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Nijjar Realty, Inc., d/b/a Pama Management *and* Gerardo Haro. Case 21–CA–092054

November 20, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

On December 4, 2013, Administrative Law Judge William Nelson Cates 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 Respondent also filed a motion to dismiss the complaint or, alternatively, to stay and reschedule the hearing. The General Counsel filed an opposition to the Respondent's motion.

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

Applying the Board's decision in *D. R. Horton*, 357 NLRB No. 184 (2012), enf. denied in relevant part, 737 F.3d 344 (5th Cir. 2013), the judge found that the Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a Comprehensive Agreement and Applicant's Statement of Agreement (CAASA) that requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial.[1] In *Murphy Oil USA, Inc*., 361 NLRB No. 72 (2014), enf. denied in part, *Murphy Oil USA, Inc. v. NLRB*, No. 14-60800 (5th Cir. Oct. 26, 2015), the Board reaffirmed the relevant holdings of *D. R. Horton*, supra.

The Board has considered the decision and the record in light of the exceptions and briefs[2] and, based on the judge's application of *D. R. Horton* and on our subsequent decision in *Murphy Oil*, we affirm the judge's rulings, findings,[3] and conclusions, and adopt the recommended Order as modified and set forth in full below.[4]

1. To the extent that the Respondent argues that the complaint is time-barred by Section 10(b) because the initial unfair labor practice charge was filed and served more than 6 months after the Charging Party, Gerardo Haro, signed and became subject to CAASA, we reject this argument, as did the judge. The Respondent continued to maintain the unlawful CAASA during the 6-month period preceding the filing of the initial charge. The Board has long held under these circumstances that maintenance of an unlawful workplace rule, such as the Respondent's CAASA, constitutes a continuing violation that is not time-barred by Section 10(b). See *PJ Cheese, Inc.*, 362 NLRB No. 177, slip op. at 1 (2015); *The Neiman Marcus Group*, 362 NLRB No. 157, slip op. at 2 & fn. 6 (2015); and *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, slip op. at 2 & fn. 7 (2015). It is equally well-established that an employer's enforcement of an unlawful rule, like the CAASA, independently violates Section 8(a)(1). See *Murphy Oil*, supra, at 19–21.

We also reject the Respondent's argument that the judge should not have treated its attempt to enforce its policy as within the 10(b) period, because, although alleged as unlawful in the complaint, it was not included in the charge. The allegation involving the Respondent's enforcement of its arbitration policy is of the same class of violations as the allegation in the charge that it maintained an unlawful arbitration policy. The enforcement of the policy was dependent on, and plainly related to, its

[1] We agree with the judge that the "Comprehensive Agreement" and the "Applicant's Statement of Agreement" forms constituted "one inextricably intertwined employment application" (which we, like the judge, have abbreviated as "CAASA"). The Respondent required Haro, like other employees, to sign both the CA and the ASA at the same time, as part of the same set of documents, and as a condition of continuing employment with the Respondent.

[2] The Respondent has requested oral argument. The request is denied as the record and briefs adequately present the issues and the positions of the parties.

[3] In the Facts section of the judge's decision, the judge stated that Charging Party Gerardo Haro filed a lawsuit alleging violations of the Fair Labor Standards Act. Haro's lawsuit actually alleged violations of state labor law. This inadvertent error by the judge does not affect the result.

The Respondent excepts to the judge's refusal to admit into evidence an earlier agreement that Haro signed when he initially applied to the Respondent and other evidence that the Respondent argues demonstrate its reasons for implementing the CAASA. We find that the judge did not abuse his discretion in finding that this evidence was not relevant to the issues in this case.

[4] We shall modify the Order to conform to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified. Consistent with our decision in *Murphy Oil*, supra, at 21, we shall order the Respondent to reimburse Haro for all reasonable expenses and legal fees, with interest, incurred in opposing the Respondent's unlawful motion in state court to compel individual arbitration of his class or collective claims. See *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 747 (1983) ("If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorneys' fees and other expenses" as well as "any other proper relief that would effectuate the policies of the Act."). Interest shall 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).

We shall also order the Respondent to notify the state court that it has rescinded or revised the CAASA and to inform the court that it no longer opposes Haro's lawsuit on the basis of the CAASA.

maintenance. Because the complaint allegation emerged out of the investigation of the charge while the proceeding was pending before the General Counsel, the complaint allegation was sufficiently related to a timely charge. See *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, slip op. at 2 fn. 9; see generally *NLRB v. Fant Milling Co.*, 360 U.S. 301 (1959).

2. We reject the Respondent's argument that Haro was not engaged in concerted activity in filing a lawsuit alleging violations of the state wage and hour law in the Superior Court of the State of California. As the Board made clear in *Beyoglu*, 362 NLRB No. 152 (2015), "the filing of an employment-related class or collective action by an individual is an attempt to initiate, to induce, or to prepare for group action and is therefore conduct protected by Section 7." Id., slip op. at 2. See also *D. R. Horton*, 357 NLRB No. 184, slip op. at 3.

3. We also reject the Respondent's contention that the opt-out provision of its Comprehensive Agreement places it outside the scope of the prohibition against mandatory individual arbitration agreements under *Murphy Oil* and *D. R. Horton*. See *D. R. Horton*, slip op. at 13 fn. 28. The Board has rejected this argument, holding that an opt-out procedure still imposes an unlawful mandatory condition of employment that falls squarely within the rule set forth in *D. R. Horton* and affirmed in *Murphy Oil*. See *On Assignment Staffing Services*, 362 NLRB No. 189, slip. op. at 1, 4–5 (2015). The Board further held in *On Assignment*, slip op. at 1, 5–8, that even assuming that an opt-provision renders an arbitration agreement not a condition of employment (or nonmandatory), an arbitration agreement precluding collective action in all forums is unlawful even if entered into voluntarily because it requires employees to prospectively waive their Section 7 right to engage in concerted activity. Id.[5]

4. We deny the Respondent's motion to dismiss the complaint or, alternatively, to stay the proceedings. The Respondent's arguments about the validity of the Board's decision in *D. R. Horton* lack merit for the reasons stated in *Murphy Oil*, slip op. at 2 fn. 16. The Respondent's assertion that the Board should issue a stay until it "has a non-challengeable quorum" is moot, given that the Board is currently composed of confirmed Members. The Respondent also argues that the complaint is invalid because the Regional Director who issued it was not appointed by a lawfully constituted Board. We reject this argument. The complaint was issued by Olivia Garcia, who was appointed Regional Director for Region 21 on December 22, 2011, at which time the Board had a valid quorum. See *Longshore & Warehouse Local 19 (Seattle Tunnel Partners)*, 361 NLRB No. 122, slip op. at 1 fn. 1 (2014). Lastly, we reject the Respondent's claim that, even if *D. R. Horton* is good law, it is distinguishable and inapplicable.

[5] Our dissenting colleague argues that Sec. 8(a)(1) of the Act does not prohibit agreements that waive class and collective actions, especially when, as here, they contain an opt-out provision. We disagree, for the reasons stated in *Murphy Oil*, supra, slip op. at 17–18, and *On Assignment*, supra, slip op. at 4, 9 & fns. 28, 29, 31.

ORDER

The National Labor Relations Board orders that the Respondent, Nijjar Realty, Inc., d/b/a Pama Management, El Monte, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and/or enforcing a mandatory and binding arbitration agreement in its Comprehensive Agreement and Applicant's Statement of Agreement (CAASA) that requires employees, as a 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 mandatory and binding arbitration agreement in all of its forms, or revise it in all of its forms to make clear to employees that the arbitration agreement does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums.

(b) Notify all applicants and current and former employees who were required to sign or otherwise became bound to the CAASA that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) Notify the Superior Court of California, Los Angeles County in Case BC487199 that it has rescinded or revised the mandatory arbitration agreements upon which it based its petition to compel arbitration and to stay action pending arbitration of Gerardo Haro's claim, and inform the court that it no longer opposes the action on the basis of those agreements.

(d) In the manner set forth in the remedy section of the judge's decision, as amended, reimburse Gerardo Haro for any reasonable attorneys' fees and litigation expenses that he may have incurred in opposing the Respondent's petition to compel individual arbitration.

(e) Within 14 days after service by the Region, post at its facility in El Monte, California, copies of the attached

notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative shall be posted by the Respondent and maintained for 60 consecutive 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 an 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. If the Respondent has gone out of business or closed the facility 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 April 26, 2012.

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

Dated, Washington, D.C. November 20, 2015

Mark Gaston Pearce, Chairman

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

I agree that the National Labor Relations Act (the Act or NLRA) protects employees from retaliation if they engage in "concerted" activities for "mutual aid or protection." As explained in my partial dissenting opinion in *Murphy Oil USA, Inc.,*[1] I also agree that an employee may engage in protected activities in relation to a claim asserted under a statute other than NLRA.[2] However, I believe Section 8(a)(1) of the Act does not vest authority in the Board to dictate any particular procedures pertaining to the litigation of non-NLRA claims, nor does the Act entitle employees to class-type treatment of such claims. Moreover, when parties enter into an agreement that waives class or collective litigation regarding non-NLRA claims, I believe questions about the enforceability or nonenforceability of such an agreement are exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims. Id.

In this case, the Respondent required its employees to enter into a Comprehensive Agreement and Applicant's Statement of Agreement (Agreement) that provided for individual arbitration of employment-related claims and waived the right to pursue class or collective actions in employment-related disputes involving non-NLRA claims.[3] Additionally, the Agreement contains an "opt-out" provision that permits employees to exercise a choice *not* to be covered by the class waiver by checking a designated box on the Agreement form. Haro signed the Agreement, and later he filed a class action lawsuit against the Respondent in state court alleging California labor law violations and asserting claims under the California Private Attorney General Act (PAGA). In reliance on the Agreement, the Respondent filed a state court motion to compel arbitration, which the court granted regarding Haro's individual claims.[4]

I disagree with my colleagues' finding that Section 8(a)(1) of the NLRA prohibits agreements that waive class and collective actions, and I especially disagree

[6] If this Order is enforced by a judgment of the 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."

[1] 361 NLRB No. 72, slip op. at 22–35 (2014) (Member Miscimarra, dissenting in part). The Board majority's holding in *Murphy Oil* invalidating class-action waiver agreements was recently denied enforcement by the Court of Appeals for the Fifth Circuit. *Murphy Oil USA, Inc. v. NLRB*, No. 14-60800, 2015 WL 6457613 (5th Cir. Oct. 26, 2015).

[2] I agree that non-NLRA claims can give rise to "concerted" activities engaged in by two or more employees for the "purpose" of "mutual aid or protection," which would come within the protection of NLRA Sec. 7. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 23–25 (Member Miscimarra, dissenting in part). However, the existence or absence of Sec. 7 protection does not depend on whether non-NLRA claims are pursued as a class or collective action, but on whether Sec. 7's statutory requirements are met—an issue separate and distinct from whether an individual employee chooses to pursue a claim as a class or collective action. Id.; see also *Beyoglu,* 362 NLRB No. 152, slip op. at 4–5 (2015) (Member Miscimarra, dissenting). Here, Charging Party Gerardo Haro filed the lawsuit by himself without seeking the support of any other employee and testified that he did not even know what a class action was, though the judge found that Haro discussed the lawsuit with other employees after it was filed. Because I would dismiss the complaint in any event, I find it unnecessary to decide whether this evidence establishes that Haro was engaged in concerted activity.

[3] The majority adopts the judge's finding that the Comprehensive Agreement and Applicant's Statement of Agreement were "one inextricably intertwined employment application." In light of my disposition of this case, I do not pass on the Respondent's exception to this finding.

[4] The court severed and stayed the PAGA claims.

with the Board's finding here, similar to the Board majority's finding in *On Assignment Staffing Services*,[5] that class waiver agreements violate the NLRA even when they contain an opt-out provision. In my view, Sections 7 and 9(a) of the NLRA render untenable both of these propositions. As discussed in my partial dissenting opinion in *Murphy Oil*, NLRA Section 9(a) protects the right of every employee as an "individual" to "present" and "adjust" grievances "at any time."[6] This aspect of Section 9(a) is reinforced by Section 7 of the Act, which protects each employee's right to "refrain from" exercising the collective rights enumerated in Section 7. Thus, I believe it is clear that (i) the NLRA creates no substantive right for employees to insist on class-type treatment of non-NLRA claims;[7] (ii) a class-waiver agreement pertaining to non-NLRA claims does not infringe on any NLRA rights or obligations, which has prompted the overwhelming majority of courts to reject the Board's position regarding class waiver agreements;[8] (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA);[9] and (iv) the legality of such a waiver is even more self-evident when the agreement contains an opt-out provision, based on every employee's Section 9(a) right to present and adjust grievances on an "individual" basis and each employee's Section 7 right to "refrain from" engaging in protected concerted activities.

The opt-out mechanism in Respondent's Agreement is not cumbersome, and I believe it is clearly unwarranted for the Board to find that the NLRA is violated by this type of opt-out class waiver agreement. According to my colleagues, the NLRA's "protection" paradoxically operates in reverse: rather than *protecting* employees' rights to engage in or refrain from certain kinds of collective activities, the majority makes it unlawful for employees to be given the *choice* of whether to make non-NLRA claims subject to individual arbitration. In my view, the NLRA does not divest employees of the right to make such a choice. Rather, Congress twice expressed its intention to protect this right of employees: in Section 7, which guarantees employees the right to "refrain" from collective action, and in Section 9(a), which guarantees every employee the right "at any time" to present and adjust his or her grievances individually, and thus to enter into agreements with employers providing for their adjustment on an individual basis.

The legality of the Respondent's opt-out agreement is reinforced by other considerations. Courts have uniformly upheld individual arbitration agreements that contain opt-out provisions (rejecting arguments like those advanced by my colleagues here).[10] Moreover, insofar as

[5] 362 NLRB No. 189, slip op. at 1, 4–5 (2015).

[6] *Murphy Oil*, above, slip op. at 30–34 (Member Miscimarra, dissenting in part). Sec. 9(a) states: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That *any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted*, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment" (emphasis added). The Act's legislative history shows that Congress intended to preserve every individual employee's right to "adjust" any employment-related dispute with his or her employer. See *Murphy Oil*, above, slip op. at 31–32 (Member Miscimarra, dissenting in part).

[7] When courts have jurisdiction over non-NLRA claims that are potentially subject to class treatment, the availability of class-type procedures does not rise to the level of a substantive right. See *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) ("The use of class action procedures . . . is not a substantive right.") (citations omitted), petition for rehearing en banc denied No. 12-60031 (5th Cir. 2014); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.").

[8] The Fifth Circuit has twice denied enforcement of Board orders invalidating a mandatory arbitration agreement that waived class-type treatment of non-NLRA claims. See *Murphy Oil, Inc., USA v. NLRB,* above; *D. R. Horton, Inc. v. NLRB,* above. The overwhelming majority of courts considering the Board's position have likewise rejected it. See *Murphy Oil,* 361 NLRB No. 72, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 36 fn. 5 (Member Johnson, dissenting) (collecting cases); see also *Patterson v. Raymours Furniture Co., Inc*., No. 14-CV-5882 (VEC), 2015 WL 1433219 (S.D.N.Y. Mar. 27, 2015); *Nanavati v. Adecco USA, Inc.,* No. 14-cv-04145-BLF, 2015 WL 1738152 (N.D. Cal. Apr. 13, 2015), motion to certify for interlocutory appeal denied 2015 WL 4035072 (N.D. Cal. June 30, 2015); *Brown v. Citicorp Credit Services, Inc.,* No. 1:12-cv-00062-BLW, 2015 WL 1401604 (D. Idaho Mar. 25, 2015) (granting reconsideration of prior determination that class waiver in arbitration agreement violated NLRA).

[9] Even if a conflict existed between the NLRA and an arbitration agreement's class waiver provisions, the FAA requires that the arbitration agreement be enforced according to its terms. *Murphy Oil,* above, slip op. at 34 (Member Miscimarra, dissenting in part); id., slip op. at 49–58 (Member Johnson, dissenting).

[10] *On Assignment Staffing*, above, slip op. at 12–13 (Member Johnson, dissenting); see also *Johnmohammadi v. Bloomingdale's,* 755 F.3d 1072, 1075–1077 (9th Cir. 2014) (where employee had the right to opt out of individual arbitration agreement but chose not to, she "freely elected to arbitrate employment-related disputes on an individual basis . . . [and thus] cannot claim that enforcement of the agreement violates either the Norris-LaGuardia Act or the NLRA"); *Davis v. O'Melveny & Meyers,* 485 F.3d 1066, 1073 (9th Cir. 2007) ("[I]f an employee has a meaningful opportunity to opt out of the arbitration provision when signing the agreement and still preserve his or her job, then it is not procedurally unconscionable."); *Legair v. Circuit City Stores, Inc.,* 213 Fed. Appx. 436, 439 (6th Cir. 2007) (when plaintiff "failed to take the required action to opt out. . . . [he] by his conduct demonstrated his agreement to be bound"); *Garrett v. Circuit City Stores, Inc.,* 449 F.3d 672, 675 & fn. 2 (5th Cir. 2006) (employee agreed to arbitrate dispute

an employer implies or expresses a preference that employees refrain from exercising a voluntary opt-out right provided in a class waiver arbitration agreement, Section 8(c) of the Act precludes the Board from relying on such advocacy as evidence that the agreement is unlawful.[11] Finally, I disagree that Congress vested the Board with authority to conclude that employees lack sufficient "equality" in bargaining power to make their own choices regarding agreements pertaining to whether class-type procedures may apply to non-NLRA claims.[12]

Because I believe the Respondent's Agreement was lawful under the NLRA, I would find it was similarly lawful for the Respondent to file a motion in state court seeking to enforce the Agreement. It is relevant that the state court that had jurisdiction over the non-NLRA claims *granted* the Respondent's motion to compel arbitration. That the Respondent's motion was reasonably based is also supported by the multitude of court decisions that have enforced similar agreements.[13] As the Fifth Circuit recently observed—after rejecting (for the second time) the Board's position regarding the legality of class waiver agreements—"[I]t is a bit bold for [the Board] to hold that an employer who followed the reasoning of our *D. R. Horton* decision had no basis in fact or law or an 'illegal objective' in doing so. The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders."[14] I also believe that any Board finding of a violation based on the Respondent's meritorious state court motion to compel arbitration would improperly risk infringing on the Respondent's rights under the First Amendment's Petition Clause. See *Bill Johnson's Restaurants v. NLRB,* 461 U.S. 731 (1983); *BE & K Construction Co. v. NLRB,* 536 U.S. 516 (2002); see also my partial dissent in *Murphy Oil,* above, 361 NLRB No. 72, slip op. at 33–35. Finally, for similar reasons, I believe the Board cannot properly require the Respondent to reimburse the Charging Party for its attorneys' fees in the circumstances presented here. *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 35.

For the above reasons, I believe that the Respondent's agreement, including its "opt-out" provisions, should be deemed lawful under NLRA Section 8(a)(1).

Accordingly, I respectfully dissent.

Dated, Washington, D.C. November 20, 2015

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Philip A. Miscimarra, Member

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 a mandatory and binding arbitration agreement in our Comprehensive Agreement and Applicant's Statement of Agreement (CAASA) that requires employees, 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 listed above.

WE WILL rescind the CAASA in all of its forms, or revise it in all of its forms to make clear that it does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums.

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at issue where he had had notice and an opportunity to opt out of arbitration agreement, but did not do so); *Circuit City Stores, Inc. v. Najd,* 294 F.3d 1104, 1109 (9th Cir. 2002) (where employee could "mull over whether to opt out of [the agreement, he] . . . . assented . . . by failing to exercise his right to opt out"); *Circuit City Stores, Inc. v. Ahmed,* 283 F.3d 1198, 1199–1200 (9th Cir. 2002) (arbitration agreement not procedurally unconscionable where employee had meaningful opportunity to opt out); *Michalski v. Circuit City Stores, Inc.,* 177 F.3d 634, 636 (7th Cir. 1999) (employee "was free not to arbitrate; she was given a choice and she chose—by not signing the opt-out provision—to be bound").

[11] *On Assignment Staffing*, above, slip op. at 13 (Member Johnson, dissenting).

[12] Id., slip op. at 14–15.

[13] See, e.g., *Murphy Oil, Inc., USA v. NLRB*, above; *Johnmohammadi v. Bloomingdale's*, above; *D. R. Horton, Inc. v. NLRB*, above; *Owen v. Bristol Care, Inc.,* 702 F.3d 1050 (8th Cir. 2013); *Sutherland v. Ernst & Young LLP,* 726 F.3d 290 (2d Cir. 2013).

[14] *Murphy Oil, Inc., USA v. NLRB,* above, at *6. Because I would dismiss the enforcement allegation on the merits, I find it unnecessary to decide whether the allegation was properly included in the complaint despite not being included in the charge, and whether the judge erred in excluding evidence proffered by the Respondent regarding the reasons for its implementation of the Agreement.

WE WILL notify all applicants and current and former employees who were required to sign the CAASA that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

WE WILL notify the court in which Gerardo Haro filed his collective wage claim that we have rescinded or revised the mandatory arbitration agreements upon which we based our petition to compel arbitration and to stay action pending arbitration of Gerardo Haro's claim, and WE WILL inform the court that we no longer oppose Gerardo Haro's collective claim on the basis of that agreement.

WE WILL reimburse Gerardo Haro for any reasonable attorneys' fees and litigation expenses that he may have incurred in opposing our petition to compel individual arbitration.

NIJJAR REALTY, INC., D/B/A PAMA MANAGEMENT

The Board's decision can be found at www.nlrb.gov/case/21-CA-092054 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.

Cecelia Valentine, Esq., for the Government.[1]
Ronald W. Novotny, Esq., for the Company.[2]
David Spivak Esq., for the Charging Party.

DECISION

Statement of the Case

WILLIAM NELSON CATES, Administrative Law Judge. This case was tried before me on August 26, 2013, in Los Angeles, California. Charging Party Haro filed the charge initiating this matter on October 25, 2012, and the Acting General Counsel issued a complaint and notice of hearing (complaint) on May 30, 2013. The Government alleges the Company violated Section 8(a)(1) of the National Labor Relations Act (the Act) by, since on or about April 26, 2012, maintaining a Comprehensive Agreement and Applicant's Statement of Agreement (CAASA) which contains provisions that precludes employees from participating in collective and class litigation to resolve disputes arising out of employment, and, prohibits employees from arbitrating disputes as a class. It is further alleged the Company has, since on or about April 26, 2012, required all new and existing employees to execute the CAASA forms which provides that employees resolve all disputes arising out of employment through binding arbitration (unless they opt out by checking a box on the CAASA forms) and also, provides employees must arbitrate their claims individually. It is also alleged the Company has, since at least December 14, 2012, enforced the arbitration provisions regarding resolving disputes arising out of employment through binding arbitration as set forth in the CAASA forms, by asserting it in litigation brought against the Company by Charging Party Haro in *Gerardo Haro Guadarrama v. Nijjar Realty, Inc.* et al Case number BC487199 (Superior Court of California, Los Angeles County) by filing a petition to compel plaintiffs to individually arbitrate their class wide wage and hour claims against the Company. The trial court (Superior Court of California, Los Angeles County) on March 6, 2013, adopted its tentative ruling to Sever and Stay the Private Attorney General Act (PAGA) claims and to compel arbitration of Charging Party Haro's and all other claims on an individual basis.

This is another case raising issues concerning arbitration policies that effect collective bargaining and representational rights related to *D. R. Horton, Inc*., 357 NLRB No. 184 (2012), petition to review filed 12-60031 (5th Cir. 2012), (oral argument heard on February 5, 2013).

The Company, in its answer to the complaint, and at trial, denies having violated the Act in any manner alleged in the complaint.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. I carefully observed the demeanor of the witnesses as they testified and I rely on those observations here. I have studied the whole record, and based on the detailed findings and analysis below, I conclude and find the Company violated the Act essentially as alleged in the complaint.

FINDINGS OF FACT

I. JURISDICTION

The Company is a corporation with an office and place of business in El Monte, California, where it has been, and continues to be, engaged in the business of property management including management of leased residential properties. During the past year, a representative period, the Company derived gross revenues in excess of $500,000, and during that same time purchased and received at its El Monte, California facility goods from other enterprises located within the State of California, each of which other enterprises received these goods directly from points outside the State of California. The parties admit, and I find, the Company is an employer engaged in

[1] I shall refer to counsel for the Acting General Counsel as counsel for the Government and the Acting General Counsel as the Government.

[2] I shall refer to counsel for the Respondent as counsel for the Company and shall refer to the Respondent as the Company.

commerce within the meaning of Section 2(2), (6), and (7) of the Act.[3]

II. FACTS

Charging Party Haro made his initial application for employment with the Company on August 24, and commenced working around September 1, 2011. Haro was employed as a maintenance worker working from the Company's Ontario, California office the first 3 months and from the San Bernardino, California office the last month of his employment. Haro left his employment with the Company around mid-January 2012. The circumstances of Haro's departure from the Company are not before me.

Haro, who lives in San Bernardino, performed general maintenance work on, for example, floors, ceilings and welding assignments at company managed properties. Haro testified Rocio Chanez (Supervisor Chanez) was in charge of the San Bernardino area and Alejandro Montiel (Supervisor Montiel)[4] was supervisor of the maintenance workers.

Haro was required to and filled out a second job application and related employment documents for the Company on December 29, 2011. Haro testified that when he and 18 to 20 other maintenance employees reported for work at the San Bernardino office on the morning of December 29, 2011, they were told by both Supervisors Chanez and Montiel they had to fill out and sign new employment documents and if they did not "they would not pay us." Haro said Chanez and Montiel did not tell them anything about the documents except that they had to sign them. Haro asked what kind of documents they were and Chanez replied they were from the Company's El Monte, California office. Haro testified Montiel and Chanez "just wanted us to sign [the documents] in a hurry and go to work."

Haro completed the documents while in the office and placed them on Montiel's desk before going to work. Haro placed a question mark on the signature line of Applicant's Statement and Agreement because he "did not understand any of this." When Haro returned to the office that afternoon the secretary told him he had failed to sign some portions of the documents. The secretary placed post-its where Haro was to sign or mark which he did. The documents were in English. Haro started speaking English at age 30 and can read some English. Haro did not ask for a copy of the CAASA forms he signed on December 29, 2011, nor, did he request a Spanish language copy before signing the forms. Haro did not ask that the documents be translated for him. Haro testified he did not ask his supervisors any questions about the documents but did ask coworkers who did not know what the documents were. Haro testified he understood he had to sign the documents to continue working for the Company, and, he also understood that by having to sign the documents he was agreeing to the terms of the documents. No one from management or the secretary brought to Haro's attention when he signed the documents in the morning or when he further signed them in the afternoon that there was an "opt out" box in the CAASA forms that he could initial.

The CAASA forms executed by Charging Party Haro and the other maintenance employees, which were required by the Company as a condition of employment, contains, in part, the following:

> Comprehensive Agreement
>
> 2. Employee, Emplicity and Company, agree to utilize binding arbitration as the sole and exclusive means to resolve all disputes that may arise out of or be related in any way to Employee's employment, including but not limited to the termination of Employee's employment and Employee's compensation. Employee specifically waives and relinquishes his/her right to bring a claim against Emplicity and/or Company, in a court of law, and this waiver shall be equally binding on any person who represents or seeks to represent Employee in a lawsuit against Emplicity or Company in a court of law. Similarly, Emplicity and Company specifically waive and relinquish their rights to bring a claim against Employee in a court of law, and this waiver shall be equally binding on any person who represents or seeks to represent Emplicity or Company in a lawsuit against the Employee in a court of law. Employee, Emplicity, and Company agree that any claim, dispute, and/or controversy that Employee may have against Emplicity (or its owners, directors, officers, managers, employees, or agents), or Company (or its owners, directors, officers, managers, employees, or agents), or that Emplicity or Company may have against Employee, shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act ("FAA"), in conformity with the procedures of the California Arbitration Act, (CAL. Code Civ. Proc. Sec 1280 et seq., including section 1283.05 and all of the Act's other mandatory and permissive rights to discovery). The FAA applies to this agreement because both Emplicity and Company business involves interstate commerce. Included within the scope of this Agreement are all disputes, whether based on tort, contract, statute (including, but not limited to, any claims of discrimination, harassment and/or retaliation, whether they be based on the California Fair Employment and Housing Act, Title VII of the Civil Rights Act of 1964, as amended, or any other state or federal law or regulation), equitable law, or otherwise. The only exception to the requirement of binding arbitration shall be for claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers' Compensation Act, Employment Development department claims, or as may otherwise be required by state or federal law. However, nothing

[3] The Company at trial, and in its posttrial brief, contends *D. R. Horton,* supra is invalid because it was not decided by a quorum of at least three Board Members pursuant to 29 U.S.C. § 153(b) and was thus unconstitutional (citing *Noel Canning v. NLRB* 705 F.3d 490 (D.C. Cir. 2013), cert. granted 133 S.Ct. 2861 (June 24, 2013)). The Board has rejected similar contentions in numerous cases, see, e.g., *Bloomingdale's Inc.,* 359 NLRB No. 113 (2013). I note the Board now has a full complement of five members nominated by the President and confirmed by the Senate and could, if they deemed appropriate, reaffirm the earlier Board's actions. Consistent with Board precedent, I reject the Company's *Noel Canning,* supra, defense.

[4] While Chanez and Montiel were not named as supervisors in the complaint, and it is not necessary here to decide that issue, it appears no party disputes their positions or authority. I have applied the supervisory title to them for ease of understanding the sequence of events leading to the signing of the employment documents at issue here.

herein shall prevent Employee from filing and pursuing proceedings before the California Department of Fair Employment and Housing, or the United States Equal Employment Opportunity Commission (although if Employee chooses to pursue a claim following the exhaustion of such administrative remedies, that claim would be subject to the provisions of this Agreement). By this binding arbitration provision, Employee, Emplicity and Company give up their right to trial by jury of any claim Employee may have against Emplicity or Company, or of any claim Emplicity or Company may have against Employee. This agreement is not intended to interfere with Employee's rights to collectively bargain, to engage in protected, concerted activity, or to exercise other rights protected under the National Labor Relations Act.

4. This binding arbitration agreement shall not be construed to allow or permit the consolidation or joinder of other claims or controversies involving any other employees, and will not proceed as a class action, collective action, private attorney general action or any similar representative action. No arbitrator shall have the authority under this agreement to order any such class of representative action. I further understand and acknowledge that the terms of this Agreement include a waiver of any substantive or procedural rights that I may have to bring an action on a class, collective, private attorney general, representative or other similar basis. However, due to the nature of this waiver, the Company has provided me with the ability to choose to retain these rights by affirmatively checking the box at the end of this paragraph. Accordingly, I expressly agree to waive any right I may have to bring an action on a class, collective, private attorney general, representative or other similar basis, unless I check this box [ ].

Applicant's Statement and Agreement:

I further agree and acknowledge that Emplicity, the Worksite Employer, and I will utilize binding arbitration to resolve all disputes that may arise out of the employment context. Emplicity, the Worksite Employer, and I agree that any claim, dispute, and/or controversy that either I may have against Emplicity or the Worksite Employer (or their owners, directors, officers, managers, employees, agents, and parties affiliated with their employee benefit and health plans) or Emplicity or the Worksite Employer may have against me, arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with Emplicity or the Worksite Employer shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act, in conformity with the procedures of the California Arbitration Act (Cal. Code Civ. Proc. Sec 1280 et seq., including section 1283.05 and all of the Act's other mandatory and permissive rights to discovery), included within the scope of this Agreement are all disputes, whether based on tort, contract, statute (including, but not limited to any claims of discrimination and harassment, whether they be based on the California Fair Employment and Housing act, Title VII of the Civil Rights Act of 1964, as amended, or any other state or federal law or regulation), equitable law, or otherwise with exception of claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers' Compensation Act, Employment Development Department claims, or as otherwise required by state or federal law. However, nothing herein shall prevent me from filing and pursuing proceedings before the California Department of Fair Employment and Housing, or the United States Equal Employment Opportunity Commission (although if I choose to pursue a claim following the exhaustion of such administrative remedies, that claim would be subject to the provisions of this Agreement). Further, this Agreement shall not prevent either me or the Company from obtaining provisional remedies to the extent permitted by Code of Civil Procedure Section 1281.8 either before the commencement of or during the arbitration process. In addition to any other requirements imposed by law, the arbitrator selected shall be a retired California Superior Court Judge, or otherwise qualified individual to whom the parties mutually agree, and shall be subject to disqualification on the same grounds as would apply to a judge of such court. All rules of pleading (including the right of demurrer), all rules of evidence, all rights to resolution of the dispute by means of motions for summary judgment, judgment on the pleadings, and judgment under Code of Civil Procedure Section 631.8 shall apply and be observed. Resolution of the dispute shall be based solely upon the law governing the claims and defenses pleaded, and the arbitrator may not invoke any basis (including but not limited to, notions of "just cause") other than such controlling law. The arbitrator shall have the immunity of a judicial officer from civil liability when acting in the capacity of an arbitrator, which immunity supplements any other existing immunity. Likewise all communications during or in connection with the arbitration proceedings are privileged in accordance with Cal. Civil Code Section 47(b). As reasonably required to allow full use and benefit of this agreement's modifications to the Act's procedures, the arbitrator shall extend the times set by the Act for the giving of notices and setting of hearings. Awards shall include the arbitrator's written reasoned opinion. I understand and agree to this binding arbitration provision, and I, the Worksite Employer and Emplicity give up our right to trial by jury of any claim, the Worksite Employer and/or Emplicity may have against me.

On June 29, 2012, Charging Party Haro, through counsel, filed his Fair Labor Standard's Act lawsuit (*Gerardo Haro Guadarrama v Nijjar Realty, Inc*. et. al.) against the Company on behalf of himself and all others similarly situated, and as an "aggrieved employee" on behalf of other "aggrieved employees" under the Labor Code Private Attorney General Act of 2004 (PAGA). Haro testified that before he filed his lawsuit he did not discuss doing so with other employees. Haro explained he did not even know what a class action lawsuit meant. Haro said he had, after he filed his lawsuit, discussed the claims made in his lawsuit "lots" of times with current and former employees of the Company.

On December 14, 2012, the Company filed a Petition to Compel Arbitration and to Stay Action Pending Completion of Arbitration in *Gerardo Haro Guadarrama v. Nijjar Realty, Inc*.

et. al. seeking to enforce the provisions of the CAASA forms its employees, including Haro, had been compelled to sign.

On March 6, 2013, Superior Court of California, County of Los Angeles, Judge Jane R. Johnson issued her Ruling on Submitted Matter in the *Gerardo Haro Guadarrama v. Nijjar Realty, Inc.* et. al. case stating, "The Court adopts its tentative ruling (1) severing and staying the PAGA claims, and (2) compelling arbitration of Guadarrama's individual claims as to all remaining claims."

Company Chief Financial Officer Evert Miller (CFO Miller or Miller) testified the Company, for a number of years, utilized professional employer organizations to staff its workforce. For example, the Company utilized a professional employer organization "Workforce" at least in 2010. On December 3, 2011, the Company started using the professional employee organization Emplicity. These professional employee organizations handled employment applications and payroll documents for the Company. CFO Miller explained the Company would "interview and select the employee" and Emplicity "would have them sign the actual employment agreement and put them on the payroll." Miller testified Emplicity developed the application and employment documents utilized including the Comprehensive Agreement and Applicant's Statement of Agreement (CAASA) forms. Miller stated the Company had no input in drafting these documents but added he read over the CAASA forms after they were drafted. Miller testified that by the Company adopting and utilizing the CAASA forms it was not the Company's intention to interfere with the employees' right to assert group claims. Miller stated the Company no longer contracts with Emplicity and, has not since the expiration of that contractual relationship in 2012, utilized the CAASA forms. Miller explained the Company attempted to enforce the CAASA forms against Charging Party Haro in order to limit exposure to costs and it was also easier for the Company to handle individual claim cases. CFO Miller further explained the use of individual arbitration for claims is a "much less costly method to deal with claims against the Company."

III. SOME PRELIMINARY CONTENTIONS AND FINDINGS

A. The 10(b) Issue

The Company contends the entire complaint here should be dismissed because it is time-barred in that it is based on events that occurred entirely outside the applicable limitations period. Section 10(b) of the Act requires that alleged violations of the Act occur within 6 months of the filing of a charge. The Company contends, correctly so, that the first date of allegations the Company violated the Act in the complaint is that "since on or about April 26, 2012" the Company has maintained a Comprehensive Agreement and Applicant's Statement and Agreement (CAASA) containing provisions that preclude employees from: arbitrating disputes as a class; requiring new and existing employees to execute CAASA forms providing that employees resolve all disputes arising out of employment through arbitration unless they opt out by checking a box on the CAASA forms' and, that the Company requires its new and existing employees to execute the CAASA forms which requires its employees to arbitrate their claims individually. The Company correctly notes Charging Party Haro signed his CAASA forms on December 29, 2011. The Company contends there is no showing it required any employees to sign the CAASA forms or that it actually hired any employees after April 26, 2012. The Company contends these seminal allegations of the complaint, upon which all other allegations are based, has not been established. The Company further contends that because the unfair labor practice relating to the enforcement of the CAASA agreements in the civil suit, filed on December 14, 2012, (*Gerardo Haro Guadarrama v. Nijjar Realty, Inc.* et al.) was "inescapable grounded" on events predating the 6-month limitations period, and as such, the entire complaint is barred by Section 10(b) of the Act.

I find the Company's 10(b) defense without merit. First it is clear, as testified to by CFO Miller, the Company continued to hire employees after December 29, 2011, and continued, at least for a time, to have new employees execute the CAASA forms. Second, again as testified to by CFO Miller, the Company made no effort, after it stopped using the professional employer Emplcity, to: rescind any of the agreements (CAASA forms) that had been instituted with employees by Emplicity; nor, did it seek to withdraw the arbitration component of the agreements previously signed by its employees as instituted by Emplicity; nor, did the Company seek to eliminate the waivers the employees entered into by signing the CAASA forms waiving their right to collective action or class related arbitration. I am persuaded the Company maintained the CAASA employment forms, singed by its employees on and after April 26, 2012. That the evidence establishes the Company continued to maintain the CAASA forms after April 26, 2012, is clearly demonstrated in that the Company still maintain Charging Party Haro's CAASA forms into mid-December 2012 even after Haro's employment with the Company had ended. The charge filed on October 25, 2012, was timely filed with respect to events on and after April 26, 2012. Even if one considers December 29, 2011, the date Charging Party Haro signed the CAASA employment forms, as the controlling date, the Company's 10(b) defense fails. The allegations are that the Company continued to maintain the CAASA forms on and after April 26, 2012. It is clear the Company maintained Haro's CAASA employment forms even as of December 14, 2012, when it utilized those forms in its defense to Haro's lawsuit. It is irrelevant when Haro signed the CAASA forms the Company continued to maintain, and in Haro's case utilize, because this is a continuing matter subject to an ongoing violation within the 10(b) period. Thus, the continued maintaining and enforcing of the CAASA forms within the 10(b) period establishes that this conduct and action by the Company is not inescapable grounded in pre-10(b) events and the Supreme Court's holding in *Local Lodge 1424 v. NLRB (Bryan Mfg.),* 362 U.S. 411 (1960), does not require a different result than what I reach here.

It is well established that unlawful rules maintained by an employer inside the 10(b) period can be found unlawful, even if executed, adopted or promulgated outside the 10(b) period. See, e.g., *Camey Hospital,* 350 NLRB 627, 640 (2007).

Having rejected the Company's 10(b) defense, I turn to other complaint allegations.

B. The Company is responsible for the Comprehensive Agreement and Applicant's Statement of Agreement

As noted elsewhere herein, the complaint alleges the Company violated Section 8(a)(1) of the Act by, since on or about, April 26, 2012, maintaining and requiring its employees to execute a Comprehensive Agreement and Applicant's Statement of Agreement (CAASA) forms which contains provisions precluding employees from participating in collective and class litigation to resolve disputes arising out of employment, and prohibits employees from arbitrating disputes as a class.

The CAASA employment application forms at issue here are part of the record and undisputed. I consider the Comprehensive Agreement and Applicant's Statement of Agreement to, in essence, constitute one inextricably intertwined employment application packet. Stated differently, at all applicable times here, employees, or applicants for employment, were required to sign both forms. On December 29, 2011, then current employees were required to execute the CAASA forms under the penalty of not being paid or allowed to continue working. As fully explained elsewhere, these CAASA forms were maintained at least until December 14, 2012, at which time the Company utilized Haro's forms in its state court action. To the extent the Company, advances as a defense, it was not responsible for the CAASA forms because the forms were formulated and drafted by the professional employer organization Emplicity, is totally without merit. First, the Applicants Statement of Agreement expressly refers to the Company here as the "Worksite Employer." Second, CFO Miller testified that while the Company had no input in formulating or drafting the CAASA employment forms, he read the forms and added that when the Company *utilized* and *adopted* the CAASA employment forms it was not the Company's intention to interfere with the employees' right to assert group claims. Clearly CFO Miller knew, and so testified, the Company adopted and utilized the CAASA forms crafted by Emplicity. CAASA forms were utilized in all hiring for the Company. I conclude and find, the Company is responsible for the content of the employment forms utilized for and/or by it.

IV. ANALYSIS OF CENTRAL ISSUES

The complaint alleges that since April 26, 2012, the Company has maintained a Comprehensive Agreement and Applicant's Statement and Agreement (CAASA) which contains provisions that precludes employees from participating in collective and class litigation to resolve disputes arising out of employment and prohibits employees form arbitrating disputes as a class and requires all new and existing employees to resolve all disputes arising out of employment through binding arbitration unless they opt out by checking a box in the Comprehensive Agreement and requires new and existing employees to arbitrate their claims individually. Additionally, it is alleged that as least since December 14, 2012, the Company has enforced the arbitration provisions regarding resolving disputes arising out of employment through binding arbitration as set forth in the CAASA forms by asserting it in litigation brought against the Company by the Charging Party in *Gerardo Haro Guadarrama v. Nijjar Realty, Inc.* et al and by filing a petition to compel plaintiffs to individually arbitrate their class wide wage and hour claims against the Company. The State Court, on March 6, 2013, adopted its tentative ruling to sever and stay the PAGA claims and to compel arbitration of the Charging Party's individual claims as to all remaining claims.

The Company, at trial, argued at length in a motion to dismiss that it considers *D. R. Horton,* supra wrongly decided and unenforceable. The Company, at trial, raised various asserted justifications including that numerous Federal and State court decisions, issued after D. *R. Horton*, have rejected the *D.R. Horton* rational of the Board. The Company renews here, its argument, that *D. R. Horton* was wrongly decided. I reject again the Company's request I find *D. R. Horton* wrongly decided. Such requested action must be made directly to the Board and not to me. I am bound by Board precedent, including *D. R. Horton*, unless and until the Supreme Court overturns it or the Board itself does so. I must, and do, follow *D. R. Horton*.

The overriding issue here is whether the Company's Comprehensive Agreement and Applicant's Statement of Agreement (CAASA) forms contain restrictive provisions that violates Section 8(a)(1) of the Act. In addressing the CAASA forms, I do not consider them to be separate documents, but, rather one inextricably intertwined employment document. The CAASA forms had to be signed by all current and new employees and were mandatory conditions of employment. As Charging Party Haro credibly testified, the 18 to 20 employed maintenance workers were required, on December 29, 2011, to sign the new CAASA forms or the Company "would not pay" or allow them to return to work unless they signed the CAASA forms "in a hurry" so they could go "back to work."

Looking further at the content of the CAASA forms, it is necessary to review the rules the Board has established for doing so.

In evaluating whether a rule applied to all employees, as a condition of continued employment, including the mandatory CAASA rules at issue here, violates Section 8(a)(1), the Board, as noted in *D. R. Horton Inc.*, at 4–6, applies its test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), citing *U–Haul Co. of California,* 347 NLRB 375, 377 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007). Pursuant to *Lutheran Heritage* the inquiry, or test to be applied, is whether the rule explicitly restricts activities protected by Section 7 of the Act. If so, the rule is unlawful. If it does not explicitly restrict protected activity, the finding of a violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or, (3) the rule has been applied to restrict the exercise of Section 7 rights.

Viewing the CAASA employment forms as a whole, I am fully persuaded a reasonable employee would read the rules as restricting his or her ability to resolve in concert employment disputes protected by Section 7 of the Act.

Counsel for the Government, in her posttrial brief, states the CAASA employment forms "are lawful in that they specifically exempt claims arising under the National Labor Relations Act", but, rather asserts the CAASA employment forms unlawfully restrict employees' ability to resolve employment-related issues in a protected concerted manner. Accordingly, I do not address

whether the CAASA employment forms could reasonably be construed as restricting employees' rights to file charges or claims with the National Labor Relations Board.

While I do not address whether the CAASA forms restricts or bars filing of Board charges, I do address whether the CAASA forms interferes with and restricts employees' from engaging in protected concerted conduct. In this regard, the Board in *D. R. Horton, Inc.,* supra at slip op. at 13, held an employer violates Section 8(a)(1) of the Act "by requiring employees to waive their right to collectively pursue employment-related claims in all forums, arbitral and judicial." The Board noted at. 10 "The right to engage in collective action—including collective *legal* action—is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest."

Provisions of the CAASA employment forms, in part, state: "Employee . . . and Company, agree to utilize binding arbitration as the sole and exclusive means to resolve all disputes that may arise out of or be related in any way to Employee's employment, including but not limited to termination . . . [and] . . . compensation." The rules, in part, further state: "This binding arbitration shall not be construed to allow or permit the Consolidation or joinder of other claims or controversies involving any other employees, and will not proceed as a class action, collective action, private attorney general action or any similar representative action. No arbitrator shall have the authority under this agreement to order any such class or representative action." Again in the CAASA forms it states; "I further agree and acknowledge that . . . the . . .[Company] and I will utilize binding arbitration to resolve all disputes that may arise out of the employment context." The CAASA forms conclude; in part, "I understand and agree to this binding arbitration provision . . ."

The CAASA employment forms clearly inhibits and interferes with Section 7 conduct, and, the Company's insisting its employees waive their right to pursue class actions in court, arbitration or any other forum as a condition of employment violates Section 8(a)(1) of the Act and I so find.

I reject the Company's contention the "opt-out" provision in the CAASA forms, allowing an employee to entirely opt-out of the waiver relating to the right to bring class and concerted actions, renders the waiver lawful under the *D. R. Horton* rational. Although I view the Comprehensive Agreement and the Applicant's Statement of Agreement to constitute one document and as such the waiver would, if valid, apply to both portions of the CAASA employment forms, I would, nonetheless, conclude the waiver is invalid even if applied to each portion separately.

I find the Company's "opt-out" policy has a reasonable tendency to chill employees from exercising their statutory rights because they are required to take an affirmative action simply to preserve Section 7 rights they already have. State differently, the CAASA waiver unlawfully compels, as a condition of employment, employees to affirmatively act (check an "opt-out" box at the end of a long paragraph, with little explanation, as to its far reaching effects) in order to maintain rights they already have under Section 7; for example, to exercise their substantive statutory right to bring collective or class claims. The CAASA waiver is also invalid because it imposes a waiver of Section 7 rights, or to "opt-out" at a time when the employees are unlikely to have an awareness of employment issues that may now, or in the future, be best addressed by collective or class action. Additionally the CAASA waiver violates public policy. While not precedent Judge Gerald M. Etchingham in *Gamestop Corp., Gamestop Inc., Sunrise Publications, Inc., and Gamestop Texas LTD. (L.P.)* JD(SF)–42–13 WL– (August 29, 2013) spoke to why such waivers violates public policy. Judge Etchingham explained, and I adopt his rational, that a waiver, such as the one here, violates public policy because such waivers operate as a prospective waiver of employees rights to pursue future concerted conduct in the form of collective class action(s). I am persuaded the Company, by imposing an immediate and affirmative requirement on Charging Party Haro and his coworkers, in a hurried setting, to sign the CAASA waiver simply to maintain their statutory Section 7 rights, or forever lose them, interfered with Haro and his coworkers exercise of those statutory rights.

In summary, I find, the "opt-out" provision of the CAASA employment forms does not render the waiver of class and collective action voluntary; but, rather unlawfully burdens employees requiring them to prospectively trade away their statutory right to engage in collective or class actions, including litigation in any forum, that may arise in the future. I note the Board has long held employees may not be required to prospectively trade away their statutory rights. *Ishikawa Gasket American, Inc.,* 337 NLRB 175, 176 (2001).

Contrary to the Company's contention the Federal Arbitration Act (FAA) does not preclude a finding the CAASA waiver is invalid. The Board in *D. R. Horton, Inc.* concluded that finding restrictions on class or collective actions unlawful under the NLRA would not necessarily conflict with the FAA. The Board recognized it must be mindful of any conflicts between the terms or policies of the Act and those of other federal statues, including the FAA. The Board explained that where possible conflict exists, it is required, when possible, to undertake a "careful accommodation" of the two statues, citing, *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942). The Board concluded such accommodation does not mean that the Act must automatically yield to the FAA—or the other way around. The Board explained that when two Federal statues are capable of coexisting both should be given effect absent a clearly expressed congressional intent to the contrary. The Board in *D. R. Horton, Inc.* noted arbitration agreements may be invalidated, in whole or in part, for any grounds that exist at law or in equity for the revocation of any contract, including that the agreement is contrary to public policy. The Board in *D. R. Horton, Inc.,* held that if it considered the policies underlying the FAA and the NLRA as part of the balancing test required to determine if a term of a contract is against public policy and invalid under section 2 of the FAA; or, as a part of the accommodation analysis required in *Southern Steamship,* its conclusion would be the same; that an employer violates the NLRA by requiring employees, as a condition of employment, to waiver their right to pursue collective redress in both judicial and arbitral forums and it also accommodates policies underlying both the NLRA and the FAA to the greatest extent possible.

In summary on this point, the FAA does not preclude a finding that, the wavier here is invalid.

The Company contends two Supreme Court cases decided after *D. R. Horton, Inc.,* are controlling and that the waiver here must be found valid. One case, *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013), involved merchants who accepted American Express cards and in their agreement with American Express agreed to arbitrate disputes arising between them and American Express and further precluded any claims from being arbitrated on a class action basis. The merchants, nonetheless, filed a class action suit against American Express contending their agreement with American Express violated federal antitrust statues. The merchants contended waiving class arbitration made their agreement with American Express invalid and unenforceable because the cost of individually arbitrating a Federal statutory claim would exceed any potential recovery. In response to the merchant's suit, American Express moved to enforce the individual arbitration agreement terms pursuant to provisions of the FAA. The Supreme Court rejected the merchants' position and held arbitration is a matter of contract agreement between the parties and the FAA precludes courts from invalidating a contractual waiver of class arbitration simply because the cost of individually arbitrating a Federal statutory claim exceeds any potential recovery.

The other case the Company relies on; *CompuCredit Corp. v. Greenwood* 132 S.Ct 665, 669 (2012), involved actions brought by consumers against the marketer of credit cards and the issuing bank, alleging fees that were charged in connection with the credit cards violated the Federal Credit Repair Organization Act (CROA). The Court held that CROA provisions requiring credit repair organizations to disclose to consumers their right to sue for violations of CROA and prohibiting waiver of that right did not preclude enforcement of the arbitration agreement the parties had also executed. The Supreme Court held the FAA required the parties' arbitration agreement to be enforced according to its terms. The court specifically concluded that even when the claims at issue are Federal statutory claims, the FAA's mandate cannot be overridden unless "overridden by a contrary congressional command." The Company here argues there is no such "command" in the NLRA and the Board has no authority to declare the arbitration agreement here invalid.

The two Supreme Court cases above address consumer rights and contract language, and, in my opinion, have absolutely nothing to do with unilaterally imposed arbitration agreements in the context of employee—employer relationships. The cases do not discuss how, if at all, the FAA may be applied to alter, by private arbitration agreements, the core substantive rights protected by the NLRA which are the foundation on which the NLRA and all Federal labor law rests. It goes without saying the core issue before me is whether the Company may, by private arbitration agreement imposed on its employees, restrict the right of its employees to engage in concerted or class activities recognized and protected by Section 7 of the Act. I have elsewhere here concluded the Company cannot lawfully do so and nothing in the subsequent Supreme Court decisions compels a different conclusion than I make.

Did the Company, as alleged in the complaint, violate Section 8(a)(1) of the Act when it enforced the arbitration provisions by asserting them in litigation brought against it by Charging Party Haro in *Gerardo Haro Guadarrama v. Nijjar Realty et al* by filing a petition to compel Haro and other plaintiffs to individually arbitrate their class wide wage and hour claims against the Company? The answer is clearly yes.

The Company asserts, in its posttrial brief, Haro was not engaging in "protected concerted activity" when he filed his litigation in *Gerardo Haro Guadarrama v. Nijjar Realty et al*. The Company asserts Haro was not involved in any group action when he filed his class action lawsuit because, as he testified, he did not even know what a class action lawsuit was, and, did not seek the support of others before filing the suit. The Company's arguments are without merit. The Board in *D. R. Horton Inc.* held that filing a class action is protected concerted activity. The Board in so holding relied on *Meyers Industries,* 281 NLRB 882, 887 (1986), for the proposition that the actions of a single employee, such as Haro here, are protected, if the employee "seek[s] to initiate or to induce or to prepare for group action." *D. R. Horton, Inc.,* slip op. at 4. The Board further held "an individual who files a class or collective action . . . in court . . . seeks to initiate or induce group action and is engaged in conduct protected by Section 7." The . . . fact Charging Party Haro may not have understood all the ramifications of a class action lawsuit, or even what constituted a class action suit is not controlling. Haro and various coworkers discussed the lawsuit after it was filed. The filing of a class action lawsuit to address wages, hours, and other terms and conditions of employment, as was the case here, constitutes protected activity, unless done with malice or in bad faith of which there is none demonstrated here.

I find the Company's action of filing its petition to compel Haro and his coworkers to individually arbitrate their classwide wage and hour claims violated Section 8(a)(1) of the Act

CONCLUSIONS OF LAW

1. The Company, Nijjar Realty, Inc., d/b/a Pama Management is, and has been, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By maintaining mandatory requirements in its employment applications, Comprehensive Agreement and Applicant's Statement of Agreement (CAASA), that waives the right of its employees to maintain class of collective actions in all forums, judicial or arbitral, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and has violated Section 8(a)(1) of the Act.

3. By enforcing the arbitration provisions set forth in the Comprehensive Agreement and Applicant's Statement and Agreement by asserting them in litigation brought against the Company in *Gerardo Haro Guadarrama v. Nijjar Realty, Inc.* et al by filing a petition to compel plaintiffs to individually arbitrate their class wide wage and hour claims against the Company, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and has violated Section 8(a)(1) of the Act.

REMEDY

Having found the Company has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative actions designated to effectuate the policies of the Act.

I recommend the Company be ordered to rescind, modify or revise its Comprehensive Agreement and Applicant's Statement of Agreement (CAASA) to clearly inform its employees that the agreement does not constitute a waiver in all forums of their right to maintain employment-related class or collective actions and notify its employees the CAASA forms have been rescinded, modified or revised and provide a copy of the modified or revised agreements to all employees. If the Company has ceased using the CAASA forms it is to review each employee's personnel file, and remove any CAASA documents remaining in the personnel files of its employees and destroy the documents. The Company shall timely notify each employee of the removable and destruction of the CAASA forms.

I recommend the Company be required to reimburse Charging Party Haro for any litigation and related expenses, with interest, todate and in the future, directly related to the Company's filing its petition (*Gerardo Haro Guadarrama v. Nijjar Realty, Inc.,* et al*)* in the Superior Court of California, Los Angeles County. Determining the applicable rate of interest on the reimbursement will be as outlined in *New Horizons*, 283 NLRB 1173 (1987), (adopting the Internal Revenue Service rate for underpayment of Federal taxes). Interest on all amounts due to Charging Party Haro shall be computed on a daily bases as prescribed in *Kentucky River Medical Center*, 356 NLRB 8 (2010). This remedy is specifically to include any direct legal and other expenses incurred with respect to any State court ordered individual arbitration proceedings. See *Federal Security Inc*., 359 NLRB No. 1, slip op at 14 (2012).

I recommend the Company be required to, upon request, file a joint motion with Charging Party Haro to vacate the State Court Order compelling arbitration, if a motion to vacate can still be timely filed, that the Superior Court of California, Los Angeles County, (*Gerardo Haro Guadarrama v. Nijjar Realty, Inc.* et al) issued on March 6, 2013. See *Federal Security Inc*.,supra.

I lack authority to direct the Superior Court of California to vacate its Order; however, the Government has other venues in which it may seek such relief.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Company, Nijjar Realty, Inc. d/b/a Pama Management, El Monte, California, it officers, agents, successors, and assigns, shall

1. Cease and desist form

(a) Maintaining mandatory requirements in its employment application documents, Comprehensive Agreement and Applicant's Statement of Agreement (CAASA) forms, that waives employees' right to maintain class or collective actions in all forums; arbitral and judicial.

(b) Enforcing such agreements by filing petition(s) in any court to compel individual arbitration, pursuant to the terms of the CAASA forms.

(c) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their right under the Act.

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

(a) Within 7 calendar days after the Board enters its Decision, upon request of Charging Party Haro, file with the Superior Court of California Los Angeles County in *Gerardo Haro Guadarrama v. Nijjar Realty, Inc. et al,* a motion to withdraw its petition to compel individual arbitration pursuant to the terms of the CAASA documents and to request the Superior Court vacate its Order of March 6, 2013, compelling arbitration, if such a motion to vacate can still be timely filed.

(b) Reimburse Charging Party Haro for all legal and other expenses incurred in defending the Superior Court of California, Los Angeles petition filed by the Company in *Gerardo Haro Guadarrama v. Nijjar Realty, Inc. et al* including all expenses incurred related to the court's order compelling arbitration to date, and in the future, with interest as described in the remedy section of this decision.

(c) Rescind, modify or revise the Comprehensive Agreement and Applicant's Statement of Agreement to ensure its employees that the CAASA forms do not contain or constitute a waiver in all forums of their right to maintain employment-related class or collective actions.

(d) Notify its employees of the rescinded, modified or revised CAASA forms and provide a copy of the modified or revised CAASA forms to each employee and notified each employee that the original CAASA forms have been removed from their personnel records and destroyed.

(e) Within 14 days after service by the Region, post at its El Monte, California facility, as well as all its California locations, copies of the notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Company's authorized representative, shall be posted by the Company and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as email, posting on an intranet or an internet site, or other electronic means, if the Company customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Com-

[5] If no exceptions are filed provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 201.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] 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 the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

pany has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Company at any time since April 26, 2012.

Dated at Washington, D.C., December 4, 2013.

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 or enforce our Comprehensive Agreement and Applicant's Statement of Agreement (CAASA) forms that waives employees' right to maintain class or collective action in all forums, arbitral and judicial.

WE WILL NOT enforce or attempt to enforce such agreements by filing a petition(s) in any court to compel you to individually arbitrate your wage and hour and other collective action lawsuits or arbitrations.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights under the Act.

WE WILL within 7 days after the Board Order, upon request of Charging Party Haro, file a joint motion to vacate the State Court Order issued on March 6, 2013, if such a motion can still be timely filed, in *Gerardo Haro Guadarrama v. Nijjar Realty, Inc.* et al Case number BC487199.

WE WILL reimburse Charging Party Haro any legal and other expenses incurred related to our motion to compel arbitration or any other legal or arbitration action related to that motion, plus interest, as described in the remedy section of this decision.

WE WILL rescind, modify or revise our Comprehensive Agreement and Applicant's Statement of Agreement forms to make it clear to our employees that our CAASA forms do not constitute a waiver in all forums of your right to maintain employment-related class or collective actions.

WE WILL notify our employees we have rescinded, modified, or revised our CAASA forms and provide each a copy of the revised or modified CAASA forms.

NIJJAR REALTY, INC., D/B/A PAMA MANAGEMENT