited by applicable law, these Terms of Use include:

- Your agreement that either party may compel binding arbitration for most types of disputes, and your agreement to submit to an informal dispute resolution process for at least 30 days prior to the initiation of any claim (Section 18).
- Your agreement that no claims can be adjudicated on a class basis (Section 18).

7. Rules for Use of the Handy Platform.

You shall NOT use the Handy Platform (including but not limited to any Community Areas) to do any of the following:

(f) Publish, post, upload, distribute or disseminate any profane, defamatory, false, misleading, fraudulent, threatening or unlawful topics, names, materials or information, or any materials, information or content that involve the sale of counterfeit or stolen items.

8. No Employment. Handy provides a software platform which allows you to connect with independent Professionals. Handy is not the employer of any Professional. You acknowledge that we do not supervise, direct, or control a Professional's work or Professional Services performed in any manner. A Professional provides services to you as an independent contractor, and is not an employee, joint venture, partner, agent, or franchisee of Handy for any purpose whatsoever.

18. Mutual Arbitration Agreement.

(b) Arbitration. If a Dispute is not resolved through Informal Negotiations, you and Handy agree to resolve any and all Disputes (except those Disputes expressly excluded below) through final and binding arbitration ("Arbitration Agreement"). This Arbitration Agreement shall be governed by the Federal Arbitration Act and evidences a transaction involving commerce. The arbitration will be commenced and conducted before a single arbitrator under the Commercial Arbitration Rules (the "AAA Rules") of the American Arbitration Association ("AAA") and, where appropriate, the AAA's Supplementary Procedures for Consumer Related Disputes ("AAA Consumer Rules"), both of which are

available at the AAA website (www.adr.org). Your arbitration fees and your share of arbitrator compensation will be governed by the AAA Rules (and, where appropriate, limited by the AAA Consumer Rules). If you are unable to pay such costs, Handy will pay all arbitration fees and expenses. Each party will pay the fees for his/her or its own attorneys, subject to any remedies to which that party may later be entitled under applicable law. The arbitrator will make a decision in writing. Additionally, the arbitrator, and not any federal, state, or local court or agency, shall have the exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this Arbitration Agreement. However, the preceding sentence shall not apply to the "Class Action Waiver" described in Section d below.

(d) WAIVER OF RIGHT TO BE A PLAINTIFF OR CLASS MEMBER IN A CLASS ACTION. You and Handy agree to bring any Dispute in arbitration on an Individual basis only, and not as a class or collective action. There will be no right or authority for any Dispute to be brought, heard or arbitrated as a class or collective action ("Class Action Waiver"). Regardless of anything else in this Arbitration Agreement and/or the applicable AAA Rules or AAA Consumer Rules, the interpretation, applicability, enforceability or formation of the Class Action Waiver may only be determined by a court and not an arbitrator.

21. General Provisions. No agency, partnership, joint venture, employer-employee or franchiser-franchisee relationship is intended or created by this Agreement.

8. Since at least May 5, 2015, and continuing to date, Respondent has promulgated and maintained the following provisions in the versions of its Service Professional Agreement (SPA) identified below:

(a) SPA in effect from approximately May 5, 2015 until approximately June 4, 2015:

1.1 Background Statement. Handy and Service Professional intend that Service Professional will provide these services to Service Requesters strictly as an independent Service Professional, and not as an employee, agent, joint venturer, partner or franchisee of Handy...for any purpose. Handy does not provide the Services described in

this Agreement and does not employ individuals to perform said Services.

4.2. Equipment, Expenses, and Sales. Service Professional is solely responsible for any costs or expenses incurred by Service Professional in connection with the performance of the Services, and in no event shall Handy reimburse, or be required to reimburse, Service Professional for any tools, materials, costs, or expenses used in connection with the Services. Service Professional shall furnish and maintain, at Service Professional's own expense, the tools, equipment, supplies, and other materials used to perform the Services.

5. Relationship of the Parties. Service Professional is an independent contractor and has not been engaged by Handy to perform services on Handy's behalf....This Agreement shall not be construed to create any association, partnership, joint venture, employee or agency relationship between Service Professional and Handy...for any purpose.

12.1. Informal Negotiation. To expedite resolution and reduce the cost of any dispute, controversy or claim related to this Agreement or otherwise arising from the relationship between Service Professional and Handy, Service Professional and Handy agree to first attempt to negotiate any dispute informally for at least thirty (30) days before initiating any arbitration or court proceeding.

12.2. Mandatory and Exclusive Arbitration. Handy and Service Professional mutually agree to resolve any disputes between them exclusively through final and binding arbitration instead of filing a lawsuit in court. This arbitration agreement...shall apply...to...the Service Professional's classification as an independent contractor[.]

12.2(b) CLASS ACTION WAIVER – PLEASE READ. Handy and Service Professional mutually agree that by entering into this agreement to arbitrate, both waive their right to have any dispute or claim brought, heard or arbitrated as a class action, collective action and/or representative action, and an arbitrator shall not have any authority to hear or arbitrate any class, collective or representative action (“Class Action Waiver”).

12.2(c) Service Professional agrees and acknowledges that entering into this arbitration agreement does not change Service Professional's status as an independent contractor

in fact and in law, that Service Provider is not an employee of Handy...and that any disputes in this regard shall be subject to arbitration as provided in this agreement.

(b) SPA in effect from approximately June 4, 2015 through approximately September 3, 2015:

1.1 Background Statement. Handy and Service Professional intend that Service Professional will provide these services to Service Requesters strictly as an independent Service Professional, and not as an employee, agent, joint venturer, partner or franchisee of Handy...Requester for any purpose. Handy does not provide the Services described in this Agreement and does not employ individuals to perform said Services.

4.2. Equipment, Expenses, and Sales. Service professional is solely responsible for any costs or expenses incurred by Service Professional in connection with the performance of the Services, and in no event shall Handy reimburse, or be required to reimburse, Service Professional for any tools, materials, costs, or expenses used in connection with the Services. Service Professional shall furnish and maintain, at Service Professional's own expense, the tools, equipment, supplies, and other materials used to perform the Services.

5. Relationship of the Parties. Service Professional is an independent contractor and has not been engaged by Handy to perform services on Handy's behalf....This Agreement shall not be construed to create any association, partnership, joint venture, employee or agency relationship between Service Professional and Handy...for any purpose.

12.1. Informal Negotiation. To expedite resolution and reduce the cost of any dispute, controversy or claim related to this Agreement or otherwise arising from the relationship between Service Professional and Handy, Service Professional and Handy agree to first attempt to negotiate any dispute informally for at least thirty (30) days before initiating any arbitration or court proceeding.

12.2. Mandatory and Exclusive Arbitration. Handy and Service Professional mutually agree to resolve any disputes between them exclusively through final and binding arbitration instead of filing a lawsuit in court. This arbitration

agreement...shall apply...to...the Service Professional's classification as an independent contractor[.]

12.2(b) CLASS ACTION WAIVER – PLEASE READ. Handy and Service Professional mutually agree that by entering into this agreement to arbitrate, both waive their right to have any dispute or claim brought, heard or arbitrated as a class action, collective action and/or representative action, and an arbitrator shall not have any authority to hear or arbitrate any class, collective or representative action (“Class Action Waiver”).

12.2(c) Service Professional agrees and acknowledges that entering into this arbitration agreement does not change Service Professional's status as an independent contractor in fact and in law, that Service Provider is not an employee of Handy...and that any disputes in this regard shall be subject to arbitration as provided in this agreement.

(c) SPA in effect from approximately September 3, 2015 until a date presently unknown to the General Counsel:

1.1 Background Statement. Handy and Service Professional intend that Service Professional will provide these services to Service Requesters strictly as an independent Service Professional, and not as an employee, agent, joint venturer, partner or franchisee of Handy...for any purpose. Handy does not provide the Services described in this Agreement and does not employ individuals to perform said Services.

4.2. Equipment, Expenses, and Sales. Service professional is solely responsible for any costs or expenses incurred by Service Professional in connection with the performance of the Services, and in no event shall Handy reimburse, or be required to reimburse, Service Professional for any tools, materials, costs, or expenses used in connection with the Services. Service Professional shall furnish and maintain, at Service Professional's own expense, the tools, equipment, supplies, and other materials used to perform the Services.

5. Relationship of the Parties. Service Professional is an independent contractor and has not been engaged by Handy to perform services on Handy's behalf....This Agreement shall not be construed to create any association, partnership,

joint venture, employee or agency relationship between Service Professional and Handy...for any purpose.

9.2 Termination. In the event there is a dispute whether Handy or Service [Professional] materially breached the agreement, and it cannot be resolved by informal negotiations, the parties agree to submit any such dispute to final and binding arbitration as described in paragraph 12.2, below.

12.1. Informal Negotiation. To expedite resolution and reduce the cost of any dispute, controversy or claim related to this Agreement or otherwise arising from the relationship between Service Professional and Handy, Service Professional and Handy agree to first attempt to negotiate any dispute informally for at least thirty (30) days before initiating any arbitration or court proceeding.

12.2. Mandatory and Exclusive Arbitration. Handy and Service Professional mutually agree to resolve any disputes between them exclusively through final and binding arbitration instead of filing a lawsuit in court. This arbitration agreement...shall apply...to...the Service Professional's classification as an independent contractor[.]

* * *

BY AGREEING TO ARBITRATE ALL SUCH DISPUTES, THE PARTIES TO THIS AGREEMENT AGREE THAT ALL SUCH DISPUTES WILL BE RESOLVED THROUGH BINDING ARBITRATION BEFORE AN ARBITRATOR AND NOT BY WAY OF A COURT OR JURY TRIAL.

12.2(b) CLASS ACTION WAIVER – PLEASE READ. Handy and Service Professional mutually agree that by entering into this agreement to arbitrate, both waive their right to have any dispute or claim brought, heard or arbitrated as a class action and/or collective action, and an arbitrator shall not have any authority to hear or arbitrate any class and/or collective action (“Class Action Waiver”).

12.2(e) Service Professional agrees and acknowledges that entering into this arbitration agreement does not change Service Professional's status as an independent contractor in fact and in law, that Service Provider is not an employee

of Handy...and that any disputes in this regard shall be subject to arbitration as provided in this agreement.

(d) SPA in effect from approximately February 10, 2017 until a date presently unknown to the General Counsel:

1.1 Background Statement. Handy and Service Professional intend that Service Professional will provide the services to Service Requesters strictly as an independent Service Professional, and not as an employee, worker, agent, joint venturer, partner or franchisee of Handy or any Service Requester for any purpose. Handy does not provide the Services described in this Agreement and does not employ individuals to perform said Services.

4.3 Costs of Operation. Service Professional is solely responsible for any costs or expenses incurred by Service Professional in connection with the operation of Service Professional's principal place of business and the performance of the Services, and in no event shall Handy reimburse, or be required to reimburse, Service Professional for any tools, materials, costs or expenses used in connection with the Services. Service Professional shall furnish and maintain, at Service Professional's own expense, the tools, equipment, supplies, and other materials used to perform the Services.

5. Relationship of the Parties. Service Professional is an independent contractor and has not been engaged by Handy to perform services on Handy's behalf....Service Professional represents that he or she is customarily engaged in an independently established trade, occupation, profession and/or business offering the Services to the general public and/or Service Professional represents that he or she maintains a principal place of business in connection with Service Professional's trade, occupation, profession and/or business that is eligible for a business deduction for federal tax purposes. This Agreement shall not be construed to create any association, partnership, joint venture, employee, worker or agency relationship between Service Professional and Handy...for any purpose.

9.2 Termination. In the event there is a dispute whether Handy or Service Professional materially breached the agreement, and it cannot be resolved by informal negotiations, the parties agree to submit any such dispute to

final and binding arbitration, unless Service Professional exercises his/her right to opt out of arbitration, as described in paragraph 12.2, below.

12.1. Informal Negotiation. To expedite resolution and reduce the cost of any dispute, controversy or claim related to this Agreement or otherwise arising from the relationship between Service Professional and Handy, Service Professional and Handy agree to first attempt to negotiate any dispute informally for at least thirty (30) days before initiating any arbitration or court proceeding.

12.2. Mutual Arbitration Provision. Mandatory and Exclusive Arbitration. Handy and Service Professional mutually agree to resolve any disputes between them exclusively through final and binding arbitration instead of filing a lawsuit in court. This Mutual Arbitration Provision...shall apply...to...the Service Professional's classification as an independent contractor[.]

* * *

BY AGREEING TO ARBITRATE ALL SUCH DISPUTES, THE PARTIES TO THIS AGREEMENT AGREE THAT ALL SUCH DISPUTES WILL BE RESOLVED THROUGH BINDING ARBITRATION BEFORE AN ARBITRATOR AND NOT BY WAY OF A COURT OR JURY TRIAL.

12.2(b) CLASS ACTION WAIVER – PLEASE READ. Handy and Service Professional mutually agree that by entering into this agreement to arbitrate, both waive their right to have any dispute or claim brought, heard or arbitrated as a class action and/or collective action, and an arbitrator shall not have any authority to hear or arbitrate any class and/or collective action (“Class Action Waiver”).

12.2(e) Service Professional agrees and acknowledges that entering into this Mutual Arbitration Provision does not change Service Professional's status as an independent contractor in fact and in law, that Service Provider is not an employee of Handy...and that any disputes in this regard shall be subject to arbitration as provided in this agreement.

(e) SPA in effect from approximately May 19, 2017 until a date presently unknown to the General Counsel:

1.1 Background Statement. Handy and Service Professional intend that Service Professional will provide the services to Service Requesters strictly as an independent Service Professional, and not as an employee, worker, agent, joint venturer, partner or franchisee of Handy...for any purpose. Handy does not provide the Services described in this Agreement and does not employ individuals to perform said Services.

4.3 Costs of Operation. Service Professional is solely responsible for any costs or expenses incurred by Service Professional in connection with the operation of Service Professional's principal place of business and the performance of the Services, and in no event shall Handy reimburse, or be required to reimburse, Service Professional for any tools, materials, costs or expenses used in connection with the Services. Service Professional shall furnish and maintain, at Service Professional's own expense, the tools, equipment, supplies, and other materials used to perform the Services.

5. Relationship of the Parties. Service Professional is an independent contractor and has not been engaged by Handy to perform services on Handy's behalf....Service Professional represents that he or she is customarily engaged in an independently established trade, occupation, profession and/or business offering the Services to the general public and/or Service Professional represents that he or she maintains a principal place of business in connection with Service Professional's trade, occupation, profession and/or business that is eligible for a business deduction for federal tax purposes. This Agreement shall not be construed to create any association, partnership, joint venture, employee, worker or agency relationship between Service Professional and Handy...for any purpose.

9.2 Termination. In the event there is a dispute whether Handy or Service Professional materially breached the agreement, and it cannot be resolved by informal negotiations, the parties agree to submit any such dispute to final and binding arbitration, unless Service Professional exercises his/her right to opt out of arbitration, as described in paragraph 12.2, below.

12.1. Informal Negotiation. To expedite resolution and reduce the cost of any dispute, controversy or claim related to this Agreement or otherwise arising from the relationship between Service Professional and Handy, Service Professional and Handy agree to first attempt to negotiate any dispute informally for at least thirty (30) days before initiating any arbitration or court proceeding.

* * *

BY AGREEING TO ARBITRATE ALL SUCH DISPUTES, THE PARTIES TO THIS AGREEMENT AGREE THAT ALL SUCH DISPUTES WILL BE RESOLVED THROUGH BINDING ARBITRATION BEFORE AN ARBITRATOR AND NOT BY WAY OF A COURT OR JURY TRIAL.

12.2(b) CLASS ACTION WAIVER – PLEASE READ. Handy and Service Professional mutually agree that by entering into this agreement to arbitrate, both waive their right to have any dispute or claim brought, heard or arbitrated as a class action and/or collective action, and an arbitrator shall not have any authority to hear or arbitrate any class and/or collective action (Class Action Waiver).

12.2(e) Service Professional agrees and acknowledges that entering into this Mutual Arbitration Provision does not change Service Professional's status as an independent contractor in fact and in law, that Service Provider is not an employee of Handy...and that any disputes in this regard shall be subject to arbitration as provided in this agreement.

9. Since at least June 4, 2015, Respondent has required its Service Professionals to agree to the Acknowledgements set forth below as a condition of employment with Handy:

(a) An Acknowledgement effective from June 4, 2015 until a date presently unknown to the General Counsel, which provides, in relevant part, that:

(i) I understand and acknowledge that I am a self-employed contractor and not a Handy employee.

(ii) I specifically desire and intend to operate as an independent contractor.

(iii) I understand that I am responsible for all costs and expenses associated with operating as an independent contractor, including with respect to tools, insurance, materials, supplies and personnel.

(iv) I understand and agree that, if at any time, I believe that my relationship with Handy is something other than an independent contractor, I agree to immediately notify Handy of this view.

(b) An Acknowledgement in effect as of March 30, 2017, which provides, in relevant part, that:

(i) I understand and acknowledge that I am a self-employed contractor and not a Handy employee.

(ii) I specifically desire and intend to operate as an independent contractor. I understand that I am responsible for all costs and expenses associated with operating as an independent contractor, including with respect to tools, insurance, materials, supplies and personnel.

(iii) I understand and agree that, if at any time, I believe that my relationship with Handy is something other than an independent contractor, I agree to immediately notify Handy of this view.

(iv) I understand that the Handy [SPA] contains a Mutual Arbitration Provision (Section 12.2) which requires, unless I opt out as described in the Mutual Arbitration Provision, Handy and me to submit disputes to final and binding arbitration.

(c) An Acknowledgement in effect as of about May 2017, a more precise date being presently unknown to the General Counsel, which provides, in relevant part, that:

(i) I understand and acknowledge that I am a self-employed contractor and not a Handy employee.

(ii) I specifically desire and intend to operate as an independent contractor. I understand that I am responsible for all costs and expenses associated with operating as an independent contractor, including with respect to tools, insurance, materials, supplies and personnel.

(iii) I understand and agree that, if at any time, I believe that my relationship with Handy is something other than an independent contractor, I agree to immediately notify Handy of this view.

(iv) I understand that the Handy [SPA] contains a Mutual Arbitration Provision (Section 12.2) which requires, unless I opt out as described in the Mutual Arbitration Provision, Handy and me to submit disputes to final and binding arbitration

10. About August 10, 2015, Respondent filed a Motion to Compel Arbitration and Dismiss Complaint in a case Emmanuel brought in the United States District Court for the District of Massachusetts (Civil Action 1:15-12914-NMG), on behalf of herself and others similarly situated, alleging that Respondent has misclassified them as independent contractors in violation of the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201, et seq., and various Massachusetts state law provisions.

11. Since about February 18, 2015, and continuing to date, Respondent has misclassified its cleaners as “independent contractors,” while they are in fact statutory employees and being treated as such by Respondent, thereby infringing upon, and restraining them in, the exercise of their rights under Section 7 of the Act.

12. By the conduct described above in paragraphs 7, 8, 9, 10, and 11, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

13. The unfair labor practices of Respondent described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

WHEREFORE, in view of the fact that Respondent employs cleaners throughout the United States, as part of the remedy for the unfair labor practices alleged above the General Counsel seeks a nationwide remedy including, a Notice posting at any locations or offices of Respondent, a mailing of the Notice to Employees to any employee employed by Respondent since February 18, 2015, and a posting of the Notice on Respondent’s internet portal.

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the consolidated complaint. The answer must be **received by this office on or before September 11, 2017, or postmarked on or before September 10, 2017.** Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties.

An answer may also be filed electronically through the Agency's website. To file electronically, go to www.nlr.gov, click on **E-File Documents**, enter the NLRB Case Number, and follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12:00 noon (Eastern Time) on the due date for filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was off-line or unavailable for some other reason. The Board's Rules and Regulations require that an answer be signed by counsel or non-attorney representative for represented parties or by the party if not represented. See Section 102.21. If the answer being filed electronically is a pdf document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then the E-filing rules require that such answer containing the required signature continue to be submitted to the Regional Office by traditional means within three (3) business days after the date of electronic filing. Service of the answer on each of the other parties must still be accomplished by means allowed under the Board's Rules and Regulations. The answer may not be filed by facsimile transmission. If no answer is filed, or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the consolidated complaint are true.

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on **September 26, 2017, at 10:00 AM, at the Thomas P. O'Neill, Jr. Federal Building, 10 Causeway Street, 6th Floor, Boston, Massachusetts 02222**, and on consecutive days thereafter until concluded, a hearing will be conducted before an administrative law judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this consolidated complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.

Dated: August 28, 2017



JOHN J. WALSH, JR., REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD
REGION 01

Attachments

Attachment 2

Answer

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 1**

HANDY TECHNOLOGIES, INC.

And

MAISHA EMMANUEL, AN INDIVIDUAL

Case 01-CA-158125

HANDY TECHNOLOGIES, INC.

And

MYETIA VAUGHAN, AN INDIVIDUAL

Case 01-CA-158144

ANSWER TO CONSOLIDATED COMPLAINT

Respondent answers the Consolidated Complaint in this matter (referred to below as the Complaint) as follows:

1. Respondent admits the allegations of paragraphs 1(a)-(d) of the Complaint.
2. Respondent admits that it is a Delaware corporation as stated in paragraph 2 of the Complaint, but denies the remaining allegations of that paragraph.
3. Respondent admits the allegation in paragraph 3 of the Complaint that it has derived gross revenues in excess of the amount stated but denies that any such revenues derive from the conduct of business operations as described in paragraph 2, which has been denied above.
4. Respondent denies the allegations of paragraph 4 of the Complaint.
5. Respondent denies the allegations of paragraph 5 of the Complaint.
6. Paragraph 6 of the Complaint calls for a legal conclusion that does not require a response.

7. In response to paragraph 7 of the Complaint, including subsections 7(a)-(b) thereof, Respondent admits only that this paragraph contains excerpts taken out of context from Respondent's "Terms of Use/User Agreement" posted on Respondent's internet website for all consumers ("Users") of Respondent's internet-based service and platform that facilitates communications between Users offered through Respondent's website. Respondent denies that these excerpts are accurate statements of the complete Terms of Use/User Agreement posted on the website. Respondent further denies that the Terms of Use/User Agreement establishes terms or conditions of anyone's employment, and further denies that the Terms of Use/User Agreement violates the Act.

8. In response to paragraph 8 of the Complaint, including subsections 8(a)-(e) thereof, Respondent admits only that this paragraph contains excerpts taken out of context from various versions of Respondent's "Service Professional Agreements" (SPAs). Respondent denies that these excerpts are accurate statements of the complete agreements. Respondent further denies that the SPAs establish terms or conditions of anyone's employment, and further denies that the SPAs violate the Act.

9. Respondent admits that paragraph 9 of the Complaint refers to excerpts from Respondent's agreements that are taken out of context but denies that they are accurate statements of the complete agreements, and further denies that the agreements violate the Act, or that agreeing to them was a condition of employment with the Respondent.

10. Respondent admits that it filed a motion in a judicial proceeding as referenced in paragraph 10 of the Complaint, but denies the remaining allegations of that paragraph, and specifically denies that it misclassified any employees as independent contractors and also denies that filing the motion violated the Act.

11. Respondent denies the allegations of paragraph 11 of the Complaint.
12. Respondent denies the allegations of paragraph 12 of the Complaint.
13. Respondent denies the allegations of paragraph 13 of the Complaint, and specifically denies that it has committed any unfair labor practices.

AFFIRMATIVE DEFENSES

1. All or part of this case should be held in abeyance until the United States Supreme Court decides whether class action waivers are lawful in *NLRB v. Murphy Oil USA, Inc.* and the related pending cases.

2. Respondent is entitled to enforce the arbitration agreement(s) in this case according to the terms thereof under the Federal Arbitration Act, 9 USC §1 *et seq.*, for the reasons stated by the court of appeals in *NLRB v. Murphy Oil USA, Inc.*, 808 F.3d 1013 (5th Cir. 2015).

3. All of the cleaning service providers who are alleged in the Complaint to have used Respondent's software platform, including the charging parties, were independent contractors and not employees under the Act. To the extent that the Complaint relies on the new standard of proof described in *FedEx Home Delivery*, 362 NLRB No. 29 (2014), *vacated*, 849 F.3d 1123 (D.C. Cir. 2017) to reach a contrary result, that case is distinguishable and should also not be followed because the Board's order therein was vacated by the D.C. Circuit, and cannot be lawfully relied on here. Any subsequent holding by the Board to the contrary must be overruled. In any event, Respondent's service providers meet the test applied by the Board in *FedEx* and/or the tests applied by the D.C. Circuit and the Supreme Court, and must be found to be independent contractors.

4. To the extent that the Complaint asserts that Respondent has violated the Act merely by informing independent cleaning service providers of its view that they are independent contractors and/or seeking confirmation of such status in business agreements, in the absence of any Board authority so holding in the history of the Act, the Complaint is objectively baseless and should not be allowed to proceed to trial.

5. The Complaint violates Section 8(c) of the Act to the extent it alleges that Respondent's mere expression of the view in its agreements or elsewhere that its cleaning service providers are independent contractors constitutes evidence of an unfair labor practice.

6. The Complaint violates the U.S. Constitution, and state and federal laws, by infringing on Respondent's right to enter into lawful contracts, and by alleging that Respondent's legitimate business relationships and agreements with independent contractors are somehow unlawful.

7. Because the cleaning service providers referred to in the Complaint are independent contractors, the Board lacks jurisdiction to find Respondent to be in violation of the Act with regard to them. Because it is the General Counsel's burden to establish such jurisdiction, and in accordance with holdings of the D.C. Circuit and the Supreme Court, the General Counsel should bear the burden of proving that the cleaning service providers are employees and not independent contractors. To the extent that the General Counsel relies on Board holdings to the contrary, such holdings are distinguishable or should be overruled.

8. Assuming *arguendo* that any of the cleaning service providers who have used Respondent's software platform were employees under the Act, which they were not, none of the language alleged in the Complaint can reasonably be construed as restricting any service providers from filing charges with the Board, and the Complaint does not properly allege to the

contrary. In any event, Respondent has properly informed the service providers that nothing prevents them from filing charges with the National Labor Relations Board to seek redress of claims arising under Section 7 of the Act and that Respondent will not retaliate against them for exercising rights protected under the National Labor Relations Act. To the extent that the Complaint relies on any Board decision holding to the contrary, such case is distinguishable or should be overruled.

9. Assuming *arguendo* that any of the cleaning service providers who have used Respondent's software platform were employees under the Act, which they were not, none of the language alleged in the Complaint can reasonably be construed as chilling employees in the exercise of their rights within the meaning of the Board's precedent in *Lutheran Heritage Village*, 343 NLRB 646 (2004). To the extent that any Board decision holds to the contrary, it is distinguishable or should be overruled, or else *Lutheran Heritage Village* itself should be overruled.

10. Assuming *arguendo* that any fact alleged in the Complaint is a violation of the Act, it would be *de minimis* and therefore would not warrant the issuance of a remedial order.

11. Notwithstanding the assertions in the wherefore clause on page 16 of the Complaint, the General Counsel is not entitled to a remedy of any kind because Respondent has not employed service providers at any time, and it has not committed unfair labor practices or otherwise violated the Act.

12. Certain allegations in the Complaint are barred by Section 10(b) of the Act.

13. The Complaint does not state a claim upon which relief can be granted and does not state facts sufficient to constitute an unfair labor practice or a violation of the Act.

14. To the extent the Complaint exceeds the scope of the charge(s), it is therefore barred.

15. Respondent reserves the right to modify or supplement these defenses.

WHEREFORE, Respondent requests that the Complaint be dismissed in its entirety.

Dated: September 18, 2017

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Answer is being served by electronic mail on the following this 18th day of September, 2017:

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