

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

**BAYLOR UNIVERSITY MEDICAL CENTER**

**and**

**Case 16-CA-195335**

**DORA S. CAMACHO, an Individual**

**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO  
RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S  
DECISION**

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**I. INTRODUCTION**

On February 12, 2018, the Honorable Administrative Law Judge Robert A. Ringler issued a Decision and Recommended Order in this matter concluding that Respondent violated Section 8(a)(1) of the National Labor Relations Act (NLRA or Act) by offering employees severance agreements, two provisions of which interfere with rights protected by Section 7 of the Act. The ALJ found the two provisions to be unlawful under *The Boeing Company*, 365 NLRB No. 154 (Dec. 14, 2017) (*Boeing*). First, the ALJ found that the *No Participation in Claims* clause of Respondent’s separations agreements prohibits former employees from assisting and participating in claims against Respondent. Second, the ALJ found that the *Confidentiality* provision in those agreements prevents employees from discussing their wages, hours and working conditions with other employees or third parties. (JD slip op. at 5, LL. 1-13).

On March 12, 2018, Respondent filed twenty-eight Exceptions to the ALJ’s findings of fact, application of Board law, conclusions of law, remedy, and order. Respondent’s Exceptions may be grouped as follows: (A) Minor and technical issues, and derivative exceptions depending entirely on other exceptions (Exceptions 1-3, 5, 22 and 23); (B) Challenges to the premise that an

employer can violate the Act by offering former employees severance agreements (Exceptions 20 and 21); (C) Challenges to the scope of the violation—whether this case is about the Charging Party or a larger class of employees (Exceptions 6 and 22-28); and (D) Substantive challenges to whether the provisions at issue unlawfully restrict Section 7 rights (Exceptions 4 and 7-19). As discussed below, Respondent’s technical and minor exceptions are either incorrect or inconsequential. Respondent’s challenges to the premise that an employer can violate the Act by offering employees severance agreements in exchange for their giving up certain rights rely on misinterpretations of long established law. Its challenges to the scope of the violation at issue here are critically flawed, and finally, Respondent’s arguments that the provisions at issue do not unlawfully restrict employee rights under Section 7 are unpersuasive.

With respect to Respondent’s substantive arguments about the provisions of the separation agreements, Respondent agrees with the ALJ that *Boeing* provides the proper analytical framework, but disagrees with his application. The General Counsel conversely agrees with the ALJ’s ultimate conclusions, but now clarifies that, rather than the *Boeing* analytical framework, the Board’s decision in *S. Freedman & Sons, Inc.*, 364 NLRB No. 82 (Aug. 25, 2016) (*S. Freedman & Sons*) and cases cited therein provides the appropriate analytical framework in this case.

In determining that the provisions at issue were unlawful, the ALJ properly relied on *Metro Networks, Inc.*, 336 NLRB 63 (2001), a lead case for analyzing whether provisions of severance agreements interfere with rights protected by the Act. However, the ALJ relied upon *Metro Networks* in the context of *Boeing*, which is a framework for evaluating employment rules, policies and procedures. Analyzing the terms of the severance agreements as though they were employment rules, the ALJ determined that the provisions’ impact on employees’ NLRA-

protected rights outweighed Respondent's justifications. The ALJ's rationale and conclusions as to these provisions were supported by the record, but as noted above and discussed in detail below, the controlling analytical framework is found most recently in *S. Freedman & Sons*.

For the reasons set forth below, Counsel for the General Counsel submits that each of Respondent's Exceptions should be denied. Counsel for the General Counsel urges the Board to find that the provisions are unlawful under the proper analytical framework, and to find that Respondent violated the Act by issuing its employees severance agreements that include unlawful provisions that restrict employees' rights outside the scope of their separations from employment with Respondent.<sup>1</sup>

## II. FACTS<sup>2</sup>

Charging Party Dora S. Camacho<sup>3</sup> was employed by Respondent, a Texas corporation and healthcare institution engaged in providing medical services to the public, at its Dallas, Texas location, as an administrative assistant in the Continuing Medical Education (CME) Department until her termination on September 30, 2016. (GC Exh. 1(i); Tr. 31, LL. 13-22). The ALJ properly noted that Camacho's termination was not alleged to be unlawful in this case. (JD slip op. at 1, fn. 2; GC Exh. 1(i)).<sup>4</sup> Camacho performed administrative tasks for the CME Department, which is responsible for coordinating educational opportunities for physicians to

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<sup>1</sup> Counsel for the General Counsel will separately submit limited cross-exceptions and a brief in support thereof.

<sup>2</sup> References to the record are as follows: Tr. for Transcript, GC Exh. for General Counsel exhibits, and R. Exh. for Respondent exhibits. This case was heard in Fort Worth, Texas before the Honorable ALJ Robert A. Ringler on November 28, 2017, based on an unfair labor practice charge in Case 16-CA-195335 filed by Mary Harokopus, attorney for Dora S. Camacho, on March 21, 2017. (GC Exh. 1(a)). On July 27, 2017, the Regional Director for Region 16 issued a Complaint and Notice of Hearing in Case 16-CA-195335. (GC Exh. 1(c)). On November 7, 2017, the Regional Director issued an Amended Complaint and Notice of Hearing. (GC Exh. 1(i)). Respondent filed its Answer to the Amended Complaint and Notice of Hearing on November 20, 2017. (GC Exh. 1(l)).

<sup>3</sup> In its Exception 1, Respondent excepts to the ALJ's finding that the Charging Party's name is Doris Camacho. The General Counsel agrees that the Charging party's name is Dora S. Camacho, not Doris Camacho.

<sup>4</sup> In its Exception 2, Respondent disputes the ALJ's finding that Camacho's firing was not alleged to be unlawful, citing the dismissal letter issued to Camacho's attorney on April 27, 2017 in Case 16-CA-194387. The Regional Director's decision in that case does not impact the allegations in the case at hand, and the Amended Complaint, along with the record evidence, support that Camacho's firing is not alleged to be unlawful in this case. (GC. Exh. 1(i)).

obtain CME credits. (Tr. 68, LL. 3-19). As an administrative assistant, Camacho had access to Respondent's computer systems, which contained information about the physicians participating in CME opportunities, program metrics, vendor information, and budget information. (Tr. 73, LL. 3-25; 74, LL. 1-14). Respondent's Human Resources Manager Lisa Smith testified that Camacho was also exposed to patient health information by virtue of working in a hospital setting. (Tr. 75, LL. 12-25; 76, LL.1-7). Smith testified that if confidential patient information were divulged, it would harm Respondent, basing her conclusion on her preference that her own health information remain confidential, as well as Respondent's "culture of confidentiality." (Tr. 76, LL. 14-25; 77, LL. 2-15). Smith also testified about the importance of the hospital's reputation; basing her conclusion on her own experience obtaining positive medical treatment with Respondent. (Tr. 78, LL. 13-25; 79, LL. 1-6).

After Camacho's termination, Respondent's Human Resources manager mailed her a proposed severance agreement, which it termed a "Confidential Separation Agreement and General Release."<sup>5</sup> (GC Exh. 2; Tr. 32, LL. 8-13, 19-25; 33, LL. 15-19). The proposed Separation Agreement included three provisions at issue in this proceeding:

**No Participation in Claims:** CAMACHO agrees that, unless compelled to do so by law, CAMACHO will not pursue, assist or participate in any Claim brought by any third party against BSWH or any Released Party. CAMACHO agrees, unless compelled otherwise by an order from a court of competent jurisdiction, to notify BSWH upon learning that CAMACHO is identified as a witness in any case in which she might be requested or compelled to testify against BSWH or any Released Party.

**Confidentiality:** CAMACHO agrees that she will not disclose any information regarding the existence or substance of this Agreement, directly or indirectly, except: (i) to members of her immediate family, provided that they agree to maintain confidentiality as set out herein; (ii) as may be necessary to obtain professional legal and/or tax advice, provided that any legal or tax advisors agree to maintain confidentiality as set out herein; and (iii) as required by applicable law or as necessary to enforce this Agreement. CAMACHO further agrees that neither she nor her immediate family members, attorneys or tax advisors shall disclose any of the terms or provisions of this

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<sup>5</sup> In its Exception 3, Respondent excepts to the ALJ's finding that Respondent offered Camacho a *Confidential Settlement Agreement and General Release*. The General Counsel agrees that the document in question was, in fact, entitled *Confidential Separation Agreement and General Release*. (GC. Exh. 2).

Agreement to any other third party without the express written consent of BSWH, unless compelled to do so by law. CAMACHO may disclose that the terms of her separation from BSWH are part of a mutually satisfactory agreement which is covered by a confidentiality clause, and, therefore she is not at liberty to discuss the terms of her agreement or her separation.

CAMACHO understands and agrees that she must continue to keep secret and confidential and not to utilize in any manner all trade secrets and proprietary and confidential information of BSWH or any of the Released Parties made available to her during her period of employment with BSWH or any of the Released Parties, including without limitation, information concerning operations, finances, pricing, employees, patients, clients, customers, vendors, donors and prospect lists; proprietary information; computer passwords and program designs; proprietary computer software designs and hardware configuration; proprietary technology; new product and service ideas; business plans; marketing, trading, research, and sales data; customer, prospect, vendor, or personnel lists; financial and other personal information regarding customers, patients, and employees; confidential information...about other companies and their products, strategic plans or strategies; information about any claim or lawsuits; information protected by the attorney-client, work product or investigative privileges; and any other information expressly designated "Confidential" (all such information being collectively referred to herein as "Confidential Information").

CAMACHO agrees not to cause or to permit the disclosure, reproduction, use, transfer, or dissemination of any information concerning or related to the Confidential Information to any third-party including, but not limited to, any third-party BSWH considers to be a competitor, potential competitor, or associate or client of a competitor or potential competitor (collectively "Competitor"), without the prior written consent of BSWH. In all cases where CAMACHO is not certain whether information is Confidential Information or whether a third-party is a Competitor; CAMACHO shall assume that the information is Confidential Information and that the third-party is a Competitor. CAMACHO agrees to use her best efforts to protect the Confidential Information.

**Non-Disparagement:** CAMACHO agrees that she shall not directly or indirectly make, repeat or publish any false, disparaging, negative, unflattering, accusatory, or derogatory remarks or references, whether oral or in writing, concerning BSWH and the Released Parties collectively and/or individually, or otherwise take any action which might reasonably be expected to cause damage or harm to BSWH and the Released Parties collectively and/or individually.

In agreeing not to make disparaging statements, CAMACHO agrees and acknowledges that she is making, after conferring with counsel, a knowing, voluntary and intelligent waiver of any and all rights she may, have to make disparaging comments, including rights under the First Amendment to the United States Constitution and any other applicable federal and state constitutional rights.

CAMACHO further agrees that in the event of a breach of this non-disparagement provision, BSWH may also pursue other remedies at law or in equity in the event of any breach of this Agreement. CAMACHO agrees and acknowledges that a court of competent jurisdiction may enter an injunction to prevent her from violating this Section and that such injunction would not constitute a prior restraint on constitutional rights and that she is waiving her legal right to make such an argument.<sup>6</sup>

(GC Exh. 2). Camacho did not sign the Separation Agreement. (Tr. 34, LL. 12-14).

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<sup>6</sup> The ALJ found the *Non-Disparagement* provision of the Separation Agreement lawful. (JD slip op. at 4, LL. 26-31). This conclusion will be addressed in the General Counsel's cross-exceptions and brief in support.

Between September 21, 2016 and November 2, 2017, Respondent issued Agreements to other employees that included the same or substantially similar provisions as those quoted above. (GC Exhs. 2, 3). Twenty-six of Respondent's separated employees signed the agreement offered to them, and remain bound by its terms. (GC Exh. 3). Twenty-four of those employees were offered and signed Workforce Realignment Agreement and General Releases (hereinafter Realignment Agreements), while two employees signed Confidential Separation Agreement and General Releases (hereinafter Separation Agreements) almost identical to that offered to Camacho. (GC Exh. 3).<sup>7</sup> Respondent's Human Resources department presented the Separation and Realignment Agreements to employees, answered their questions or referred them to Respondent's Legal Department, and gave employees the opportunity to review the Agreements on their own before deciding whether to sign or let the offer expire. (Tr. 49-52; 53, LL. 1-4; GC. Exh. 2, 3).

### **III. ARGUMENT**

Respondent filed 28 exceptions in this matter. Respondent's Exceptions may be grouped as follows: (A) Minor and technical issues, and derivative exceptions depending entirely on other exceptions (Exceptions 1-3, 5, 22 and 23); (B) Challenges to the premise that an employer can violate the Act by offering former employees severance agreements (Exceptions 20 and 21); (C) Challenges to the scope of the violation—whether this case is about the Charging Party or a larger class of employees (Exceptions 6 and 22-28); and (D) Substantive challenges to whether the provisions at issue unlawfully restrict Section 7 rights (Exceptions 4 and 7-19). The technical exceptions have been addressed above and will be discussed no further. Exceptions 22 and 23

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<sup>7</sup> Contrary to Respondent's assertion in Exception 5, the *No Participation in Claims* and *Confidentiality* clauses vary only slightly between the Separation Agreements and Realignment Agreements, and those differences do not change the meaning of the provisions for purposes of their legality under the NLRA. Slight differences between the Agreements within the sections relevant to this proceeding will be noted below.

are derivative exceptions, challenging the legal conclusions and remedies based on arguments made in other exceptions and are not addressed herein. In the following paragraphs, Counsel for the General Counsel will address Respondent's challenges to the premise of the violation, the scope of the violation, and finally, whether the provisions at issue unlawfully restrict employees' rights.

**A. Offers of Severance Agreements to Discharged Employees May Violate the Act**

The ALJ, relying upon well-established Board law, found that by offering an agreement containing unlawful provisions to Camacho and by offering and entering into such agreements with other employees, the Respondent violated Section 8(a)(1) of the Act. Although Respondent admits that it offered the severance agreement to Camacho and does not deny that it entered into similar agreements with other employees, Respondent contends that, regardless of the specific terms of the agreement, it did not violate the Act.

In Exceptions 20 and 21, Respondent raises four arguments against the premise that its actions could have violated the Act. First, Respondent argues generally that the Board favors private dispute resolution between parties. Next, Respondent contends that its offer to Camacho did not violate the Act because Camacho did not accept it. Third, Respondent argues that an adverse subjective reaction of the employee to the offer is necessary to find a violation. Fourth, Respondent contends that offers to discharged employees cannot violate the Act because discharged employees are not employees under the Act. All four of Respondent's contentions on this topic are misguided and should be rejected.

*1. The Board's policy of favoring private resolution is not unlimited*

Although Respondent is correct in its assertion that Board policy favors private dispute resolution between parties, Respondent is misguided in its suggestion that the Board should not find violations where private agreements restrict employee rights. As the Board recently

explained in *S. Freedman & Sons*, “[t]he Board favors private, amicable resolution of labor disputes, whenever possible.” 364 NLRB No. 82, slip op. at 2 (internal quotation omitted), enforced No. 16-2066, 2017 WL 5197406 (4th Cir. Nov. 7, 2017). To that end, the Board “has found that an employer may condition a settlement on an employee’s waiver of Section 7 rights *if the waiver is narrowly tailored to the facts giving rise to the settlement* and the employee receives some benefit in return for the waiver.” *Id.* (emphasis supplied). Since at least 1979, the Board has evaluated whether any waiver of Section 7 rights in the terms of a settlement agreements is appropriately tailored to the events giving rise to the issuance of the agreement. *See Coca-Cola Bottling Co. of Los Angeles*, 243 NLRB 501, 502 (1979).

2. *Whether or not accepted, a separation agreement offer containing unlawful provisions may violate the Act*

The Board should similarly disregard Respondent’s contention that it did not violate the Act because Camacho refused to enter the separation agreement. Board law is clear that such offers, whether or not accepted, may violate the Act. *See Metro Networks, Inc.*, 336 NLRB at 66-67.

3. *The subjective response of the employee to a separation agreement offer is irrelevant*

Respondent relies on *Metro Networks* for the proposition that the testimony of the employee receiving the offer and some type of adverse, subjective reaction to it is necessary. Respondent arrives at this conclusion through a misreading of the Board’s finding of fact with respect to whether an offer had been made in that case.

In *Metro Networks*, the Board found that the employer offered an agreement to one employee (Brocklehurst) but did not offer the agreement to another employee (Zoltowski). The record provides few details about the alleged offers. Regarding Zoltowski, the ALJ summarily concluded in his description of the facts that “each was to receive severance pay on [agreement

to certain terms]” and in his analysis, he wrote that “Respondent offered each severance pay.” *Id.* at 70, 72. With respect to Zoltowski, the Board disagreed that an offer had been made, noting that the employer “neither showed her the severance agreement nor told her about” the terms. *Id.* at 66, n. 14. Respondent attempts to extrapolate from the Board’s factual finding that an offer had not been made in *Metro Networks* some type of subjective state of mind element that was not proven in this case because Camacho did not testify. The *Metro Networks* Board revealed no such requirement, but was merely applying well-established general principles of contract law. *Cf. Pittsburgh-Des Moines Steel Co.*, 202 NLRB 880, 888 (1973) (“Though technical rules of contract law do not necessarily control decisions in labor-management cases, normal ‘offer and acceptance’ rules are generally considered determinative with respect to the existence of collective-bargaining contracts.”); *Bennett Packaging Co.*, 285 NLRB 602, 698 (1987) (same). Under the Restatement (Second) of Contracts, an offer or promise has three elements: (1) a promise, or a manifestation of intent to act or refrain from acting in a specified way; (2) a promisor, who manifests the intention; and (3) a promisee to whom the manifestation is addressed. While it appears that the alleged promise/offer in *Metro Networks* failed at the third element, as there was no evidence that the promise was conveyed to Zoltowski, there is no such problem in the case at hand.

Camacho’s testimony may have been necessary if, like in *Metro Networks*, there was a dispute as to whether Respondent had made an offer. However, Respondent has never denied that it made Camacho an offer. *See* Respondent’s Motion for Summary Judgment (“After her termination, BUMC offered Camacho a Confidential Separation Agreement and General Release”) and Respondent’s Answer to the Amended Complaint (“...when she was offered”). In fact, at trial, Respondent’s own witness testified that Respondent offered Camacho the agreement

(Tr. 32, LL. 8-13). Respondent's contention that Counsel for the General Counsel was required to call Camacho, who was offered the agreement and filed a charge in response to it, as a witness at trial to prove that an offer was made and a reaction by Camacho made to that offer, is a misinterpretation of *Metro Networks* that the Board should reject.

4. *Camacho and other former employees are employees under Section 2(3) of the Act.*

Contrary to Respondent's assertions otherwise, Camacho remained an employee entitled to the protection of the Act even after Respondent fired her. Pursuant to Section 2(3) of the Act and longstanding Board precedent, Camacho and other terminated employees remained statutory employees when Respondent offered them the Agreements after their terminations. It is well settled that the Act's protections extend to "members of the working class generally," to include "former employees of a particular employer." *Little Rock Crate & Basket Co.*, 227 NLRB 1406, 1406 (1977) (citing *Briggs Manufacturing Co.*, 75 NLRB 569, 570, 571 (1947)). In *Briggs Mfg. Co.*, the Board clarified that Section 2(3) of the Act provides that the term "employee" includes "any employee," not limited to the employees of a particular employer, unless the Act explicitly states otherwise. 75 NLRB at 570. The Board has consistently extended the Act's protections to former employees whose employment with a particular employer was terminated, either lawfully, unlawfully, voluntarily, or otherwise. *See, e.g., M.D.V.L., Inc.*, 363 NLRB No. 190, slip op. at 1, n. 2 (May 11, 2016) (rejecting respondent's argument that former employee was no longer employee under the Act after voluntary resignation); *Cowabunga, Inc.*, 363 NLRB No. 133, slip op. at 3 (Feb. 26, 2016) (rejecting respondent's argument that individual no longer employed by respondent at time it filed motion to compel arbitration agreement was no longer an employee under the Act); *Little Rock Crate & Basket Co.*, 227 NLRB at 1406 (finding former employee maintained status as employee after termination where respondent discharged him in

the morning; he remained on premises and distributed union literature). Like the discharged employee in *Little Rock Crate & Basket Co.*, Camacho was a recently terminated employee when Respondent offered her the Separation Agreement, and maintained her rights under the Act.

Respondent's argument suggests employees' Section 7 rights only last for some short period of time after the employment relationship is severed, but this is contrary to longstanding Board precedent. Thus, Respondent seeks to distinguish *Little Rock Crate & Basket Co.* from the case at hand in that in *Little Rock*, the former employee had been terminated "moments before" the interference, whereas in this case, the interference came "after" her discharge. Respondent cites no support for its theory that a closing window of employee rights follows a termination, nor does it suggest what its proper contours should be.

The cases cited by Respondent as standing for the proposition that former employees are no longer afforded the Act's protection do not involve discharged employees and are wholly distinguishable from the case at hand. The categories of non-employees Respondent cites include unpaid staff, certain job applicants, and disabled employees with a primarily rehabilitative relationship with their employer. *See respectively WBAI Pacifica Foundation*, 328 NLRB 1273 (1999) (finding unpaid staff do not work for hire or depend on employer for their livelihood or economic standards; therefore Act's concern with balancing bargaining power between employer and employee not present); *Toering Electric Co.*, 351 NLRB 225 (2007) (finding applicants for employment entitled to Section 2(3) protection where they are genuinely interested in seeking to establish employment relationship), and *Brevard Achievement Center*, 342 NLRB 982 (2004) (finding Act intended to apply to primarily economic relationships, not rehabilitative). The distinction between those classes of employees and the former employees in

this case are obvious and far-reaching, and Respondent's attempt at arguing that Camacho and other former employees did not maintain the Act's protection is misguided.

It is undisputed that Camacho and other former employees worked for Respondent for pay, not rehabilitation or on a voluntary basis, up to and until the time of their separations, when they were offered the Agreements. Board law makes clear that former employees who remain active in the workforce maintain the protections of the Act, including terminated employees, laid off employees, and those who voluntarily quit. *See Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 167-168 (1971) (noting legislative history of Section 2(3) "indicates that the term 'employee' is not to be stretched beyond its plain meaning embracing only those who work for another for hire," and distinguishing between individuals who were "members of the active work force available for hire," including applicants for employment, registrants for hiring halls, and individuals who have quit or whose employers have gone out of business, all of whom the Board considers employees, and retired 'pensioners' in that case). Camacho and other former employees maintain the Act's protection after their separation from employment, and are entitled to relief for the harm they have suffered, or may suffer, because of their former employer's unlawful action.

Based on the foregoing, Respondent's arguments against the theory of the allegation have no weight and should be disregarded.

**B. The Offer to Camacho was not Isolated and Separation and Realignment Agreements Offered to Other Employees are at Issue**

Respondent's attempts, in Exceptions 6 and 22-28, to cast this case as one of limited scope, are similarly misguided. The evidence in this case establishes that the violation here is broader than a single rejected offer to one employee at one time. The record makes clear that, as alleged in the charge and the complaint, Respondent regularly offered and entered into

agreements including similar provisions with other employees. Those agreements affect the rights of the former employees who entered into them as well as the current employees who are effectively cut-off from the former employees.

Despite its protests about the scope of the violation alleged, Respondent does not deny that it offered and entered into severance agreements including the two provisions at issue with at least twenty-seven employees, nor does Respondent suggest that it has ceased this practice. Nonetheless, Respondent employs various arguments to attempt to frame this case as being about only one employee, Camacho, who did not enter into an agreement containing the terms at issue.

Rather than affirmatively deny that its regular practice was to offer outgoing employees severance agreements, Respondent argues that allegations and evidence about that practice should not be considered. Respondent argues that the complaint allegations pertaining to the practice were insufficiently related to the charge, that the subpoena which caused it to produce agreements entered into by twenty-six employees should not have been upheld, and that the agreements *which it produced* have not been authenticated. Respondent's arguments fail as the complaint allegations are related to the charge allegations, the subpoena was properly upheld, and the evidence that it produced is properly relied upon.

*1. The charge and the complaint fairly put respondent on notice*

Respondent has been on notice, since the charge was filed on March 21, 2017, that the provisions of its severance agreements were the subject of unfair labor practice allegations. Respondent's argument that the charge does not closely enough match the complaint should be rejected. Unfair labor practice charges "do not [] serve the purpose of a pleading" and are sufficient when they "merely set[] in motion the machinery of an inquiry." *NLRB v. Indiana & Michigan Electric Company*, 318 U.S. 9, 17 (1943). Rather than the charge, it is the complaint

issued by the Board's General Counsel which is the pleading in unfair labor practice hearing, and once the complaint issues, "the question is only the truth of its accusations." *Id.*

In considering the sufficiency of a charge to support an allegation in a complaint, the Board has generally required that the complaint allegation be related to and arise out of the same situation as the conduct alleged to be unlawful in the underlying charge, although it need not be limited to the specific violations alleged in the charge. *Nickles Bakery of Indiana, Inc.*, 296 NLRB 927 (1989). In order to determine whether the allegations in the complaint are sufficiently related to those in the charge, the Board applies the "closely related test" comprised of the following factors: (1) whether the allegations involve the same legal theory; (2) whether the allegations arise from the same factual circumstances; and (3) whether the respondent would raise similar defenses to the allegations. *See Carney Hospital*, 350 NLRB 627, 639 (2007) (citing *Nickles Bakery*, 296 NLRB at 928; *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988)). Applying that test, the charge and complaint are sufficiently related.

In this case, the charge, which was filed on March 21, 2017, alleges that "[s]ince about the past six months, [Respondent] has interfered with, restrained, and coerced its employees in the exercise of rights protected by Section 7 of the Act by maintaining an unlawful and/or overly-broad confidential separation agreement and general release." Thus, the timespan of the charge reached back six months prior to its filing (September 21, 2016), referenced employees in the plural, and alleged that Respondent's severance agreements contained unlawful provisions. The complaint similarly alleged that since "about October 4, 2016, Respondent has issued Separation Agreements to employees containing" the provisions at issue. The charge allegations and the complaint allegations involve the same legal theory, the allegations arise from the same

factual circumstances (Respondent's issuance of agreements containing the same provisions to employees), and the defenses to the allegations are the same.

Respondent contends that the scope of the complaint should be limited because the charge language differs from the complaint language and because the charge was filed by only one of the twenty-seven identified employees. These contentions should be rejected. Respondent's quibble with the difference between the "maintain" language of the charge and the "issue" language of the complaint attempts to hold the charge to the level of a pleading; a standard that the Court rejected in 1943. Nor is Respondent's contention that scope should be limited to Camacho because she alone filed a charge persuasive. It is well established that persons alleged to have been discriminated against in a charge need not be signatories to the charge in order for the charge to be valid. *See Wellington Industries*, 358 NLRB 783, 783 n. 2 (2012) (rejecting assertion that charging party union lacked standing). Moreover, where an alleged violation involves a class of employees, the individuals need not be named during the hearing, let alone in the text of the charge. *See Regional Import and Export Trucking Co.*, 292 NLRB 206 (1988), reversed and remanded on other grounds by *Truck Drivers Local Union No. 807, I.B.T. v. Regional Import & Export Trucking Co., Inc.* 944 F.2d 1037 (2d Cir. 1991). In *Regional Import Trucking*, the Board explained that where "there is discrimination against a class of employees, the General Counsel need not name each of them at the unfair labor practice hearing stage of the proceeding," because, if necessary, "their identity may be resolved at the compliance stage." 292 NLRB 206, 231 (1988), *enfd mem. sub nom. NLRB v. Truck Drivers Local Union No. 807*, 914 F.2d 244 (3d Cir. 1990).

Respondent's reliance on *Ajioma Lumber, Inc.* is unavailing. In that case, the charge allegations specifically named discriminatees and the General Counsel later unsuccessfully

attempted to expand the violation to include a broader group of employees. *See Ajioma Lumber, Inc.*, 345 NLRB 261, 263 (2005). Unlike the charge and complaint in *Ajioma Lumber*, the charge and complaint here both refer to “employees.” Accordingly, this is not a case where a specific group of discriminatees was later expanded to include a general group; at all times the alleged discriminatees were broadly defined as “employees.” Thus, Respondent’s argument against the sufficiency of the relationship between the charge and the complaint falls flat.

2. *The ALJ properly ordered Respondent to comply with the subpoena*

Prior to the hearing, Counsel for the General Counsel issued Respondent a subpoena duces tecum requiring it to produce copies of separation agreements it had entered into with employees for the period encompassed by the charge. Respondent filed a petition to revoke the subpoena, arguing that the agreements of employees besides Camacho were beyond the scope of the litigation. At the same time, Respondent steadfastly maintained its “tree falling in the woods” defense with respect to Camacho’s claim: that it had merely offered an agreement to Camacho, who had not entered into it, and so how could employees’ rights have been restrained? Respondent’s production in response to the subpoena fairly well answers that claim.

The issue of whether Respondent’s conduct was isolated or part of a larger practice was important to establishing the scope of the violation as well as the scope of the remedy. Thus, the ALJ properly denied Respondent’s petition to revoke and required Respondent to produce responsive documents, including all separation agreements entered into with employees for the six-month period prior to the filing of the charge. Respondent’s production revealed, as alleged in the complaint, that its offer to Camacho was not an isolated event. Accordingly, Respondent’s defense that Camacho herself did not enter the agreement, in addition to being legally inaccurate, was made factually irrelevant by the fact twenty-six other employees did enter such agreements.

3. *The ALJ properly relied upon the subpoenaed documents*

In its continuing effort to frame the case as being only about Camacho, Respondent also challenges the ALJ's decision to rely upon the very documents that it (Respondent) produced on the grounds that they were not authenticated.<sup>8</sup> To be clear, Respondent does not affirmatively argue that the documents are inauthentic or even that there are any questions as to their genuineness. Rather, Respondent misapplies the Federal Rules of Evidence and Board law in making a purely technical argument for exclusion. Respondent's arguments here fail for a few reasons; first, because the ALJ's ruling as to the authenticity of the documents was correct; second, because Respondent failed to preserve the issue through objection; third, because as the party producing the documents, Respondent must present an actual challenge to their authenticity rather than merely question the authentication process to preclude them.

In order to authenticate a document, the Federal Rules of Evidence require "evidence sufficient to support a finding that the matter in question is what its proponent claims." Fed. R. Evid. 901(a). Witness testimony that a document is what a party claims it to be is only one of several, non-limiting illustrations of methods of authentication listed in the Federal Rules of Evidence. *See id.* at 901(b)(1). *See also Francisco v. Verizon S., Inc.*, 756 F. Supp. 2d 705, 715 (E.D. Va. 2010), *aff'd*, 442 F. App'x 752 (4th Cir. 2011) ("authentication may be sufficient based on extrinsic evidence, as well as "[a]pppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.") In this case, the

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<sup>8</sup> It is unclear what Respondent is asking the Board to do with respect to this exception. If the documents were truly of questionable authenticity, the appropriate action would be to remand the case for more evidence as to that issue. *See e.g. American Beauty Baking Co.*, 198 NLRB 327 (1972) (after remand for further examination of authenticity of cards previously admitted), *John S. Barnes Corp.*, 180 NLRB 911, 913 (1970), *enfd.* 77 LRRM 2372 (D.C. Cir. 1971), *cert. denied* 404 U.S. 854 (1971) (same). Yet, Respondent seems to request that the Board simply ignore the allegedly unauthenticated evidence.

circumstances well supported the ALJ's finding that the documents were what the General Counsel asserted that they were.

Moreover, Respondent failed to properly object to authenticity at trial. *See The Gulfport Stevedoring Ass'n*, 363 NLRB No. 10, slip op. at 1, n. 1 (Sept. 25, 2015). It is generally understood that a "party owes the trial court the obligation of a sound, clear and articulate motion, objection or exception, so as to permit the trial judge a chance to consider the legal contention or to correct an error already made." *Shields v. Campbell*, 559 P.2d 1275, 1279 (Or. 1977). *See also State v. Wilson*, 918 P.2d 826, 834-835 (Or. 1996), *cert. denied* 519 U.S. 1065 (1997) (failure to argue and cite particular objection to admission of hearsay evidence at trial precludes raising it on appeal). "Although there is no bright-line rule to determine whether a matter has been raised below, 'a workable standard' is that the argument must be raised sufficiently for the trial court to rule on it." *State of Ariz. v. Components, Inc.*, 66 F.3d 213, 217 (9<sup>th</sup> Cir. 1995), *citing In re E.R. Fegert, Inc.*, 887 F.2d 955, 957 (9th Cir. 1989). *See also Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901, 908 (9th Cir. 2004). Reviewing bodies will not address issues raised in passing or unsupported by authority or persuasive argument. *Cowiche Canyon Conservancy v. Bosley*, 828 P.2d 549, 553 (Wash. 1992). In this case, Respondent's counsel did not make a clear and timely objection.

The witness through whom the severance agreements were introduced into evidence, Respondent's Human Resources representative Lisa Smith, agreed that the documents had been produced in response to a subpoena. She was familiar with three of agreements included and testified that all of the documents had been produced by Respondent's Legal Department. (Tr. 41, LL. 5-7). Smith also agreed that an agreement containing the relevant portions is regularly given to outgoing employees, including both managers and rank and file employees, in a variety

of circumstances. (Tr. 55 LL. 5-25). Smith testified that such agreements are maintained in her department as well as by the Legal Department. (Tr. 56, LL. 18-20). Smith testified that the documents she had not seen before were similar, in relevant part, to the three with which she was familiar. (Tr. 57, LL. 10-12).

At trial, Counsel for Respondent did not make a clear objection to the authenticity or even to the authentication of the severance agreements. When Counsel for the General Counsel moved to introduce Exhibit 3 into evidence, Counsel for Respondent did not clearly voice an objection. After Counsel for the General Counsel moved to admit the exhibit, the ALJ asked for Respondent's positions as to whether another witness would be necessary for the purpose of authentication. (Tr. 63, LL. 17-18). Respondent's Counsel noted that her witness had only seen three of the documents. (Tr. 63, LL. 19-22; Tr. 64 LL. 1-6). This statement was not clearly an objection and it did not address whether the circumstances surrounding the documents supported a finding that the severance agreements were what the General Counsel claimed they were. The ALJ then asked Respondent's Counsel whether its Custodian of Records was present. (Tr. 64, LL. 7-8). Respondent's Counsel equivocated as to whether it would be necessary for the Custodian of Records to testify.

At that point, the ALJ admitted the severance agreements, ruling that under the circumstances, including that they had been produced in response to subpoena, they had the "essence of reliability about them." (Tr. 64, LL. 12 – 25; Tr. 65, LL. 1-5) After the ALJ admitted the agreements, Respondent's Counsel said nothing.

In this case, in light of the fact that the witness was familiar with some of the documents, that the documents were nearly identical in relevant ways, that the witness was familiar with the regular use and storage of the documents, and where the Respondent had produced them in

response to a subpoena, the ALJ correctly found them to be what the General Counsel claimed they were. Nor did Respondent properly object to this ruling.

Respondent had earlier argued that the witness did not have personal knowledge of all of the agreements. In making this argument, she had addressed whether the first example listed in Federal Rule of Evidence 901(b) applied. However, she did not address the larger issue: whether in light of all of the circumstances, there were any doubts about authenticity. Moreover, she did not object at the time of the ALJ's ruling. Where Respondent did not clearly state an objection to the ALJ's ruling, it did not preserve its right to appeal the ruling. *Shields v. Campbell*, 559 P.2d 1275, 1279 (Or. 1977).

Indeed, as the party who produced the documents, a contention that the documents are not what the General Counsel contends they are, “would be a hard argument to make.” *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966, 971–72 (C.D. Cal. 2006). Respondent cites scant authority in support of its authentication argument. Chiefly, it relies upon *Washington Fruit & Produce Co.*, which is both irrelevant and factually inapposite. 343 NLRB 1215, 1241 (2004). *Washington Fruit* is irrelevant because the ruling that Respondent references therein is that of an ALJ which was neither excepted to nor discussed by the Board. There, the General Counsel sought to admit an affidavit of an unavailable discriminatee, Ayala, who testified about “excessive supervision and surveillance” on August 8, 1997. *Id.* at 1241-1242. The ALJ received the affidavit but did not rely upon it because of several genuine concerns about its trustworthiness, including that it had not been authenticated. *See id.* Finding the affidavit unreliable, the ALJ dismissed the allegations that were supported by the affidavit. *Ibid.* No party filed exceptions to the ALJ's dismissal and the issue was never put before the Board. *Washington Fruit*, 343 NLRB at 1215, n. 1 (“There were no exceptions to the judge's dismissals

of [the allegations about] the Respondent’s excessive supervision and surveillance on August 8, 1997.”). Given this fact, the ALJ’s ruling on Ayala’s affidavit in *Washington Fruit* has “no precedential value” and is irrelevant to the matter at hand. *Trump Marina Associates LLC*, 354 NLRB 1027, 1027 n. 2 (2009), reaffid. 344 NLRB 585 (2010), enfd. 435 Fed.Appx. 1 (D.C. Cir. 2011).

In addition to being irrelevant, the evidentiary issue in *Washington Fruit* is inapposite to the case at hand. The affidavit in *Washington Fruit* was produced by the same party that was seeking to introduce it; whereas in the case at hand, the evidence at issue was produced, pursuant to subpoena, *by the party opponent seeking to exclude it*. Respondent does not actually claim that the authenticity of the documents is in doubt in any way. If claimed that the documents were inauthentic, it would be claiming that it had not complied with the subpoena. Instead, Respondent hangs its hat on an averred failure to authenticate. Parties producing document pursuant to subpoenas are expected to produce authentic documents and courts have given short shrift to arguments made by parties who dispute the authentication of documents while raising no suspicions as to their authenticity. *See, e.g., E.E.O.C. v. Fred Meyer Stores, Inc.*, 954 F. Supp. 2d 1104, 1117 (D. Or. 2013), on reconsideration in part, (Sept. 19, 2013) (“Documents produced by a party in discovery are deemed authentic when offered by the party-opponent.”); *Sobel v. Hertz Corp.*, 291 F.R.D. 525, 533 (D. Nev. 2013); *BASF Corp. v. Aristo, Inc.*, 872 F. Supp. 2d 758, 769 (N.D. Ind. 2012), on reconsideration in part, 2012 WL 2420999 (N.D. Ind. 2012); *Gregg v. Ohio Dept. of Youth Services*, 661 F. Supp. 2d 842, 853 (S.D. Ohio 2009) (“Courts have held that where a document is produced in discovery, there may be sufficient circumstantial evidence to support its authenticity.”); *Shell Trademark Management BV & Motiva Enterprises, LLC v. Ray Thomas Petroleum Co., Inc.*, 642 F. Supp. 2d 493, 510–11 (W.D. N.C. 2009); *Metro-*

*Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d at 972; *Architectural Iron Workers Local No. 63 Welfare Fund v. United Contractors, Inc.*, 46 F. Supp. 2d 769, 772 (N.D. Ill. 1999) (“The case law in this circuit is clear: documents produced in response to discovery are self-authenticating.”); *In re Greenwood Air Crash*, 924 F. Supp. 1511, 1515 (S.D. Ind. 1995) (“Production of a document by a party constitutes implicit authentication of that document.”). For a party to successfully challenge the authenticity of documents that it has produced, it must genuinely cast doubt on the authenticity of the documents. *See, e.g., Castro v. DeVry University, Inc.*, 786 F.3d 559, 578 (7th Cir. 2015) (producing party did not concede that the documents at issue were accurate); *Railroad Management Co., LLC v. CFS Louisiana Midstream Co.*, 428 F.3d 214, 219–20 (5th Cir. 2005) (same).

Accordingly, where the documents were produced by Respondent, the authenticating witness was familiar with some of a group of identical documents as well as their creation, use and storage, and where Respondent provided neither a timely objection nor evidence to suggest otherwise, the ALJ did not err in finding the separation agreements Respondent entered into with other employees to be authentic.

### **C. The Provisions of the Separation Agreements Unlawfully Restrict Section 7 Rights**

The question that is properly before the Board is whether separation agreements violate the Act where they contain the terms at issue in this case. In analyzing that question, the ALJ properly cited to *Metro Networks*, a lead case for analyzing whether settlement terms interfere with rights protected by the Act, but he did so in the context of *Boeing*, which provides a framework for evaluating employment rules, policies and procedures governing current employees. Considering the terms of the severance agreements as though they were employment rules, the ALJ determined that the provisions’ impact on employees’ NLRA-protected rights

outweighed Respondent's justifications. This is a similar finding to the one that Counsel for the General Counsel now asks the Board to make: that the terms of the severance agreement were unlawful because they conditioned receipt of severance payment upon the waiver of Section 7 rights without narrowly tailoring the waiver to the facts leading up to the employee's separation from his or her employment with Respondent. Respondent agrees with the ALJ that *Boeing* is the controlling case, but in Exceptions 4 and 7-19, disagrees with the result the ALJ reached. The General Counsel agrees with the ALJ's ultimate conclusion that the severance agreements impermissibly infringed on employee rights, but notes herein that the analytical framework described by the Board in *S. Freedman & Sons* and cases cited therein, rather than *Boeing*, provides the proper framework for the inquiry.

As noted above, the Board uses a different analytical framework specific to non-mandatory agreements offered to employees by employers which predates and was unaffected by both *Lutheran Heritage* and *Boeing*. That framework permits no-participation in claims and confidentiality provisions in severance agreements, but only if they are narrowly tailored so as not to interfere with the signatory's ability to assist the Board with the investigation of other employees' charges against the employer, or to file charges with the Board in the future regarding unrelated matters. The *No Participation in Claims* and *Confidentiality* provisions at issue in this case do not meet that standard, but instead broadly restrict signatory employees from assisting in the Board's investigative processes. The Employer therefore violated Section 8(a)(1) by issuing separation agreements including those provisions to its employees.

When deciding whether work rules unlawfully interfere with protected activity, the Board does not apply the principles of contract law, but rather approaches them with a practical balancing test. Under the framework set out in *Boeing*, the Board weighs the nature and extent

of the potential impact on NLRA rights against the legitimate justifications associated with the rule. In *Boeing*, the Board distinguished between the lawful maintenance of rules whose breadth could reasonably be construed to encompass protected activity and the unlawful application of those rules against protected activity. See 365 NLRB No. 154, slip op. at 16. Thus, in the interest of providing employers with a reasonable means of communicating legitimate expectations in the working world where employment rules are guidelines which cannot cover every situation, the Board allows for some degree of imprecision in those rules.

Severance agreements are neither the product of collective bargaining nor do they require the flexible and practical approach of work rules. Severance agreements are simply contracts between individual employees and their employers. Like all contracts, they should be interpreted “based on their plain and literal meaning so as to avoid interference with the private bargain.” *NLRB v. United Technologies Corp.*, 884 F.2d 1569, 1575 (2d Cir. 1989) (citation omitted). If a contract is reasonably interpreted as prohibiting some type of conduct, the party engaging in such prohibited conduct should expect that a contractual remedy will be pursued by the other party. Likewise, a party who has entered into a contract providing that another party will refrain from some activity should rest comfortably knowing that the other party will so refrain. An employer may lawfully negotiate for the waiver of certain employee’s Section 7 rights in a severance or separation agreement, as long as that waiver is narrowly tailored to the events giving rise to the separation and issuance of the agreement. The analysis of whether separation agreements include lawful waivers of Section 7 rights is distinct from the analysis of whether a work rule unlawfully infringes upon employees’ exercise of Section 7 rights in the workplace due to the differing nature of the documents at issue. Unlike work rules, the lawfulness of severance agreements does not hinge on whether legitimate reasons for broad language justify the

perceived inclusion of rights that cannot be waived, but upon whether a right waived by any language may be waived in the particular circumstance. *See S. Freedman & Sons*, 364 NLRB No. 82, slip op. at 2, n. 6 (noting the ALJ incorrectly analyzed settlement under a work rule framework) as compared to *Minteq International, Inc.*, 364 NLRB No. 63, slip op. at 5 (July 29, 2016) (holding that because a non-compete and confidentiality agreement was “imposed...on new employees as a condition of employment, they are properly treated as the Board treats other unilaterally implemented workplace rules” and analyzed under *Lutheran Heritage*, the Board’s framework at that time). To be lawful, such a waiver must be “narrowly tailored to the facts giving rise to the settlement” and “the employee receives some benefit in return for the waiver.” *S. Freedman & Sons*, 364 NLRB No. 82, slip op. at 2. Such an agreement can pertain only to the incident giving rise to the agreement, and an employer may *not* offer an employee an agreement that “prevent[s] a signatory employee from exercising rights that are unrelated to the facts giving rise to the settlement.” *Id.*<sup>9</sup>

In this case, the terms of Respondent’s separation agreements call for broad waivers of Section 7 rights which were not narrowly tailored to the facts giving rise to the settlements. The record established, as found by the ALJ, that the provisions at issue are a normal part of every severance agreement offer made by Respondent. Therefore, there can be little argument that these terms were tailored to any of the circumstances underlying the agreements. The issues raised in Respondent’s exceptions are whether the *No Participation in Claims* and

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<sup>9</sup> The Board has consistently held agreements do not violate the Act where an employee agrees to trade away claims or potential claims in exchange for a benefit, as long as the agreement pertains only to the incident giving rise to the agreement. *See, e.g., Coca-Cola Bottling Co. of Los Angeles*, 243 NLRB at 502; *First National Supermarkets*, 302 NLRB 727, 728 (1991). *See also Hughes Christensen Co.*, 317 NLRB 633, 634 (1995); *Regal Cinemas*, 334 NLRB 304, 306 (2001) (explaining that a “severance-limited release agreement” that pertained only to the claims that arose from the termination was lawful because it did not “improperly discourage[ ] [employees] from seeking to vindicate their legal rights, including access to the Board.”), *enforced*, 317 F.3d 300 (D.C. Cir. 2003); *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB 614, 616 n. 12 (2007).

*Confidentiality* provisions restrict employee rights and whether such rights may be waived under the circumstances.

*I. No Participation in Claims (Exceptions 7, 8 and 9)*

The *No Participation in Claims* provision in this case explicitly prohibits a signatory employee from voluntarily “participating in any claim brought by any third party”<sup>10</sup> against the Respondent. The ALJ found that this provision amounted to a “litigation ban” that “encompasses individuals, who might provide voluntary information to Board agents in further of ULP charges filed against Baylor.” (JD slip op. at 3, LL. 37-39). Respondent’s objections to the ALJ’s interpretation should be disregarded.

Respondent contends that because no employees testified with regard to these provisions, there is no evidence that they would be interpreted to encompass the litigation ban found by the ALJ. Respondent reads an inexistent requirement into *Boeing* that evidence of impact must be presented. *See* 365 NLRB No. 154, slip op. at 15 (“Parties *may* also introduce evidence regarding a particular rule’s impact on protected rights”). Respondent’s objection clearly attributes to the subjective impressions of employees an importance that is not recognized under Board law. *See, e.g., Miami Systems Corp.*, 320 NLRB 71 fn. 4 (1995), *enfd.* in relevant part and remanded 111 F.3d 1284 (6th Cir. 1997) (employees’ subjective responses to alleged interrogation not relevant).

In examining similar clauses, the Board has found that such broad terms prevent employees from assisting the Board as described by the ALJ. In *Metro Networks*, the Board

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<sup>10</sup> As Respondent notes in Exception 5, nine of the Realignment Agreements contain this prohibition on assisting and participating in any claim against Respondent, and also include the following sentence: “I understand that this Agreement is not intended to and will not interfere with my right to file a charge with EEOC or freely participate in an EEOC investigation or proceeding, without need for a court order or pre-notification to BSWH.” (GC Exh. 3 at 000193, 000204, 000215, 000226, 000238, 000250, 000262, 000274, 000286). Contrary to Respondent’s assertion, the sentence added to these nine Realignment Agreements does not cure the provisions as a whole, as they carve out an exception only for the Equal Employment Opportunity Commission (EEOC), and do not make clear that employees are free to participate in other claims of any kind.

found unlawful severance agreement terms with very similar terms. *See* 336 NLRB at 67. In that case, the non-participation term provided as follows:

you agree, not to sue or file a charge...in any forum or assist or otherwise participate, except as may be required by law, in any claim, arbitration, suit, action, investigation or other proceeding of any kind which relates to any matter that involves Metro... and that occurred on or before your execution of this Agreement.

*Id.* at 67. The Board found that the non-assistance provision's plain language waived the discharged employee's right to "cooperat[e] with the Board in important aspects of the investigation and litigation of unfair labor practice charges," including forbidding him from assisting with regard to any claim filed by another individual, activity that the Board heavily relies upon for its "ability to secure vindication of rights protected by the Act." *Id.* (quoting *Certain-Teed Products*, 147 NLRB 1517, 1519-20 (1964)). The Board was not persuaded that a clause allowing for participation "as may be required by law" could preserve the rights of the signatory employees and the employees needing access to them because voluntary cooperation was still precluded. *Id.*

In *Clark Distribution Systems, Inc.*, the Board reached a similar conclusion as the *Metro Networks* Board regarding a non-assistance clause in a severance agreement offered to employees in the context of a workforce reduction that provided:

[y]ou further agree that [y]ou will not...voluntarily appear as a witness, voluntarily provide documents or information, or otherwise assist in the prosecution of any claims...against the company.

336 NLRB 747, 748 (2001). The Board held that the clause would prohibit signatory employees from voluntarily providing evidence to the Board in an investigation into charges related to other employees' employment with the company. *See id.* at 749. The Board made clear that the crucial difference between the clause at issue and previous clauses it had found lawful was that the latter were "limited to the claims of the employees who entered into them." *Id.* at 748 ("At

the outset, we observe that the instant case is distinguishable from *Hughes Christensen Co.*...and *First National Supermarkets*...The waiver and release agreements in those cases were limited to the claims of the employees who entered into them. By contrast, the confidentiality clause in issue here barred [the employees] from assisting a Board investigation of a claim filed by another individual.”). *See also Ishikawa Gasket America*, 337 NLRB 175, 175-76 (2001) *enforced*, 354 F.3d 534 (6th Cir. 2004) (Unlawful clause prohibiting “any conduct which is contrary to the Company’s interests in remaining union-free” for a period of twelve months because “future rights of employees as well as the rights of the public may not be traded away in this manner”) (quoting *Mandel Security Bureau, Inc.*, 202 NLRB 117, 119 (1973)). The clause here is similarly broad in scope as the clauses of *Metro* and *Clark* above.

The right to voluntarily assist the Board in its investigative processes, which Respondent’s *No Participation in Claims* clause requires employees to waive, is important both to the signatory employee and to other former and current employees. The Board has long recognized that its “ability to secure vindication of rights protected by the Act depends in large measure upon the ability of its agents to investigate charges fully and to obtain relevant information and supporting statements from individuals.” *Certain-Teed Products*, 147 NLRB at 1520. In *NLRB v. Scrivener*, the Supreme Court affirmed the Board’s finding that employees must be afforded complete freedom from coercion by their employer when providing information to the Board “to prevent the Board’s channels of information from being dried up by employer intimidation of prospective complainants and witnesses,” especially because individuals themselves initiate Board proceedings. 405 U.S. 117, 121-122 (1972) (quoting *John Hancock Mut. Life Ins. Co. v. NLRB*, 191 F.2d 483, 485 (D.C. Cir. 1951)). The Board’s investigations rely heavily upon the voluntary assistance of witnesses who provide testimony,

documents, and information necessary to accurately determine whether a responding party violated in the Act in a particular case. *See Metro Networks*, 336 NLRB at 67 (citing *NLRB v. Scrivener*, 405 U.S. at 122).

Although Respondent claims that it provided a “legitimate rationale” for requiring such a broad waiver of employee rights, as noted above, the applicable analysis in severance agreement cases as set out in *S. Freedman*, *Metro Networks*, and *Clark Distribution*, does not include consideration of whether an employer has provided a legitimate justification for the waiver it seeks. Accordingly, Respondent’s assertions regarding its justification for the broad waiver language in its *No Participation in Claims* clause should be rejected.

In *Metro Networks*, the Board found the provision discussed above to be unlawful, explaining that it relies on individuals *voluntarily* providing information during case investigations to properly fulfill its mandate, and not merely when required to do so by law. *See* 336 NLRB at 67. The Board held that the employer violated Section 8(a)(4) and (1) of the Act by issuing the severance agreement to the discharged employee, reasoning that the Act requires complete freedom for those who have information about unfair labor practices to report them to the Board and that Section 8(a)(4) protects not only an employee from being discriminated against for acting on her own behalf, but also for participating in others’ unfair labor practice investigations. *See id.* at 66 (citing *Nash v. Fla. Indus. Comm’n*, 389 U.S. 235, 238 (1967); *NLRB v. Scrivener*, 405 U.S. at 122, 124). Similarly, in *Clark Distribution Systems*, the Board held that the Employer violated Section 8(a)(1) because its broad prohibition against participating in claims, discussed *supra*, was not justified. *See* 336 NLRB at 749. Accordingly, the Board should find that the inclusion of the *Non-Participation in Claims* clause in Respondent’s separation agreements violates the Act.

## 2. Confidentiality Provisions (Exceptions 13 – 19)

In denying Respondent's Motion for Summary Judgment in this case, the Board suggested that "to the extent not already permitted under Board precedent, the legality of confidential severance agreements for former employees should be reconsidered." Counsel for the General Counsel acknowledges the Board's concern set forth in a footnote in the denial of the referenced Motion for Summary Judgment and notes that, as discussed in greater detail below, Board law does permit confidentiality provisions in severance agreements, so long as they are properly tailored to the dispute giving rise to the issuance of the agreement in question. Respondent's confidentiality clause in its separation agreements provides that a signatory employee must "keep secret and confidential and not...utilize in any manner all...confidential information of...[Respondent]...made available to her during her...employment..., including...information concerning operations, finances,...employees,...personnel lists; financial and other personal information regarding...employees." As the ALJ concluded, Respondent's confidentiality provision also calls for an impermissible waiver of Section 7 rights because it "broadly encompasses wages and benefits" and "bans discussion of wages, hours, and working conditions with employees." (JD slip op. at 4, LL. 20-21; 5, LL. 8-10). This finding gives rise to two issues; first, whether the contract language should be interpreted as waiving those rights identified by the ALJ, and second, whether such rights may lawfully be traded in these circumstances.

Respondent disagrees that the provision at issue should be interpreted as encompassing wages and benefits and banning employee discussions about wages, hours and working conditions. However, whether examining the language under contractual principles or using handbook rule guidance, the provisions clearly inhibit protected discussions.

A close look into the Board’s past analysis of confidentiality provisions, especially dissents from then-Member Philip A. Miscimarra in rules cases pre-dating *Boeing*, confirms such language would include a ban on protected discussions. In *MCPC, Inc.*, Member Miscimarra agreed that the employer’s rule restricting employees from disseminating “personal or financial information” was unlawful because it “would prohibit protected employee discussions regarding compensation without other important justifications.” 360 NLRB 216, 216 n. 4 (2014). Member Miscimarra similarly agreed with the majority’s finding in *Schwan’s Home Service, Inc.*, that a portion of the employer’s rule prohibiting disclosure of information concerning employees was unlawful. See 364 NLRB No. 20, slip op. at 10 (June 10, 2016) (Member Miscimarra, concurring in part and dissenting in part). Like the provisions in *MCPC, Inc.* and *Schwan’s*, the Confidentiality provision at issue in this case would prohibit employee discussions about their wages, hours and working conditions.

The Agreements here are therefore reasonably interpreted as “broadly encompass[ing] wages and benefits” and “ban[ning] discussion of wages, hours, and working conditions with employees.” The next question is whether a waiver of so broad a right is appropriate in these circumstances.

Board law allows employers to provide appropriate compensation in exchange for an employee’s limited waiver of the right to discuss aspects of her employment, but the Board has rejected such exchanges when the waiver is as broad as the one at issue here. In *S. Freedman & Sons*, the Board considered the legality of a settlement agreement the employer offered its employee that included a confidentiality clause. See 364 NLRB No. 82, slip op. at 1. The employer in that case terminated its employee for causing an accident, and after discussions with

union representatives, agreed to convert the termination into a suspension if the employee agreed to certain terms, including requiring the employee to:

waive my right to file a grievance against the Company regarding this termination or suspension...and agree that the terms of this Agreement will remain confidential and that any disclosure of this Agreement may lead the Company to take disciplinary action against me, up to and including the termination of my employment.

*Id.*, slip op. at 2. The Board held that, given the limited nature of the agreement and in light of other circumstances, the employer did not violate Section 8(a)(1) of the Act by including the confidentiality clause in the settlement agreement. *See id.* Because the agreement at issue was limited to the terms of the employee's reinstatement after the accident, the employee received the benefit of reinstatement to his former position, and the confidentiality clause included therein did not prevent him from discussing future discipline or pursuing grievances or litigation over matters unrelated to this particular termination, the Board found the agreement lawful. *See id.* In making its determination that the confidentiality clause was an acceptable limited waiver of that employee's Section 7 rights, the Board distinguished it from clauses in severance agreements that did prevent signatory employees from exercising rights unrelated to the facts giving rise to the agreement. *See S. Freedman & Sons*, 364 NLRB No. 82, slip op. at 2. The Board also noted that the union representing the employees was not bound by the settlement and to the extent that knowledge of the settlement could benefit them, the employees had an alternative means of obtaining that knowledge. *See id.*

Conversely, in *Metro Networks*, the Board considered whether a severance agreement containing a much broader non-disclosure/confidentiality provision constituted an acceptable trade of an employee's Section 7 rights in exchange for severance pay. Therein, the confidentiality clause provided that the signatory employee could not:

publish, publicize, disseminate, communicate...to any entity or persons whatsoever, directly or indirectly, information concerning your employment with [the employer], the existence of this Agreement or the terms described herein except to your immediate family, attorneys, accountants or tax advisors.

336 NLRB at 64. The Board found this clause unlawful because it would prohibit the discharged employee from communicating with anyone about his employment with the employer, and would also interfere with his ability to assist with another individual's charge. *See id.* at 66-67. The Board rejected the employer's defense that the non-disclosure clause was limited to the terms of the severance agreement because the clause prohibited the communication of "information concerning his employment" to any entity or person. *Id.* at 67, n. 18.

The *Confidentiality* provision of the Separation and Realignment Agreements here requires a waiver more like that in *Metro Networks* than the waiver in *S. Freedman & Sons*. In addition to preventing signatory employees from speaking about the terms of the separation agreement, which would be lawful under *S. Freedman*, it also prevents employees from speaking about "personal information regarding...employees" and "confidential information" that was made available to them during their employment, including "information concerning . . . employees."<sup>11</sup> This language is similar to, and has the same effect as, the non-disclosure provision in *Metro Networks*, which the Board found prohibited a signatory employee from communicating information about his employment to any person or entity. *See Metro Networks*, 336 NLRB at 67, n. 18.

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<sup>11</sup> The Agreements issued to Camacho and two other employees also generally preclude them from disclosing information about employees made available to them during their employment with Respondent, and include provisions allowing the employees to disclose to other individuals only "that the terms of her separation from BSWH are part of a mutually satisfactory agreement which is covered by a confidentiality clause, and, therefore she is not at liberty to discuss the terms of the agreement or her separation." (GC Exhs. 2, 3 at 000294-295, 000305-206). In its Exception 5, Respondent excepts to the ALJ's characterization of all of the Agreements offered to employees, including Camacho, as "essentially equivalent" and containing analogous *No Participation in Claims*, *Confidentiality*, and *Non-Disparagement* clauses, and points to this additional phrase in the Agreement offered to Camacho. This phrase, however, is inconsequential to the legality of the Agreements, as it allows signatory employees to make only vague disclosures regarding the existence of the Agreement and its enclosed confidentiality clause. (GC. Exhs. 2, 3). The Agreement still prohibits protected discussions about employee information.

Although the waiver is as broad as the waiver in *Metro Networks*, Respondent provides no rationale to distinguish its clause from the confidentiality clause of that case. At hearing, Respondent presented only vague, conclusory testimony through Smith about its interest in maintaining the privacy of physician and patient information, as well as Respondent's proprietary information. (Tr. 73, LL. 3-25; 74-76; 77, LL. 1-15). Smith testified that as a healthcare institution where employees have access to patient information and data, Respondent maintains a culture of confidentiality. (Tr. 74, LL. 15-25; 75, LL. 1-10). Again, to the extent that this testimony was offered in support of a justification for including such broad waiver language in its Confidentiality clause, such should be rejected as irrelevant inasmuch as the appropriate analytical framework does not include consideration of such a justification.

Employees have a fundamental right under the NLRA to discuss their wages, hours, and working conditions with co-workers and third parties, and the *Metro Networks* Board made clear that an employer cannot lawfully include provisions restricting those discussions in severance agreements it offers to former employees. *See* 336 NLRB at 67. While Respondent could have included a confidentiality clause that lawfully prohibited only the disclosure of information related to the dispute giving rise to the issuance of the Agreement, the *Confidentiality* provision it actually used broadly prohibits the disclosure of employee-related issues and information, rendering it unlawfully overbroad in scope and not narrowly tailored. Thus, the Board should find that the Confidentiality provisions unlawfully restrict Section 7 activity.

#### **IV. CONCLUSION**

For the reasons set forth above, Counsel for the General Counsel respectfully requests that the Board deny Respondent's Exceptions in their entirety and find that the Separation and Realignment Agreements at issue herein are unlawful. Counsel for the General Counsel requests that the Board find that when analyzed under the proper framework, the *No Participation in*

*Claims* and *Confidentiality* clauses of those agreements unlawfully restrict employees in the exercise of their right to assist in Board investigations of other employees' claims, and to access the Board in the Future. Counsel for the General Counsel also requests any further relief the Board deems appropriate.

**DATED** at Fort Worth, Texas, this 10<sup>th</sup> day of May, 2018.

Respectfully submitted,

*/s/ Megan McCormick*

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## CERTIFICATE OF SERVICE

I hereby certify that Counsel for the General Counsel's Answering Brief to Respondent's Exceptions to the Administrative Law Judge's Decision has been electronically served this 10th day of May, 2018 upon the following parties:

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