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Arise Virtual Solutions, Inc. and Matthew Rice. Case 12–CA–144223

August 16, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND KAPLAN

On August 12, 2016, Administrative Law Judge Charles J. Muhl issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The General Counsel filed cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The judge found, applying the Board’s decisions in *D. R. Horton*, 357 NLRB 2277 (2012), enf. denied in relevant part, 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014), enf. denied in relevant part, 808 F.3d 1013 (5th Cir. 2015), that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by maintaining and enforcing its dispute resolution program, formally titled the “Acknowledgement and Waiver Agreement,” that requires the Charging Party and other client support professionals (CSPs), as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial.

Recently, the Supreme Court issued a decision in *Epic Systems Corp. v. Lewis*, 584 U.S. ___, 138 S.Ct. 1612 (2018), a consolidated proceeding that included review of court decisions below in *Epic Systems*, 823 F.3d 1147 (7th Cir. 2016), *Ernst & Young LLP v. Morris*, 834 F.3d 975 (9th Cir. 2016), and *NLRB v. Murphy Oil USA, Inc.*, supra. *Epic Systems* concerned the issue, common to all three cases, whether employer-employee agreements that contain class- and collective-action waivers and stipulate that employment disputes are to be resolved by individualized arbitration violate the National Labor Relations Act. Id. at ___, 138 S.Ct. at 1619–1621, 1632. The Supreme Court held that such employment agreements do not violate this Act and that the agreements must be enforced as written pursuant to the Federal Arbitration Act. Id. at ___, 38 S.Ct. at 1619, 1632.

The Board has considered the decision and the record in light of the exceptions and briefs. In light of the Supreme Court’s ruling in *Epic Systems*, which overrules

the Board’s holding in *Murphy Oil*, we conclude that the complaint must be dismissed.¹

ORDER

The complaint is dismissed.

Dated, Washington, D.C. August 16, 2018

Mark Gaston Pearce, Member

Lauren McFerran, Member

Marvin E. Kaplan, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Susy Kucera, Esq., for the General Counsel.
Adam P. KohSweeney, Esq. (O’Melveny & Myers, LLP), of San Francisco, California, and *Peter W. Zinober (Greenberg Traurig, LLP)*, of Tampa, Florida, for the Respondent.
Shannon Liss-Riordan, Esq. and *Jill Kahn, Esq. (Lichten & Liss-Riordan, P.C.)*, of Boston, Massachusetts, for the Charging Party.

DECISION

CHARLES J. MUHL, Administrative Law Judge. At first glance, this case appears to involve another, routine application of the Board’s decisions in *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014), and *D. R. Horton, Inc.*, 357 NLRB 2277 (2012). The General Counsel’s complaint alleges, and the record evidence demonstrates, that Arise Virtual Solutions, Inc. (the Respondent) required Charging Party Matthew Rice and other client support professionals (CSPs) to sign an “Acknowledgement and Waiver Agreement” as a condition of working for the Respondent’s clients. Under the agreement, CSPs waived their rights to enter into any collective or class action with coworkers on any matters, and instead are limited to individual arbitrations. The Board repeatedly has concluded that such agreements violate Section 8(a)(1) of the National Labor Relations Act

The deeper question, and the actual matter in dispute, is whether CSPs are employees or independent contractors of the Respondent. If they are independent contractors, CSPs are statutorily excluded from the Act’s coverage and *Murphy Oil* does not apply. The added wrinkle here is that the Respondent is one of the newer kinds of companies that provides its services through an Internet platform. Its business model gener-

¹ We therefore find no need to address the other issues presented in the case or raised by the parties’ exceptions.

ates a non-traditional relationship between the Respondent and CSPs. Nevertheless, determining what that relationship is under the law still requires an analysis of the traditional common-law factors contained in the Restatement (Second) of Agency § 220. It also requires an evaluation of the Board's independent business factor recently refined in *FedEx Home Delivery*, 361 NLRB 610 (2014). After applying these factors, I conclude that CSPs are employees of the Respondent and the Respondent has violated the Act as alleged in the complaint.

STATEMENT OF THE CASE

This case was tried in Miami, Florida, on May 2 and 3, 2016. On January 12, 2015, Matthew Rice, an individual, filed the original unfair labor practice charge, which was docketed as Case No. 12-CA-144223. On February 5, 2015, Rice filed an amended charge. On April 27, 2015, the General Counsel issued a complaint against the Respondent, alleging multiple violations of Section 8(a)(1) of the Act. According to the complaint, the Respondent has unlawfully maintained an "Acknowledgment and Waiver Agreement" (the "waiver agreement"), since on or about January 16, 2014. The waiver agreement allegedly contains a provision which requires employees to waive their statutory right to file class action lawsuits in court, arbitration, or any other forum against the Respondent. The Respondent purportedly has required employees to enter into the waiver agreement as a condition of employment. The complaint also alleges that, about November 13, 2014, Matthew Rice filed an opt-in consent form as a plaintiff in a class action complaint against the Respondent, alleging violations of the Fair Labor Standards Act. On November 18, 2014, the Respondent requested that Matthew Rice withdraw that form, because he had previously signed the waiver agreement.

On May 11, 2015, the Respondent filed a timely answer to the complaint. The Respondent filed amended answers on April 26 and 27, 2016. The Respondent denied the complaint allegations and asserted numerous affirmative defenses. Its principal defense is that Matthew Rice is not a Section 2(3) employee of Arise Virtual Solutions, Inc.

On the entire record, including my observation of the demeanor of witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent contracts with corporate clients to provide customer service using representatives who operate from remote locations through the Company's Internet site. The Respondent's principal office and place of business is in Miramar, Florida. In conducting its business operations in the past calendar year, the Respondent derived gross revenues in excess of \$500,000. It also purchased and received, at its Miramar, Florida facility, goods valued in excess of \$50,000 directly from points located outside of the state of Florida. Thus, at all material times, I find that the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6),

and (7) of the Act, as the Respondent admits in its answer to the complaint.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Contracts Between the Respondent and Independent Businesses*

The Respondent is a virtual call center technology company that began business operations in 1997. Its genesis was large companies, including Barnes & Noble, Disney, and Sears, looking to contract out the work involved in responding to customer service inquiries. The Respondent provides Internet-based software and infrastructure to connect these companies with businesses that provide customer service. In the Respondent's vernacular, these are "independent businesses" (IBs). The Respondent currently has contracts with approximately 8,800 IBs. Each IB has an independent business owner (IBO).

The Respondent requires any party who wishes to become an IB to first incorporate a business. Then the corporation and the Respondent enter into a Master Services Agreement (MSA). (GC Exh. 2.) The term of an MSA is indefinite, but may be terminated by either party for any reason. Under the MSA, the Respondent offers the IB opportunities to provide customer service to the Respondent's clients. To perform work for a specific client, the IB must enter into a second agreement, a Statement of Work (SOW), with the Respondent. An SOW typically runs for 90 days. The Respondent and the IB then designate in the SOW the client support professionals (CSPs) who will provide customer service. That work includes answering customer telephone calls or emails, and providing support in chat rooms. The Respondent derives roughly 85 percent of its revenue from fees paid by clients for customer service provided by CSPs.¹

Section 1 of the MSA, entitled "Independent Contractor Relationship," contains the terms of the relationship between the Respondent and an IB. This includes certain requirements related to CSPs. Section 1.3 states: "The [IB] shall be solely responsible for the hiring, firing and/or discipline of all its employees and contractors, including [a CSP]." Section 1.6 states that the IB "agrees that it is solely responsible to compensate and provide any benefits that may be required by law . . . to any [CSP] employed by or under contract with the [IB]" to perform customer service.

Section 2 of the MSA addresses the Respondent's certification, or training, requirements. These include a "client certification course," or a course specific to a client such as Barnes & Noble. CSPs must complete the course prior to performing any customer service work for that client. Section 2.2 states that the Respondent is the "sole certifying authority" for determining if

¹ The Respondent changed the terminology it used to describe the entities involved in its business operations in February 2012. (GC Exh. 9.) Prior to then, independent businesses were referred to as virtual services corporations or super virtual services corporations. Client support professionals previously were called Arise Certified Professionals. This old parlance is reflected in certain of the documents in the record. The Respondent's announcement concerning the change in terminology stated that the Company was making the move because "[t]he acronyms ACP and VSC have at times led to the misconception that ACPs and VSCs are Arise employees."

a CSP has obtained a client certification. It also states that the Respondent retains the “sole discretion” to establish and modify the certification requirements. Section 6.1 sets forth that the Respondent will provide login credentials to CSPs for access to both the Respondent’s systems and the systems of any clients such as Barnes & Noble.

Finally, Section 10.5 of the MSA gives the Respondent the right to unilaterally amend the terms of the MSA, or any SOW thereunder, with reasonable notice to the IB. The IB’s only options thereafter are to accept the amendment or terminate the MSA. Section 11.14 of the MSA requires IBs to insure that their CSPs assigned to perform any work under an SOW “will agree to execute all document (sic) required by Arise pursuant to the terms of the SOW.”

B. How Matthew Rice Became a Client Support Professional

In March 2008, Patricia Rice incorporated a limited liability company in the state of Florida called Certified Client Solutions, LLC (CCS). (R. Exh. 10.) She is the company’s sole owner. She did so to become an IB, and also a CSP, so she could provide customer service to the Respondent’s clients. At material times, CCS and the Respondent were parties to an MSA that Patricia Rice executed in September 2010.

A year or two after CCS was incorporated, Matthew Rice, the Charging Party in this case, became a CSP and began providing customer service to Arise clients under the MSA and SOWs between the Respondent and CCS. (GC Exh. 2, Section 11.6; GC Exhs. 3, 4 and R. Exh. 5, Program Specific Appendices.) The Respondent requires CSPs to be named in the SOWs. Working out of his bedroom, Matthew Rice provided customer service for Arise clients Barnes & Noble, Disney, and Sears. Matthew Rice also happens to be Patricia Rice’s son.

To become a CSP, Matthew Rice had to meet a number of requirements set by the Respondent. The requirements are the same for any individual who wishes to become a CSP. First, Rice had to sign up and obtain login credentials on the Arise website.² He then passed a phone test with simple questions to gauge his speaking ability. Next, Rice had to pay for and pass a background check, completed by a third-party contractor.

Following those initial steps, the Respondent required Rice to complete its “CSP 101” training course. (GC Exh. 10.) The Respondent created this course and contracted out the curriculum development. The Company’s curriculum design team ultimately approves the course content. The Respondent charged Rice a fee in the neighborhood of \$100 to take this course. Through CSP 101, CSPs learn how to use the Respondent’s software; the technology, equipment, and security requirements to perform customer service work through the Arise website; and how to organize and operate a home office. (GC Exhs. 11–16.) The course also provides CSPs with training on how to properly perform customer service work. This includes how to maintain a professional image and use proper language during a phone call. (GC Exh. 19.) It also includes training on the language and formatting to properly respond to

² The Respondent’s virtual call center technology is referred to by a variety of different terms in the record, including Internet site, website, platform, and portal.

an emailed customer service inquiry, as well as acceptable response times to those inquiries. (GC Exh. 20.) The training covers proper time management as well. (GC Exh. 18.)

The CSP 101 course also introduces CSPs to the Respondent’s “performance expectations” and methods the Company uses to monitor CSP performance. (GC Exh. 22.) The training materials detail the Respondent’s performance metrics, as well as “key performance indicators” (KPIs) from Arise clients. The Respondent summarizes its performance management as follows:

Because of the severe consequences of Client Support Professionals not meeting KPIs, Arise has implemented a clear and concise performance management system. In addition to informing you of the KPIs, it entails comprehensive call monitoring, performance statistics reviews and feedback opportunities.

(GC Exh. 22, p. 10.)

Other than successfully completing the CSP 101 course, the Respondent does not maintain any educational requirements for CSPs. Matthew Rice obtained a GED prior to becoming a CSP and performing work through the Arise portal.

C. Working Conditions of Matthew Rice and Other Client Support Professionals

1. Wages

As to CSPs’ wages, each SOW provides the payment that the Respondent would make to an IB for providing customer service. For example, one SOW between the Respondent and CCS for Barnes & Noble phone customer service called for the Respondent to pay the greater of \$1.45 per call or \$4 per “service interval,” or 30 minutes worked. (GC Exh. 3, p. 15.) An SOW for email customer service provided a pay rate of \$1.25 per email. (GC Exh. 4, p. 15.) For each biweekly invoice period, the Respondent charges IBs a fee for each CSP accessing the Respondent’s website to perform the customer service work. CCS paid a fee of \$19.75 per CSP for each invoice period. (R. Exh. 12.) The Respondent deducted the fee from the total amount it paid CCS for the work CSPs performed. The Respondent does not withhold taxes for CSPs from its payments to IBs.

IBs, including CCS, are responsible for determining how much to pay their CSPs, out of the revenue received from the Respondent. In Matthew Rice’s case, Patricia Rice paid her son the full amount of money the Respondent paid CCS for work that Matthew Rice performed. For other CSPs, she retained a portion of the payment for herself. CCS issued 1099 tax forms to CSPs, including Matthew Rice, who performed work through the Arise website.

2. Equipment

When performing customer service work for Arise clients, the Respondent requires Rice, and other CSPs, to use certain equipment. This includes a computer, a headset for phone calls, and a traditional phone line. CSPs obviously need Internet access as well. The Respondent does not cover the cost to CSPs of obtaining this equipment. Matthew Rice paid roughly \$200 to obtain the equipment he needed.

3. Client-specific Training

Using this equipment and credentials supplied by the Respondent, CSPs then log in to the Arise website to view customer service work opportunities. (GC Exh. 26(a).) Once a CSP selects a particular job opportunity, the CSP must pass a client certification course before performing any customer service work. CSPs also pay a fee to complete this aspect of training. Rice took client certification courses in order to perform work for Barnes & Noble, Disney, and Sears. Each time, Rice paid a fee of about \$100. These courses were conducted in virtual classrooms through the Arise website, with other students and multiple instructors present. The instructors went through training exercises to enable the CSPs to navigate the computer systems that each client had. The instructors also trained the CSPs on customer service skills, including how to talk and relate to customers. Each course entailed 5 to 6 hours of training a day for about 3 weeks total.

4. Work Schedules

After passing a client certification course, a CSP may select 30-minute service intervals on the Arise website to perform customer service work for the client. The client determines the work hours to be made available and the number of representatives needed during each interval.

The Respondent posts all available work opportunities on its website at the same time, once per week.

Once a CSP schedules an interval, the CSP can swap or cancel the interval at any time greater than 48 hours prior to its start. The Respondent gives CSPs who work for top-performing IBs the option to “pre-select” their hours, or choose service intervals first. If a work opportunity is not selected by any CSP, the Respondent sometimes offers an additional payment to provide an incentive for a CSP to schedule it. Pursuant to the SOWs, the Respondent retains the right to remove, at its sole discretion, service intervals that “become unnecessary due to a decrease in call or contact volume” of a client. (GC Exh. 3, Section 6.)

When he provided customer service for Arise clients, Matthew Rice worked 20 to 30 hours a week, using the method described above to select his hours. Because of the structure of the Respondent’s process, Matthew Rice’s work hours in 2014 and 2015 often were scattered throughout the day. (GC Exh. 47.)

5. Business Identification

When responding to customer service inquiries, CSPs do not identify themselves as working for the Respondent. Instead, CSPs are made to appear as if they are working directly for the Respondent’s clients. For example, Matthew Rice’s signature block in email responses to customers for Barnes & Noble stated “Matt, Customer Service Representative, Barnes & Noble.” (GC Exhs. 31, 32, 34.) CSPs are instructed in training not to say anything about the Respondent during interactions with customers.

6. Performance Requirements and Monitoring

CCS and the Respondent entered into two SOWs effective November 14, 2014, to provide customer service by telephone and by email for Barnes & Noble customers. (GC Exhs. 3 and

4.) These SOWs had a term of 60 days and expired on January 15, 2015. The parties designated Matthew Rice as the sole CSP to provide customer service under the SOWs.

As previously noted, SOWs between the Respondent and IBs set forth the requirements that CSPs must meet when responding to customer service inquiries. Thus, the Barnes & Noble SOWs included the requirements which CCS, through Matthew Rice, had to meet. With respect to phone customer service, Matthew Rice had to service a minimum of 20 intervals of 30 minutes each per week. As to email, the minimum number of weekly intervals serviced was 7.

The SOW included 5 performance requirements, each of which provided a minimum level needed to earn a one, two, or three star rating. The Respondent’s clients determined how each of those star ratings was achieved. However, the Respondent reserved the right to terminate the SOW if the average of all performance metrics for a period of 4 consecutive rolling weeks was below the minimum necessary to earn one-star performance.

Three of the performance requirements were objective measures, all of which the Respondent monitored through its platform. First, the Respondent maintains its own metric, called “commitment adherence,” to determine the percentage of service intervals scheduled that a CSP actually ends up working. The Respondent tracks this commitment adherence by verifying that the CSP is logged into the Arise website during the interval. If a CSP cancels an interval less than 48 hours before it begins or does not work the interval, the CSP’s commitment adherence percentage is negatively affected. When Rice did not work intervals that he was scheduled, the Respondent issued notices to CCS and Patricia Rice passed the notices on to her son. Second, the Respondent tracked “intervals serviced,” or how many 30-minute intervals Matthew Rice worked for Barnes & Noble. Third, the Respondent monitored “average handle time,” or the average length of time Matthew Rice took on each call. The remaining 2 requirements were subjective measures: “quality scores (QA)” and “customer satisfaction (OSAT).” These will be discussed in further detail below.³

The Respondent maintains a department called “Client Results.” Within the department, the Company employs 20 to 25 client results managers and 20 to 25 performance compliance leads. Their job is to monitor CSP performance and insure they are adhering to the performance requirements in the SOWs.

The Respondent also utilizes chat performance facilitators (chat PFs) and quality assurance performance facilitators (QAPFs) for performance monitoring. Chat PFs provide chat support to CSPs when an issue arises with a customer during a phone call. CSPs can ask the chat PF to “escalate” or transfer the customer to the PF, who is identified on the call as a supervisor. Chat PFs also can listen to recorded calls and notify QAPFs if a CSP “needs more attention.” (GC Exh. 44, p. 38.)

³ Every SOW contains performance requirements including commitment adherence, although the other specific requirements may vary from client to client or based upon the type of service being provided. For example, the Disney web support chat SOW contained a performance requirement of “number of concurrent chats.” (R. Exh. 5(d).)

QAPFs evaluate a CSP's work performance against the performance requirements contained in the SOWs. If a CSP is not meeting any of those requirements, the Respondent, through QAPFs, sends information to the IB comparing actual performance with the contractual requirements and providing feedback on the CSP's performance.

For the quality score (QA) performance measure, QAPFs listen to and audit recorded customer service calls handled by a CSP. The client determines the number of calls audited and provides a form to the QAPFs to evaluate a CSP's performance on the call. The Barnes & Noble audit form included a variety of different performance categories with multiple factors therein. (GC Exhs. 35 and 37.) The QAPF is responsible for giving a score to each factor. In the category of "Quality of Service," evaluation factors included whether a CSP "expressed genuine interest in helping;" "communicated in a way the customer could understand;" and used a "courteous, confident, professional, positive" tone. The "Call Disposition" category had a "kept control of the call" component. In "Bonus Points," the factors included whether the CSP was "exceptionally enthusiastic;" "used empathetic statement;" and attempted to and successfully "de-escalated" the call. Finally, the "Critical Errors" category had a line item for "confrontational." As these factors indicate, QAPFs had to use independent judgment when conducting these audits. (Tr. 297-298.)

For customer satisfaction, QAPFs review surveys completed by customers, then provide feedback to the IB and CSPs regarding the CSPs' performance.

D. The Respondent's Decision Not to Renew the SOW Designating Matthew Rice as a CSP for Barnes & Noble

From November 14, 2014, to January 15, 2015, Performance Compliance Lead Sheri Phillips and QAPF Sheryl Holland sent Patricia and Matt Rice a total of 7 emails with negative feedback on his performance.⁴ (GC Exhs. 29, 31 to 35, 37.)

In an email dated December 1, 2014, Holland provided feedback after a customer gave Matthew Rice a "1" rating for an email customer service experience. (GC Exh. 31.) Holland detailed instructions on when a customer was fully authenticated and the correct greeting and template response that Rice should have used. She also noted improper grammar that Rice used in a sentence and advised him he needed to proofread his responses. In an email dated December 12, 2014, Phillips stated the following concerning a customer service call Rice handled:

Please be sure that you are displaying confidence on the calls and spending the time needed to practice when not servicing so that you can become more familiar with the system. Please also take advantage of any enhancement sessions being offered...

(GC Exh. 33.) On December 16, 2014, Holland sent an email to Patricia Rice with Matthew Rice carbon copied stating:

⁴ In its second amended answer filed April 27, 2016, the Respondent admitted the Sec. 2(13) agent status of Phillips. (GC Exhs. 1(g) and 1(o).) Neither Holland nor any other QAPF was alleged as a 2(13) agent in the complaint. Like CSPs, QAPFs provide their services for the Respondent through IBs.

Please review the below comments from the customer and the email that was sent from your CSP. The customer stated tracking shows delivered, but it was not, order was Lost in Transit, so LIT options should have been sent (template LITRO). Please be sure that CSP is reading and understanding request and if there is any doubt he request chat assistance. In addition, I have stated in many many emails and in Matt and my PES, he MUST select call reasons for EVERY email processed. This is still not happening. **I need to hear from him within 24 hours as to why he is not completing this task.**

(GC Exh. 34, emphasis in original.) Holland also completed and sent to the Rices two quality assurance forms, where Holland provided quality scores for Matthew Rice. (GC Exh. 35, 37.) He received a 98.14 percent score on one audit and 97.14 percent score on the other audit.

In addition, Phillips sent the results of 13 customer surveys for Matthew Rice. (GC 30, 36, 52 to 62.) The surveys included both positive and negative ratings. The bulk of the communication contained the same, pro forma text at the start. However, the introduction also states "[a]dded into this communication is feedback right from the Arise staff." That "Arise feedback" included:

- Based on the customer's comments the call will be reviewed and additional feedback may be provided by the QA PF.
- The comment is not related to the CSP that handled the transaction.
- Positive OSAT Survey! Thank you!
- Not enough information available to provide feedback. Additional feedback may be provided by the QA PF.

In January 2015, the Respondent decided not to renew the SOW under which Matthew Rice provided customer service for Barnes & Noble. Phillips emailed Patricia Rice and explained:

The new Barnes and Noble SOW was not offered to your Independent Business for Matt Rice due to overall poor feedback from the customer satisfaction surveys [as] well as overall poor quality. These were addressed through multiple feedback communications. The quality Performance Facilitator also made several attempts to enhance. Matt unfortunately did not implement/change the behaviors and show the needed improvement in quality to continue servicing the program.

(GC Exh. 6.)

E The FLSA Class Action

The Respondent requires all of its CSPs to execute the waiver agreement before they can perform customer service work for Arise clients. The Respondent drafted the agreement and maintains it on its website. That agreement states in relevant part:

CLASS ACTION WAIVER. By signing this Agreement, all parties waive their right to commence, to become a party to, or to remain a participant in, any group, representative, class, collective, or hybrid class/collective action in any court against one or more other parties to this Agreement, Arise or

any client of Arise. Further, the parties waive their right to commence, to become a party to, or to remain a participant in, any group, representative, class, collective, or hybrid class/collective action claim in arbitration or any other forum against one or more other parties to this Agreement, Arise or any client of Arise. The parties agree that any claim by or against any other party to this Agreement shall be heard in arbitration without consolidation of such claim with any other person or entity's claim. All parties agree that this Agreement does not limit any party's right to initiate an action in state or federal court challenging the enforceability of the group, representative, class, collective, or hybrid action waiver set forth herein. If Client Support Professional chooses to exercise that right, Company will not retaliate against Client Support Professional for doing so. Company reserves the right to oppose such a challenge to enforcement of this Agreement. The parties further agree that nothing in this Agreement precludes any party from participating in proceedings to adjudicate unfair labor practice charges before the National Labor Relations Board, including without limitation charges addressing the enforcement of the group, representative, class, collective, or hybrid action waiver set forth herein.

(GC Exh. 5.) The waiver agreement also includes that the Respondent and CSP "acknowledge and agree that Arise and any client of Arise are third party beneficiaries of this Agreement and any of them jointly or severally shall have the right to enforce this Agreement." Finally, the agreement states that "Client Support Professional is not an employee of Arise Virtual Solutions Inc. ("Arise") or any client of Arise." Matthew Rice signed this agreement on January 16, 2014.

On December 30, 2013, plaintiff Heather Steele filed a class action complaint against the Respondent with a claim under the Fair Labor Standards Act (FLSA). *Heather Steele et al. v. Arise Virtual Solutions, Inc.*, Case 13-CV-62823, U.S. District Court for the Southern District of Florida. (GC Exh. 41.) On November 3, 2014, Matthew Rice signed an opt-in consent form to join the class action. (GC Exh. 39.) On November 18, 2014, the Respondent's counsel, Adam KohSweeney, emailed one of the plaintiffs' attorneys, Jill Kahn, and informed her that Rice had signed the waiver agreement. (GC Exh. 28.) On November 19, 2014, Kahn advised KohSweeney that Rice's opt-in consent form would be withdrawn. On December 5, 2014, the plaintiff's counsel filed a notice of withdrawal of Rice's opt-in consent form.⁵ (GC Exh. 40.)

Analysis

1. IS CCS A NECESSARY PARTY TO THIS CASE?

Before the substantive issues can be analyzed, a preliminary matter must be addressed. In its brief, the Respondent states: "Arise maintains its position as argued in its Motion to Dismiss for Failure to Join a Required Party, dated June 15, 2015, that

⁵ I take judicial notice of the public civil docket for this case. It further shows that the district court issued an order compelling arbitration of the plaintiffs' claims on February 25, 2015. Pursuant to a stipulation of dismissal entered into by the parties, the district court dismissed the case with prejudice on October 29, 2015. Thus, the case is closed.

this matter cannot be resolved without CCS as a party respondent because CCS is a necessary party to this action, given that CCS and only CCS has a contractual relationship with Mr. Rice." The motion the Respondent references is one it filed with the Board, pursuant to Federal Rule of Civil Procedure 19. On October 29, 2015, the Board denied the motion, noting the Respondent "failed to establish that there are no genuine issues of material fact regarding its assertion that joinder of [CCS] is necessary in this case."

At the hearing, the Respondent made no similar motion to dismiss or argument to me that joinder of CCS was necessary before the case proceeded. Other than the above-quoted text, the Respondent also makes no further argument in its brief as to why joinder of CCS is necessary to this case. Nonetheless, I will briefly address the Respondent's contention.

The Board's Rules and Regulations do not address, or require, application of the Federal Rules of Civil Procedure to Board proceedings. In addition, and citing to the U.S. Supreme Court's decision in *National Licorice Co. v. NLRB*, 309 U.S. 350, 363 (1940), the Board has suggested that no need exists for the traditional rules governing joinder of parties in private litigation to be applied in Board unfair labor practice cases addressing enforcement of public rights. *Expert Electric, Inc.*, 347 NLRB 18, 19 (2006).

Even if FRCP 19 applied, the joinder of CCS is not necessary to this case. In its motion, the Respondent relied upon Rule 19(a). That rule requires a party to be joined if, "in that person's absence, the court or other tribunal cannot accord complete relief among existing parties." The Respondent argues that the waiver agreement at issue in this case is between CCS and Matthew Rice. The Respondent is not a party to that agreement. Thus, the argument goes, if the complaint allegations in this case are found meritorious, the Respondent would not have the ability to comply with an order requiring it to rescind all such agreements signed by CSPs. However, the Respondent forgets the unilateral rights it reserved for itself in the MSAs. The Respondent can unilaterally amend the MSA, or any SOW thereunder. It also can require IBs to have their CSPs execute any documents Arise dictates. Thus, the Respondent can accord complete relief in this case, if necessary, by exercising those unilateral rights.

Accordingly, I conclude that FRCP 19 is not applicable to this case and, even if it were, CCS is not a necessary party.

II. THE EMPLOYMENT STATUS OF CLIENT SUPPORT PROFESSIONALS

As indicated earlier, this case turns on the employment status of CSPs, including Matthew Rice. The General Counsel contends that CSPs are employees of the Respondent covered by the Act during the relevant period when the alleged unfair labor practices occurred. The Respondent argues that Rice was not an employee of Arise, but instead worked either as an employee or independent contractor of CCS.

Section 2(3) of the Act excludes from the definition of a covered "employee" any individual having the status of an independent contractor. 29 U.S.C. § 152(3). The party asserting independent-contractor status bears the burden of proof on that issue. *BKN, Inc.*, 333 NLRB 143, 144 (2001). In *NLRB v. United Insurance Co. of America*, 390 U.S. 254 (1968), the

Supreme Court held that independent-contractor status must be evaluated in light of the pertinent common-law agency principles. The non-exhaustive list of those factors is set forth in the Restatement (Second) of Agency § 220 (1958):

- (a) The extent of control which, by the agreement, the master may exercise over the details of the work.
- (b) Whether or not the one employed is engaged in a distinct occupation or business.
- (c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision.
- (d) The skill required in the particular occupation.
- (e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work.
- (f) The length of time for which the person is employed.
- (g) The method of payment, whether by the time or by the job.
- (h) Whether or not the work is part of the regular business of the employer.
- (i) Whether or not the parties believe they are creating the relation of master and servant.
- (j) Whether the principal is or is not in the business.

In *FedEx Home Delivery*, 361 NLRB 610 (2014), the Board reaffirmed the use of these factors. It also detailed and refined the separate factor of whether the individual was, in fact, rendering services as an independent business. Evaluation of this factor includes determining whether the individual has a significant actual (as opposed to merely theoretical) entrepreneurial opportunity for gain or loss; a realistic ability to work for other companies; a proprietary or ownership interest in the work; and an ability to control important business decisions such as scheduling, hiring, selection, and assignment of employees, purchase and use of equipment, and commitment of capital. No one factor is decisive.⁶

A. The Extent of Control the Respondent Exercises Over the Work of CSPs

The Respondent requires anyone who wishes to become a CSP to pass a background check and complete the CSP 101 training course. That course involves detailed instruction on how to perform customer service work and how to use the Company's website to access Arise client systems. In order to

⁶ The Respondent spent a great deal of time at the hearing and in its brief presenting evidence and arguing that CCS, and presumably other IBs, have an independent contractor relationship with the Respondent. The implication is that CSPs also must be independent contractors in relation to the Respondent, if the IBs they work with are in that position. In light of the applicable legal standard discussed above, I do not find the relationship between IBs and the Respondent to be relevant to this case. The only issue presented by the General Counsel's complaint is whether CSPs are employees of the Respondent. That relationship must be evaluated by applying each of the common-law agency factors. I do not agree that, if CCS were found to be an independent contractor as to the Respondent, that same status automatically would be conveyed upon Matthew Rice. See *Porter Drywall, Inc.*, 362 NLRB No. 6 (2015) (analyzing independently the question of whether crew leaders and crew members were employees).

work for a specific client, CSPs also have to take and pass a client-specific training course provided through the Arise portal. In those classes, CSPs are provided with a script and other requirements to respond to customer service inquiries. Thus, the Respondent trains, tests, and approves individuals to become both CSPs and to provide service to a particular client. This is indicative of employee status. *Slay Transportation Co.*, 331 NLRB 1292, 1293–1294 (2000).

As to work schedules, the record evidence is mixed. CSPs alone select the work opportunities and hours that they wish to work. They also retain the right to release or swap hours without the Respondent's approval, up to 2 days before the scheduled work shift.

However, as a practical matter, the Company imposes a number of restrictions on these rights. Each work interval is only 30 minutes long. An individual seeking to work a regular, full-time work schedule would have to select 80 work intervals for 1 week. But the Respondent releases the available work hours to all CSPs at the same time, only once per week. The Company also permits top performing CSPs to select work shifts first. These limitations had a foreseeable impact on Matthew Rice's work schedule. He typically logged only 20 to 30 hours per week, with intermittent work hours on many of his work days.

Through SOWs, the Respondent also imposes work hour requirements for CSPs. Matthew Rice had to work at least 13½ hours per week total, pursuant to the two Barnes & Noble SOWs from November 2014 to January 2015. The Respondent required that Rice achieve a commitment adherence of 80 to 85 percent of the work intervals he initially scheduled. Thus, the Respondent imposes limits on the ability of CSPs to cancel a work interval inside of 48 hours of its start. The Respondent reserved the right to terminate the SOW, and Rice's ability to work under it, if either of these performance metrics went unfulfilled.

The Respondent's retention of significant control over CSPs' work hours favors employee status. *Lancaster Symphony Orchestra*, 357 NLRB 1761, 1763–1764 (2011).

On balance then, the extent of control factor weighs in favor of employee status.

B. Whether CSPs are Engaged in a Distinct Occupation or Business

CSPs, including Matthew Rice, are not doing business in the name of Arise Virtual Solutions. When responding to inquiries, CSPs identify themselves as working for the Arise client for whom they provide customer service. This would support a finding that CSPs were employees of Arise clients, not the Respondent.

On the other hand, CSPs lack the infrastructure and support to operate as a separate entity, absent their affiliation with the Respondent. Moreover, the services provided by CSPs are essential to the Respondent's operations. Approximately 85 percent of the Respondent's revenue is derived from clients who contract for customer service provided by CSPs. While CSPs do not have an exclusive working relationship with the Respondent, the sporadic nature of their work hours on certain days would make it difficult for them to obtain other employ-

ment. In any event, the ability to work for multiple employers does not automatically render an individual an independent contractor. *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 2 (2015).

Overall, then, I conclude this factor is neutral.

C. Whether the Work is Usually Done Under the Direction of the Employer or by a Specialist Without Supervision

While CSPs are not subject to continuous supervision of their work duties, the Respondent directs their performance via the enforcement of performance metrics and tracking mechanisms. The SOWs require CSPs to attain a minimum level of performance in every requirement contained therein. The Respondent alone determines the work schedule commitment adherence requirement. It enforced that metric, as well as intervals serviced and average handle time, through the monitoring capabilities of its platform. For quality scores and customer satisfaction, the Respondent utilized members of its client results team to audit CSP performance and to insure they were meeting the performance requirements.

The Respondent argues that it does not control the means by which CSPs meet their performance metrics, but only the right to control the ends to be achieved. However, this assertion is contradicted by the specific feedback the client results team provided to Matthew Rice. That feedback was subjective, specific, and went beyond merely reporting results. Matthew Rice repeatedly was advised on what he needed to do to improve his work, including using proper greetings and grammar, adhering to clients' template responses, and utilizing chat PFs. QAPF Holland even demanded that Matthew Rice contact her directly and explain why he was not performing a certain task.

The Company reserves and exercises the right to terminate SOWs based on a lack of performance by CSPs. Once an SOW is terminated, CSPs lose the ability to continue providing service to a particular Arise client. Here, the Respondent terminated the SOW under which Matthew Rice performed customer service for Barnes & Noble, based on his lack of performance. As a practical matter, the Respondent's right in this regard is a disciplinary measure.

To be sure, the Respondent does not direct the work of CSPs as it is being performed. However, chat PFs have the ability to actively monitor CSP calls and may advise QAPFs about performance issues the CSPs are having. CSPs also are not subjected to any personnel policies or disciplinary system of the Respondent.

At the end of the day, I conclude this factor favors employee status. See *Sisters' Camelot*, supra, slip op. at 3 (finding that significant level of oversight favors employee status); *FedEx*, supra, 361 NLRB 610, 622 (finding direction factor favors employee status when the employer requires strict adherence to company guidelines, and closely tracks, evaluates and disciplines drivers).

D. Skill Required in the Occupation

The Respondent does not require CSPs to have a minimum level of education or any particular skills. Matthew Rice had obtained a GED, but did not have any work experience when he became a CSP. I reject the Company's contention that CSPs

had specialized skills related to the particular client they were servicing. All of the skills required to perform work as a CSP are obtained through training the Respondent provides, through the CSP 101 and client certification courses.

Accordingly, this factor supports a finding of employee status. *FedEx*, supra, slip op. at 13 (where the employer did not require drivers to have any skills and provided 2 weeks of training, factor supported employee status).

E. Whether the Employer or Individual Supplies Instrumentalities, Tools, and Place of Work

The most expensive instrumentality of work in this case is the Arise platform. The Respondent spends approximately \$500,000 to \$1 million per year to maintain it. However, the Company charges IBs a biweekly fee for each CSP who provides service through the website. The Respondent deducts that fee from the payment it makes to IBs for the work CSPs perform. In doing so, the Respondent removes that sum from the potential wage payment to a CSP. Effectively, then, the CSP is paying the platform access fee. This is indicative of independent contractor status. *City Cab Co. of Orlando*, 285 NLRB 1191, 1194 (1987) (payment of lease or rental fees over a period of time results in a substantial investment on the part of the payee, supporting independent contractor status).

As to the other tools of work, CSPs are responsible for obtaining and paying for the equipment and training necessary to respond to customer service inquiries through the website. The Respondent also does not provide CSPs with a physical location to work. Matthew Rice worked out of his home.

Accordingly, this factor favors independent contractor status.

F. Length of Time for which the Individual is Employed

The Respondent's SOWs through which CSPs provide customer service typically last only 90 days. The SOWs under which Matthew Rice performed customer service for Barnes & Noble ran for 60 days. Neither the Respondent nor the CSP is required to renew an SOW after it expires. While these agreements were of short duration, it is apparent that the Respondent routinely renews SOWs for an indefinite period, so long as CSPs meet the required performance metrics. (GC Exhs. 7 and 8.)

As a result, I find this factor neutral. *Sisters' Camelot*, supra, slip op. at 4 (factor found inconclusive where canvassers' potentially long-term relationship with employer conflicted with their discretion over whether and how much to work).

G. Method of Payment

The wages paid to CSPs for work performed through the Arise platform are determined by the IBOs, not the Respondent. The Company does not withhold taxes when making payments to IBs and reports those payments on 1099 forms. The Respondent also does not pay for any benefits for CSPs, including workers' compensation, unemployment, or disability benefits. Here, Patricia Rice decided she would pass on the entire payment from the Respondent for services rendered to each family member, including her son, who performed those services.

The Respondent also does not guarantee any minimum wage rate for CSPs. SOWs contain the amount of service revenue that the Respondent will pay to IBs for the work performed.

For the Barnes & Noble SOW under which Matthew Rice worked, the Respondent guaranteed a rate of no less than \$4 per service interval, or \$8 per hour, multiplied by the total number of intervals serviced during the invoice period. The level of service revenue provided has at least some impact on the wage rate paid to a CSP. However, it does not establish a minimum wage rate, because IBs retain the discretion to pay CSPs whatever they may choose.

On the other hand, CSPs are not subjected to any genuine financial risk, except for the minimal expenditure for equipment necessary to perform the work. CSPs also do not have any potential for entrepreneurial gain, unless they choose to work simultaneously as an IBO. The only method CSPs have to increase compensation is to work more hours.

On balance, I conclude this factor supports a finding of independent contractor status. *Argix Direct, Inc.*, 343 NLRB 1017, 1021 (2004) (lack of hourly pay rate or salary, along with no guaranteed income, favored independent contractor status); *Dial-a-Mattress Operating Corp.*, 326 NLRB 884, 891–892 (1998) (same).

H. Whether or not the Work is Part of the Regular Business of the Employer

This factor presents one of the more interesting questions in cases such as this one involving a company which has created and maintains an Internet platform through which services are provided to customers: what exactly is the company's business? The Respondent insists it is nothing more than a technology company that provides access to software and telephony infrastructure. The General Counsel counters that, irrespective of how the Respondent engages in business, the Company's core function is providing call center services to its clients.

The perspective of the Respondent's clients provides the answer to this question. Barnes & Noble, Disney, and Sears pay the Respondent to obtain call center services from CSPs, not to access and use the Company's platform. The description of the Respondent's business in the MSA is indicative of this interpretation. That agreement states the Respondent "is a virtual contact center that provides customer care solutions to its corporate clients using customer service representatives . . . who provide their [CSP] Services from remote locations . . ." (GX Exh. 2, p. 1.) The "customer care solutions" are responses to customer service inquiries through the Respondent's website.

Following the money further supports this finding. The fees paid by the Respondent's clients for these services generate 85 percent of the Company's total revenue. Only a small portion, then, is derived from the fees paid by IBs to access the Arise platform. Without the revenue derived from the CSPs' work, the Respondent essentially would be out of business.

Accordingly, I find that, at its core, the Respondent's regular business is providing call center services through its website using CSPs. Thus, this factor favors employee status. *Sisters' Camelot*, 363 NLRB No. 13, slip op. at 4 (fact that canvassers were responsible for 90 percent of organization's revenue supported finding of employee status).

I. Whether or not the Parties Believe they are Creating an Independent-Contractor Relationship

The Respondent has taken multiple steps to frame CSPs as independent contractors. CSPs execute the waiver agreement, which states CSPs are not employees of the Respondent or its clients. CSPs also have to check a box when registering as a user on the Respondent's website acknowledging that they understood they were independent contractors. However, CSPs have no right to negotiate over this term. The Respondent requires CSPs to take each of these steps in order to perform customer service work. In any event, a written agreement defining a relationship as that of an independent contractor is not dispositive.

Matthew Rice testified credibly that he viewed the Respondent—not his mother—as his employer and the people he interacted with from Arise as supervisors. In addition, Rice and other CSPs asserted FLSA claims in Federal court premised on the belief that CSPs are employees, not independent contractors.

On the whole, I conclude this factor is neutral. *FedEx Home Delivery*, 361 NLRB 610, 623.

J. Whether the Principal is or is not in the Business

As previously noted, the Respondent's regular business is to provide call center services to its clients. CSPs are the individuals providing those services through the Arise platform. Thus, the Respondent is in the same business as the CSPs. This factor likewise supports employee status. *Porter Drywall*, 362 NLRB No. 6, slip op. at 5 (2015).

K. Whether the Evidence Tends to Show that the Individual is, in Fact, Rendering Services as an Independent Business

CSPs do not have a significant actual entrepreneurial opportunity for gain or loss through their work. An entrepreneur is someone who initiates and assumes the financial risks and accepts the rewards of a new enterprise and who usually undertakes its management.⁷ CSPs do not match that definition. They do not operate a business. Their work does not involve risk. The only ability they have to affect their earnings is to work more hours or negotiate a higher wage rate with their IBOs. Neither is indicative of entrepreneurial opportunity.

While CSPs have the ability to work for other companies, that ability is somewhat unrealistic. The Respondent requires CSPs to work a minimum number of hours under each SOW. The release of all work hours for a week at the same time and the 30-minute work interval are restrictions imposed by the Respondent that produce intermittent work schedules and unusual working hours. This makes it difficult for CSPs to service more than one Arise client at a time or to work at any other job.

CSPs have no ownership interest in their customer service work.

Finally, CSPs do not have the ability to control important business decisions. CSPs do not hire or select employees. Although CSPs must purchase equipment, the cost is minimal. Moreover, the Respondent dictates the specific equipment which must be purchased and used to perform the work. CSPs

⁷ Entrepreneur, Black's Law Dictionary (10th ed. 2014).

do not otherwise invest capital that could return income. The Respondent set all of the terms of CSP work, through either its agreements with IBs or agreements it requires IBs and CSPs to execute. The Respondent can change those terms unilaterally pursuant to the terms of the MSAs.

For all these reasons, I find that CSPs do not, in fact, render services as an independent business. This factor heavily weighs in favor of employee status. *Sisters' Camelot*, supra, slip op. at 5 (canvassers' lack of control over important business decisions and lack of proprietary interest or monetary investment in their work favored employee status); cf. *Porter Drywall*, supra, slip op. at 5 (crew leaders' financial interest in their work, opportunities for gain, and control over important business decisions evidenced independent contractor status).

L. Conclusion on Employee Status

The party asserting an individual is an independent contractor, here the Respondent, has the burden of proof. Based on the analysis of the traditional common-law factors and the Board's independent business factor as described above, I conclude that the Respondent has failed to carry that burden. The majority of the factors support a finding of employee status. These include that the Respondent exercises control over the details of the CSPs' work; CSPs are not rendering services as an independent business; the Respondent is in the business of providing call center services and such services are part of its regular business; CSPs are not required to have any special skills; and the CSPs' work is being directed by the Respondent. I find that CSPs not doing business in the name of the Respondent, the length of CSPs' employment, and the parties' belief as to the relationship created are neutral factors. The factors supporting independent contractor status do not outweigh those that favor employee status. Those factors include that CSPs provide their own instrumentalities, tools and place of work and are not paid by the Respondent.

The Respondent's business structure as to CSPs is an elaborate construct designed to portray the relationship between the two as that of an independent contractor. However, that construct cannot hide the reality of the relationship, after evaluating the traditional common-law factors of agency. I conclude that customer service professionals, including Matthew Rice, are statutory employees of the Respondent and not independent contractors.

II THE MURPHY OIL ALLEGATIONS

The General Counsel's complaint alleges the Respondent violated Section 8(a)(1) by maintaining the class action waiver provision in the Acknowledgment and Waiver Agreement; requiring employees to sign the waiver agreement as a condition of employment; and enforcing the waiver agreement against Matthew Rice by requesting that Rice withdraw his opt-in consent form for the *Heather Steele* FLSA class action complaint.

In *D. R. Horton*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), petition for rehearing en banc denied (5th Cir. No. 12-60031, April 16, 2014), the Board held that an employer violates Section 8(a)(1) of the Act when it requires employees covered by the Act, as a condition

of employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours, or other working conditions against an employer in any forum, arbitral or judicial. The Board reaffirmed this principle in *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015). The Board also has ruled that an employer commits a further violation of Section 8(a)(1) if it seeks to enforce such an agreement by moving to strike the class and collective allegations in employees' work-related lawsuit or by moving to dismiss employees' collective court action and compel them to arbitrate their mutual, work-related claims individually. *Cowabunga, Inc.*, 363 NLRB No. 133, slip op. at 3 (2016); *Convergys Corp.*, 363 NLRB No. 51, slip op. at 2 (2015); *Murphy Oil*, supra, slip op. at 19.

The Respondent's conduct here falls squarely into the range prohibited by *D. R. Horton* and *Murphy Oil*. In order to perform any work for the Respondent under an SOW, CSPs are required to sign the waiver agreement. The Respondent drafted and maintains this agreement, and CSPs sign it, on the Arise platform. The agreement includes language giving the Respondent the right to enforce the class action waiver provision. Matthew Rice engaged in protected, concerted activity by filing the opt-in consent form to join the *Heather Steele* FLSA class action lawsuit. The Respondent then enforced the waiver agreement by requesting and obtaining Matthew Rice's withdrawal of his opt-in consent form.

To defend its conduct, the Respondent first argues that the saving provisions in its class waiver render it lawful. As detailed above, the waiver includes language permitting a party to file unfair labor practice charges with the Board. It also includes language allowing a party to challenge the enforceability of the waiver in state or Federal court. However, the Board has rejected the argument that waivers with such savings provisions do not violate Section 8(a)(1). See *Multiband EC, Inc.*, 363 NLRB No. 100, slip op. at 3 fn. 6 (2016); *SolarCity Corp.*, 363 NLRB No. 83, slip op. at 2-4 (2015).

The Respondent next argues that the Board's position in *D. R. Horton* and *Murphy Oil* has been "unabashedly" rejected by the U.S. Court of Appeals for the 5th Circuit. The Respondent also notes that a different court of appeals held, in *Walthour v. Chipio Windshield Repair*, 745 F.3d 1326 (11th Cir. 2014), that a provision in an arbitration agreement which waived a party's ability to bring a collective action was enforceable under the Federal Arbitration Act. Of course, an administrative law judge's duty is to apply established Board precedent which the U.S. Supreme Court has not reversed, even where the Board precedent conflicts with a court of appeals. *Austin Fire Equipment, LLC*, 360 NLRB 1176, 1176 at fn. 6 (2014); *Arrow Flint Electric Co.*, 321 NLRB 1208 (1996). In any event, the courts of appeals are now split on the Board's *D. R. Horton* decision. The 7th Circuit Court of Appeals recently upheld the Board's view and found that an arbitration provision prohibiting FLSA class actions and requiring employees to bring such claims in individual arbitration violated the Act. *Lewis v. Epic Systems Corp.*, ___ F.3d ___, 2016 WL 3029464 (7th Cir. 2016). Accordingly, I reject this argument.

As a result, I conclude that the Respondent has violated the Act in all the manners alleged in the General Counsel's complaint.

CONCLUSIONS OF LAW

1. The Respondent, Arise Virtual Solutions, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. On or about November 13, 2014, Matthew Rice engaged in concerted activities for the purpose of mutual aid and protection with other employees of the Respondent by filing an opt-in consent form as a plaintiff in the class action complaint in *Heather Steele et. al v. Arise Virtual Solutions, Inc.*, Case 13-V-62823, in the U.S. District Court for the Southern District of Florida.

3. The Respondent has violated Section 8(a)(1) by maintaining the class action waiver provision in its Acknowledgement and Waiver Agreement; requiring employees to sign the waiver agreement as a condition of employment; and enforcing the waiver agreement against Matthew Rice by requesting that Rice withdraw his consent form by which he opted into the *Heather Steele* FLSA class action complaint.

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

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Consistent with the Board's usual practices in cases involving unlawful class action waivers and litigation, I shall order the Respondent to reimburse Matthew Rice for all reasonable expenses and legal fees, with interest,⁸ incurred in opposing the Respondent's unlawful efforts to enforce the class action waiver by requesting that Rice withdraw his opt-in consent form in the *Heather Steele* FLSA class action. See *Murphy Oil*, slip op. at 21; *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 747 (1983). I also shall order the Respondent to rescind or revise the class action waiver and to notify employees that it has done so.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁹

ORDER

The Respondent, Arise Virtual Solutions, Inc., Miramar, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

⁸ Interest is to be computed in the manner prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). See *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 835 fn. 10 (1991) ("[I]n make-whole orders for suits maintained in violation of the Act, it is appropriate and necessary to award interest on litigation expenses."), *enfd.* 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993).

⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Maintaining and/or enforcing any agreement or rule that requires employees, as condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the Acknowledgment and Waiver Agreement, or revise the agreement to make clear to employees that the agreement does not constitute a waiver of employees' rights to file or maintain employment-related joint, class, or collective actions.

(b) Notify all current and former employees who were required to sign, or otherwise agree to, the Acknowledgement and Waiver Agreement that the agreement has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) In the manner set forth in the remedy section of this decision, reimburse Matthew Rice for any reasonable attorneys' fees and litigation expenses that he incurred in opposing the Respondent's unlawful efforts to enforce the Acknowledgement and Waiver Agreement.

(d) Within 14 days after service by the Region, post at its facility in Miramar, Florida, copies of the attached notice marked "Appendix."¹⁰ Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or Internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 16, 2014.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Regional Director attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C., August 12, 2016

¹⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX
 NOTICE TO EMPLOYEES
 POSTED BY ORDER OF THE
 NATIONAL LABOR RELATIONS BOARD
 An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT maintain and/or enforce an agreement or rule that requires you, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the Acknowledgment and Waiver Agreement (Waiver Agreement) or revise it to make clear that the Waiver Agreement does not constitute a waiver of employees'

rights to maintain employment-related joint, class, or collective actions.

WE WILL notify you that the Waiver Agreement has been rescinded or revised and, if revised, provide you with a copy of the revised Waiver Agreement.

WE WILL reimburse Matthew Rice for any reasonable attorneys' fees and litigation expenses he may have incurred in opposing our unlawful efforts to enforce the Waiver Agreement.

ARISE VIRTUAL SOLUTIONS, INC.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/12-CA-144223 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

