Acuity Specialty Products, Inc. d/b/a ZEP, Inc. *and* Lynn Woodford *and* Doug Heffernan. Cases 32––CA–075221 and 32–CA–102838

May 16, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On July 21, 2014, Administrative Law Judge Mindy E. Landow 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 National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The judge found, applying the Board's decision in *D. R. Horton*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), that the Respondent violated Section 8(a)(1) of the Act by promulgating, maintaining, and enforcing an arbitration policy that requires employees to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial. In *Murphy Oil USA, Inc*., 361 NLRB No. 72 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), the Board reaffirmed the relevant holdings of *D. R. Horton*, supra. The judge also found, relying on *D. R. Horton* and *U-Haul of California*, 347 NLRB 375, 377–378 (2006), enfd. 255 Fed.Appx. 527 (D.C. Cir. 2007), that maintaining the arbitration policy violated Section 8(a)(1) because employees reasonably would believe that it bars or restricts their right to file unfair labor practice charges with the Board.

The Board has considered the decision and the record in light of the exceptions and briefs 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,[1] findings,[2] and conclusions[3] and adopt the recommended Order as modified[4] and set forth in full below.[5]

[1] The Respondent asserts that the *D. R. Horton* decision is invalid because it was issued by a panel that included Member Becker. The appointment of Member Becker was constitutionally valid and had not expired, and thus the Board had a quorum at the time it issued *D. R. Horton*. See *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014); *Mathew Enterprise v. NLRB*, 771 F.3d 812, 814 (D.C. Cir. 2014); *Gestamp South Carolina, L.L.C. v. NLRB*, 769 F.3d 254, 257–258 (4th Cir. 2014); *Entergy Mississippi, Inc.,* 361 NLRB No. 89 (2014), affd. in part, revd. in part on other grounds 810 F.3d 287 (5th Cir. 2015).

[2] The parties have stipulated that the arbitration policy was promulgated by the Respondent and presented to its employees within the 10(b) period from the filing of the initial unfair labor practice charge.

No party has excepted to the judge's finding that the Respondent's arbitration policy is voluntary, and therefore we do not pass on that finding. The Respondent contends that a voluntary arbitration policy does not fall within the proscriptions of *Murphy Oil USA, Inc*., and *D. R. Horton, Inc*., supra, which involved policies that were imposed on employees as a condition of employment. See *D. R. Horton*, supra, 357 NLRB at 2289 fn. 28. The Board has rejected this argument, holding that an arbitration policy that precludes collective action in all forums is unlawful even if entered into voluntarily, because it requires employees to prospectively waive their Sec. 7 right to engage in concerted activity. See *Bristol Farms*, 363 NLRB No. 45 (2015); *On Assignment Staffing Services*, 362 NLRB No. 189, slip op. at 1, 5–8 (2015).

The Respondent argues that its arbitration policy includes an exemption allowing employees to file charges with a governmental agency, such as the Equal Employment Opportunity Commission, and thus does not, as in *D. R. Horton,* unlawfully prohibit them from collectively pursuing litigation of employment claims in all forums. In support of its argument, the Respondent cites *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053–1054 (8th Cir. 2013), in which the court stated, in dicta, that the arbitration agreement there did not bar all concerted employee activity in pursuit of employment claims because the agreement permitted employees to file charges with administrative agencies that could file suit on behalf of a class of employees. We reject the Respondent's argument for the reasons set forth in *SolarCity Corp.*, 363 NLRB No. 83 (2015).

We additionally agree with the judge, for the reasons set forth by her, that the Respondent's policy violates Sec. 8(a)(1) because employees reasonably would believe it restricts the right to file charges with the National Labor Relations Board. In doing so, we do not rely on *Dish Network Corp.*, 358 NLRB 174 (2012), cited by the judge.

The judge's finding that the Respondent enforced its arbitration policy in violation of Sec. 8(a)(1) did not reference the conduct that constituted the violation. The Respondent unlawfully enforced its arbitration policy by filing its motion in federal district court to compel Charging Parties Lynn Woodford and Doug Heffernan, and six other co-plaintiffs who signed the arbitration policy, to individually arbitrate their wage claims.

[3] The Respondent filed a motion for administrative notice and/or for limited reopening of the record requesting that the Board take notice of, or admit into evidence, arbitral awards to employees who were compelled to arbitrate pursuant to the Respondent's court enforcement actions; court judgments confirming certain arbitral awards; and the Respondent's satisfaction of the awards. The General Counsel filed an opposition and the Respondent filed a reply. The Board takes administrative notice of the arbitral awards and court judgments. Consideration of this additional evidence does not affect the result in this proceeding.

[4] We have modified the judge's recommended Order to conform to the Board's standard remedial language, and we shall substitute new notices to conform to the Order as modified.

[5] Our dissenting colleague, relying on his dissenting position in *Murphy Oil*, 361 NLRB No. 72, slip op. at 22–35, would find that the Respondent's arbitration policy does not violate Sec. 8(a)(1), especially because the policy contains an opt-in provision. He observes that the Act "creates no substantive right for employees to insist on class-type treatment" for the litigation of non-NLRA claims. This is correct, as the Board has previously explained in *Murphy Oil*, above, slip op. at 2, and *Bristol Farms*, 363 NLRB No. 45, slip op. at 2 & fn. 2 (2015). But what our colleague ignores is that the Act "does create a right to *pursue* joint, class, or collective claims if and as available, without the interference of an employer-imposed restraint." *Murphy Oil*, above, slip op. at 2 (emphasis in original). The Respondent's arbitration policy is just

The judge further found, and we agree, that the Respondent violated Section 8(a)(1) by conditioning employees' eligibility to participate in a sales bonus program upon signing the arbitration policy. There is no dispute that the program was a significant employee benefit. It granted annual bonuses to individuals ranging from $1300 to $97,500 and thus, as the judge found, offered employees the opportunity to significantly increase their wages. There can be little doubt that gaining eligibility for a substantial monetary bonus would reasonably tend to induce employees to sign the policy and surrender their core Section 7 right to act collectively. The Respondent may not lawfully condition the receipt of benefits—here, eligibility for the bonus program—upon employees' waiver of their Section 7 rights.[6]

such an unlawful restraint even considering its opt-in provision. See *On Assignment Staffing Services*, supra, slip op. at 4, 8–9 & fns. 28, 29, 31; *Bristol Farms*, above.

Likewise, for the reasons explained in *Murphy Oil* and *Bristol Farms*, there is no merit to our colleague's view that finding the Revised Arbitration Policy unlawful runs afoul of employees' Sec. 7 right to "refrain from" engaging in protected concerted activity. See *Murphy Oil*, above, slip op. at 18; *Bristol Farms*, above, slip op. at 3. Nor is he correct in insisting that Sec. 9(a) of the Act requires the Board to permit individual employees to prospectively waive their Sec. 7 right to engage in concerted legal activity. See *Murphy Oil*, above, slip op. at 17–18; *Bristol Farms*, above, slip op. at 2.

Further, we reject the position of our dissenting colleague that the Respondent's motion to compel arbitration was protected by the First Amendment's Petition Clause. In *Bill Johnson's Restaurants v. NLRB*, 461 U. S. 731, 747 (1983), the Court identified two situations in which a lawsuit enjoys no such protection: where the action is beyond a State court's jurisdiction because of Federal preemption, and where "a suit . . . has an objective that is illegal under federal law." 461 U. S. at 737 fn. 5. Thus, the Board may properly restrain litigation efforts such as the Respondent's motion to compel arbitration that have the illegal objective of limiting employees' Sec. 7 rights and enforcing an unlawful contractual provision, even if the litigation was otherwise meritorious or reasonable. See *Murphy Oil,* supra, slip op. at 20–21; *Convergys Corp.*, 363 NLRB No. 51, slip op. at 2 fn. 5 (2015).

[6] See, e.g., *Monfort of Colorado*, 284 NLRB 1429, 1430, 1470 (1987) (employer unlawfully promised increased benefits if employees formed an "employee committee" instead of selecting a union and promised employees a bonus if they did not vote for the union), affd. sub nom. *UFCW v. NLRB*, 852 F.2d 1344 (D.C. Cir. 1988); *Niagara Wires, Inc.,* 240 NLRB 1326, 1327 (1979) (maintenance of a provision in a pension plan making lack of union representation a qualification for eligibility to participate in the plan interferes with the Sec. 7 rights of employees who are otherwise eligible); *Clay City Beverages*, 176 NLRB 681, 681 (1969) (employer's payment of bonuses only to those who desisted from strike activity violated the Act), enfd. mem. 434 F.2d 1315 (6th Cir. 1971). Accord: *NLRB v. Bratten Pontiac Corp*., 406 F.2d 349, 351 (4th Cir. 1969) (Sec. 8(a)(1) was violated "when the company extracted from its salesmen a two-year agreement not to enter into 'any combination or association . . . as the price they must pay for increased employment benefits.'"). As the Supreme Court has explained, "The act of paying accrued benefits to one group of employees while announcing the extinction of the same benefits for another group of employees who are distinguishable only by their participation in protected concerted activity surely may have a discouraging effect on either present or future concerted activity." *NLRB v. Great Dane Trailers*, 388 U.S. 26, 32 (1967). We do not rely on *Saigon Gourmet Restaurant, Inc*., 353 NLRB 1063 (2009), cited by the judge.

ORDER

The National Labor Relations Board orders that the Respondent, Acuity Specialty Products, Inc. d/b/a Zep Inc., Los Gatos, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating, maintaining, and/or enforcing an arbitration policy known as the Alternative Dispute Resolution Policy (ADR arbitration policy) under which employees waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(b) Promulgating and/or maintaining its ADR arbitration policy that employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board.

(c) Conditioning eligibility to participate in an annual sales bonus program on employees' execution of the ADR arbitration policy.

(d) Withholding bonuses from employees because they did not execute the ADR arbitration policy or because they executed the ADR arbitration policy but filed or participated in employment-related class or collective claims against the Respondent.

(e) 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 unlawful ADR arbitration policy in all of its forms, or revise it in all of its forms to make clear to employees that the policy does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums, and that it does not bar or restrict employees' right to file charges with the National Labor Relations Board.

(b) Notify all current and former employees who signed the policy or to whom the policy was presented that it has been rescinded or revised and, if revised, provide them a copy of the revised policy.

(c) Notify the United States District Court for the Northern District of California, in Case No. 3:13-CV-0563-RS that it has rescinded or revised the ADR arbitration policy upon which it based its motion to compel arbitration of the claims of Lynn Woodford, Doug Heffernan, and six coplaintiffs who signed the ADR arbitration policy, and inform the court that it no longer opposes their lawsuit on the basis of the ADR arbitration policy.

(d) Restore eligibility for participation in the Respondent's annual sales bonus program to employees who qualified for bonuses under the performance standards of that year's annual sales bonus plan at any time since the promulgation and implementation of the ADR arbitration policy, for whom eligibility or participation or actual compensation was withheld either because they did not execute the ADR arbitration policy or because, notwithstanding their execution of the ADR arbitration policy, they filed or participated in employment-related class or collective claims against the Respondent.

(e) Make employees whole for any losses they may have suffered as a result of the Respondent's unfair labor practices and reimburse the Charging Parties and any other plaintiffs for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing the Respondent's motion to compel arbitration, in the manner set forth in the remedy section of the judge's decision.

(f) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its California locations copies of the attached notice marked "Appendix A"[7] and at all other locations where the ADR arbitration policy has been promulgated and/or maintained, copies of the attached notice marked "Appendix B."[8] Copies of the notices, on forms provided by the Regional Director for Region 32, 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, 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 facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix A" to all current employees and former employees employed by the Respondent at any time since August 23, 2011, and any former employees against whom the Respondent has enforced its arbitration policy since August 23, 2011. If the Respondent has gone out of business or closed any facilities other than the ones involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix B" to all current employees and former employees employed by the Respondent at those facilities at any time since August 23, 2011.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 32 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. May 16, 2016

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Mark Gaston Pearce, Chairman

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Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring in part and dissenting in part.

In this case, my colleagues find that the Respondent's "Alternative Dispute Resolution Policy and Agreement for Disputes between a Sales Rep and Acuity Specialty Products, Inc., doing business as Zep Sales and Service" (the Agreement) violates Section 8(a)(1) of the National Labor Relations Act (the Act or NLRA) because the Agreement waives the right to participate in class or collective actions regarding non-NLRA employment claims. Charging Parties Lynn Woodford, Doug Heffernan, and six other employees signed the Agreement, and later, 54 individuals, including Heffernan, Woodford, and the other six employees who also signed the Agreement, filed a lawsuit against the Respondent in Alameda County Superior Court alleging violations of California's Labor Code and Business and Professions Code. The case was removed to Federal district court, where, in reliance on the Agreement, the Respondent filed a motion to

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices 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."

[8] See fn. 7, above.

compel Heffernan, Woodford, and the six other plaintiffs who signed the Agreement to arbitrate their claims. The Federal district court granted the motion to compel arbitration. My colleagues find that the Respondent unlawfully promulgated, maintained, and enforced its Agreement. I respectfully dissent from these findings for the reasons explained in my partial dissenting opinion in *Murphy Oil USA, Inc.*[1]

I agree that an employee may engage in "concerted" activities for "mutual aid or protection" in relation to a claim asserted under a statute other than the NLRA.[2] However, 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 with the Board's finding here, similar to the Board majority's finding in *Bristol Farms*,[3] that class-waiver agreements violate the NLRA even when they contain an opt-in provision. In my view, Section 7 and Section 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."[4] 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;[5] (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;[6] (iii) enforcement of a class-action waiver as part of an arbitra-

[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 denied enforcement by the Court of Appeals for the Fifth Circuit. *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 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).

[3] 363 NLRB No. 45 (2015). The Agreement states: "If you do not wish to accept this arbitration policy and agreement, you will not be eligible to participate in the sales bonus program, but your employment will not be affected in any other way." In addition, as my colleagues note, no party has excepted to the judge's finding that the Agreement is voluntary. I believe that it is reasonable to characterize the Agreement as allowing employees to "opt in" to the Agreement. For my colleagues, however, the voluntariness of a class-waiver agreement is immaterial. They hold that "an arbitration policy that precludes collective action in all forums is unlawful even if entered into voluntarily," citing *On Assignment Staffing Services*, 362 NLRB No. 189 (2015) (finding class-action waiver agreement unlawful even where employees are free to opt out of the agreement), and *Bristol Farms*, above (finding class-action waiver agreement unlawful even where employees must affirmatively opt *in* before they will be covered by a class-action waiver agreement, and where they are free to decline to do so). By definition, every agreement sets forth terms upon which each party may insist as a condition to entering into the relationship governed by the agreement. Thus, conditioning eligibility to participate in a sales bonus program on the execution of a class-action waiver does not make it involuntary. However, the Board's position is even less defensible when the Board finds that NLRA "protection" operates in reverse—not to *protect* employees' rights to engage or refrain from engaging in certain kinds of collective action, but to *divest* employees of those rights by denying them the right *to choose* whether to be covered by an agreement to litigate non-NLRA claims on an individual basis. See *Bristol Farms*, above, slip op. at 2–4 (Member Miscimarra, dissenting).

[4] *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).

[5] 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.").

[6] The Fifth Circuit has repeatedly denied enforcement of Board orders invalidating a mandatory arbitration agreement that waived class-type treatment of non-NLRA claims. See, e.g., *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*., 96 F.Supp. 3d 71 (S.D.N.Y. 2015); *Nanavati v. Adecco USA, Inc.*, 99 F. Supp. 3d 1072 (N.D. Cal. 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); but see *Totten v. Kellogg Brown & Root, LLC*, No. ED CV 14–1766 DMG (DTBx), 2016 WL 316019 (C.D. Cal. Jan. 22, 2016).

tion agreement is also warranted by the Federal Arbitration Act (FAA);[7] and (iv) for the reasons stated in my dissenting opinion in *Bristol Farms*, above, the legality of such a waiver is even more self-evident when the agreement contains an opt-in provision, based on every employee's 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. Although questions may arise regarding the enforceability of particular agreements that waive class or collective litigation of non-NLRA claims, I believe these questions are exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims.[8]

Because I believe the class-waiver agreement provisions of the Respondent's Agreement were lawful under the NLRA, I would find it was similarly lawful for the Respondent to file a motion in Federal court seeking to enforce the Agreement.[9] It is relevant that the Federal 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 court decisions that have enforced similar agreements.[10] 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."[11] I also believe that any Board finding of a violation based on the Respondent's meritorious Federal 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 Parties and any other plaintiffs for their attorneys' fees and litigation expenses in the circumstances presented here. *Murphy Oil*, above, 361 NLRB No. 72, slip op. at 35. Accordingly, on these issues, I respectfully dissent.[12]

One issue remains to be decided, which is whether the Agreement unlawfully interferes with employees' right to file unfair labor practice charges with the Board. For the reasons expressed below, I concur with my colleagues' finding that the Agreement in this respect violates Section 8(a)(1) of the Act.[13]

In my view, three parts of the Agreement are relevant, in varying degrees, to the question of whether the Agreement unlawfully interferes with NLRB charge filing.

First, the list of "COVERED CLAIMS" refers to, among other things, claims of discrimination or harassment on an "unlawful basis"; claims of retaliation for complaining about discrimination or harassment; claims of retaliation for "exercising your protected rights under any statute"; claims of "wrongful termination or con-

[7] For the reasons expressed in my *Murphy Oil* partial dissent and those thoroughly explained in former Member Johnson's dissent in *Murphy Oil*, 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).

[8] Because I disagree with the Board's decisions in *Murphy Oil,* above, and *D. R. Horton, Inc.,* 357 NLRB 2277 (2012), enf. denied in pertinent part 737 F.3d 344 (5th Cir. 2013), and I believe the NLRA does not render unlawful arbitration agreements that provide for the waiver of class-type litigation of non-NLRA claims, I find it unnecessary to reach whether such agreements should independently be deemed lawful to the extent they "leave[] open a judicial forum for class and collective claims," *D. R. Horton*, supra, at at 2286, by permitting the filing of complaints with administrative agencies that, in turn, may file class or collective action lawsuits. See *Owen v. Bristol Care, Inc.,* 702 F.3d 1050 (8th Cir. 2013).

[9] As I explain below, I concur in my colleagues' finding that the Agreement unlawfully interfered with the right of employees to allege a violation of the NLRA through the filing of an unfair labor practice charge with the NLRB. However, the unlawfulness of the Agreement in this regard is not material to the merits of the Respondent's federal-court motion to compel arbitration of non-NLRA claims. See *Fuji Food Products, Inc*., 363 NLRB No. 118, slip op. at 4, 4–5 fn. 13 (2016) (Member Miscimarra, concurring in part and dissenting in part) (finding that employer lawfully enforced class-waiver agreement by filing motion to compel arbitration of non-NLRA claims, notwithstanding additional finding that agreement unlawfully interfered with Board charge filing).

[10] See, e.g., *Murphy Oil, Inc., USA v. NLRB,* above; *Johnmohammadi v. Bloomingdale's,* 755 F.3d 1072 (9th Cir. 2014); *D. R. Horton, Inc. v. NLRB*, above; *Owen v. Bristol Care, Inc.,* above; *Sutherland v. Ernst & Young LLP,* 726 F.3d 290 (2d Cir. 2013).

[11] *Murphy Oil, Inc., USA v. NLRB*, above, 808 F.3d at 1021.

[12] My colleagues also affirm the judge's additional finding that the Respondent violated Sec. 8(a)(1) by conditioning employees' eligibility to participate in a sales bonus program on signing the Agreement. I respectfully disagree with this finding because, as I have described above, I would find the Agreement lawful pursuant to my partial dissenting opinion in *Murphy Oil USA, Inc*. I believe it is particularly inappropriate to declare unlawful an arrangement under which the Respondent merely sought to ensure the enforceability of a lawful Agreement as a matter of contract law by providing consideration—i.e., eligibility to participate in the sales bonus program—in exchange for opting into the Agreement. Because I would find the Agreement lawful, I would also find distinguishable the cases cited by my colleagues in fn. 5 of their opinion, which dealt with incentives offered to induce employees to enter into *unlawful* agreements.

[13] I also join my colleagues in rejecting the Respondent's contention that the Board's decision in *D. R. Horton*, above, is invalid on the basis that the Board lacked a quorum at the time it issued that decision.

structive discharge"; and claims of "violations of any . . . federal statute[,]" specifically including the "Taft-Hartley Act."

Second, the section of the Agreement entitled: "WHAT IS NOT A COVERED CLAIM?" excludes from the coverage of the Agreement "[m]atters within the jurisdiction of the National Labor Relations Board."

Finally, the section of the Agreement entitled: "THE ROLE OF GOVERNMENT AGENCIES CONCERNING CERTAIN COVERED CLAIMS" states as follows:

> Some Covered Claims are claims that may be filed with a governmental agency, such as the Equal Employment Opportunity Commission (EEOC) or an equivalent state agency. Such claims include those for discrimination or harassment. For these Covered Claims, you may either file a complaint with these agencies or proceed to use the Company's dispute resolution process set forth below. If you choose to proceed directly to the Company's dispute resolution process, you will be asked to sign a voluntary waiver of the right to file charges with an agency. If you file a charge with the EEOC or equivalent state agency, you must file such a claim within the time period permitted by law after the date the alleged event occurred. The agency that receives the claim then has the right under applicable law to investigate the claim. Once this investigation has been completed, the agency will make a determination. The agency may determine that there is not cause to believe that a law was violated and will issue to you a document generally known as a "Notice of Right-to-Sue" letter. If the agency believes that there is cause to believe that a violation of law occurred, then the agency will proceed to see if the charge may be settled. If the charge is not settled, the agency may either sue the Company on your behalf or it will issue a "Notice of Right-to-Sue" letter. Under either circumstance, if you choose to bring a lawsuit, you must resolve the dispute through binding arbitration. If you are employed in California and file a wage claim with the California Division of Labor Standards Enforcement (DLSE), you may proceed through their process and any administrative hearing. Any appeal of a decision made by the DLSE, however, must be resolved through binding arbitration. You must initiate the arbitration process as described below within the applicable statute of limitations for the claim at issue.

Applying *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), and *U-Haul Co. of California*, 347 NLRB 375 (2006), enfd. 255 Fed.Appx. 527 (D.C. Cir. 2007), among other cases, the judge found that employees would reasonably interpret the Agreement as restricting their right to file unfair labor practice charges with the Board. The judge observed that the Agreement contains broad language regarding the scope of its applicability and that, although the Agreement exempts "[m]atters within the jurisdiction of the National Labor Relations Board," this exception follows a list of covered claims that include matters that could be the subject of unfair labor practice charges, including discrimination or harassment on an unlawful basis, retaliation for complaining about discrimination or harassment, retaliation for exercising protected rights under any statute, wrongful termination or constructive discharge, and violations of any Federal statute, including the Taft-Hartley Act. Accordingly, the judge found the Agreement unclear and held that the Respondent "must bear the burden of such ambiguity." The judge stated that a reasonable employee, unversed in labor and employment law, would not necessarily glean from the competing terms of the Agreement that he or she retained the right to invoke the Board's processes and procedures. My colleagues adopt the judge's finding of a violation for the reasons expressed in her decision.

For the reasons that follow, I concur in finding that the Agreement violates Section 8(a)(1) because it interferes with employees' right to file unfair labor practice charges with the Board.[14]

To begin, I agree with the judge and my colleagues that the Agreement is ambiguous about whether NLRA claims are subject to mandatory arbitration. On the one hand, the Agreement *includes*, as covered claims, matters that could be the subject of unfair labor practice charges and "violations of any . . . federal statute[,]" including the "Taft-Hartley Act."[15] On the other hand, the Agree-

[14] As I have stated elsewhere, I disagree with prong one of the *Lutheran Heritage* test, including the principle that mere ambiguity is sufficient to invalidate a workplace rule or policy. See *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 7–24 (2016) (Member Miscimarra, concurring in part and dissenting in part). See also *Applebee's Restaurant*, 363 NLRB No. 75, slip op. at 3 fn. 7 (Member Miscimarra, concurring in part and dissenting in part).

[15] As I have previously observed, many people regard "Taft-Hartley Act" as another name for the NLRA. See *GameStop Corp.*, 363 NLRB No. 89, slip op. at 4 fn. 10 (2016) (Member Miscimarra, concurring in part and dissenting in part). As explained in *GameStop*:

> The NLRA (also called the Wagner Act) was originally adopted in 1935. However, n 1947, Congress substantially amended the NLRA as part of the Labor Management Relations Act (LMRA), also commonly called the Taft-Hartley Act. Here, it may be helpful to understand that the Taft-Hartley Act consisted of multiple sections, organized by "Titles." Thus, Taft-Hartley Sec. 101, set forth within Title I, restated the *entire* amended NLRA, and the amended NLRA became widely known as the "Taft-Hartley Act." However, other sections and Titles within the Taft-Hartley Act addressed labor-related matters totally separate from the NLRA, such as the Federal Mediation and

ment specifically excludes from covered claims "[m]atters within the jurisdiction of the National Labor Relations Board." Thus, the Agreement suggests that NLRA claims are both excluded from and included within its scope. Even if the Agreement covers NLRA claims, however, I do not believe this aspect of the Agreement, standing alone, establishes that the Agreement unlawfully interferes with NLRB charge filing, at least if the Agreement otherwise preserves the right of employees to file charges with the NLRB.[16]

Nonetheless, for the reasons expressed below, I believe that the Agreement *does* unlawfully interfere with the right to file charges with the NLRB, notwithstanding the section of the Agreement entitled: "THE ROLE OF GOVERNMENT AGENCIES CONCERNING CERTAIN COVERED CLAIMS," quoted in full above. In my view, the Agreement's language regarding potential NLRB charge filing is problematic in several respects.

First, the Agreement states that "[s]ome Covered Claims are claims that may be filed with a governmental agency, such as the Equal Employment Opportunity Commission (EEOC) or an equivalent state agency." This language would seemingly permit the filing of NLRB charges,[17] and this is reinforced by subsequent language that refers to two types of covered claims—involving alleged "discrimination or harassment"—that potentially may arise under the NLRA.[18] However, the more detailed agency procedures described in this section of the Agreement are associated with the Equal Employment Opportunity Commission and equivalent State agencies, and the described procedures differ substantially from those applicable to NLRB charges and complaints.[19]

Second, not only does the Agreement potentially encompass NLRA violations among those that are deemed "Covered Claims," it further states that if an employee chooses to utilize arbitration, he or she "will be asked to sign a *voluntary waiver of the right to file charges with an agency*" (emphasis added). This statement is problematic because it is unlawful for an employer or union, in connection with the arbitration of NLRA claims, to interfere with the right to file NLRB charges, and seeking an employee waiver of the right to file NLRB charges constitutes such interference.[20] Requiring or seeking

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Conciliation Service (FMCS) and procedures for resolving national emergencydisputes (Title II), and various unlawful payments involving employers or labor organizations and court jurisdiction over certain labor disputes (Title III), among other things.

Id.

[16] As I have previously indicated, decades of Board and court case law, including the Board's decision in *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014), establish that parties may lawfully agree to submit NLRA claims to arbitration, provided they do not otherwise interfere with NLRB charge filing. See *Applebee's Restaurant*, 363 NLRB No. 75, slip op. at 2–5 (Member Miscimarra, concurring in part and dissenting in part); *GameStop*, 363 NLRB No. 89, slip op. at 4-5 fn. 10 (Member Miscimarra, concurring in part and dissenting in part); *Ralph's Grocery Co.*, 363 NLRB No. 128, slip op. at 6–7 & fn. 15 (2016) (Member Miscimarra, concurring in part and dissenting in part).

[17] If an arbitration agreement encompasses NLRA claims while preserving the right of employees to file charges with an administrative agency, I believe this may be sufficient to protect NLRB charge filing, even though the NLRB is not mentioned by name. See, e.g., *Applebee's Restaurant*, above, slip op. at 4 (Member Miscimarra, concurring in part and dissenting in part) (finding the employer's Dispute Resolution Program did not unlawfully interfere with Board charge filing where the Program stated that it "will not prevent [employees] from filing a charge with any state or federal administrative agency").

[18] Sec. 8(a)(3) of the Act makes it unlawful for an employer to engage in "discrimination . . . to encourage or discourage membership in any labor organization." The Act does not expressly prohibit harassment, but "harassment" could reasonably characterize retaliation against an employee based on NLRA-protected concerted activity (which would violate Sec. 8(a)(1) of the Act) or based on the employee's filing of charges or giving testimony in an NLRB proceeding (which would violate Sec. 8(a)(4) of the Act).

[19] For example, claims alleging violations of the NLRA are initiated with the filing of a charge with an NLRB Regional Office. From that point forward, the NLRB's General Counsel decides whether or not to issue a complaint, and under NLRA Sec. 3(d) the General Counsel's decision is unreviewable. If the General Counsel decides not to issue a complaint, that is the end of the matter: there is no private right of action under the NLRA, so the charging party cannot file a lawsuit in State or Federal court alleging a violation of the NLRA. By contrast, the Agreement here describes procedures that apply to the processing of claims filed with the Equal Employment Opportunity Commission or equivalent State agencies. It states that if the "agency" determines "there is not cause to believe that a law was violated," it "will issue to you a document generally known as a 'Notice of Right-to-Sue' letter." Alternatively, if the agency believes that a law has been violated, it will attempt to settle the matter, and if the matter is not settled, the agency "may either sue the Company on your behalf or it will issue a 'Notice of Right-to-Sue' letter," whereupon the complainant may "choose to bring a lawsuit." None of these procedures has anything to do with the filing of charges with, or the processing of charges by, the NLRB. Indeed, almost all of the language in this section of the Agreement refers to EEOC-type claims.

The section also discusses wage claims filed with the California Division of Labor Standards Enforcement and mandates that any appeal of a decision made through that entity must be resolved through binding arbitration. This also has no relationship to NLRB charge filing.

[20] See *SolarCity Corp.*, 363 NLRB No. 83, slip op. at 11 (2015) (Member Miscimarra, dissenting) ("The protection afforded to Board charge-filing is important because the filing of a charge is prerequisite to Board review of unfair labor practice issues. Consequently, an agreement that prohibits filing Board charges violates Section 8(a)(1) if entered into by an employer, and Section 8(b)(1)(A) if entered into by a union.") (fns. omitted).

The nature of the waiver request here distinguishes this case from *Banner Estrella Medical Center*, 362 NLRB No. 137 (2015). In *Banner Estrella*, I found that an employer did not violate the NLRA by requesting that employees refrain, for the duration of a workplace investigation, from disclosing what was discussed during an investigative meeting. Id., slip op. at 7-21 (Member Miscimarra, dissenting in part).

such a waiver would purport to limit the Board's postarbitration review of any resulting arbitrator's award, contrary to Section 10(a) of the Act[21] and the Board's longstanding case law regarding deferral to arbitration.[22]

As noted above, it remains possible that the Agreement was not intended to require the arbitration of NLRA claims. The Agreement states that "[m]atters within the jurisdiction of the National Labor Relations Board" are excluded from the term "Covered Claims." However, the Agreement also includes *within* the term "Covered Claims" allegations that the employer has violated the "Taft-Hartley Act." See fn. 23**Error! Bookmark not defined.**, above. Although this presents a close question, I believe the inclusion of claims under the Taft-Hartley Act among "Covered Claims" would prompt employees to reasonably regard the Agreement as requiring the arbitration of NLRA claims. And as to the arbitration of NLRA claims, the Agreement's further statement that the Respondent would seek a waiver "of the right to file charges" with an agency (like the NLRB) impermissibly interferes with the filing of the very charges that would be prerequisite to obtaining postarbitration Board review. In this respect, I believe the Agreement violates Section 8(a)(1) of the Act.

Accordingly, I respectfully dissent in part and concur in part in the instant case.

Dated, Washington, D.C. May 16, 2016

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX A

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 promulgate, maintain, and/or enforce an arbitration policy known as the Alternative Dispute Resolution Policy (ADR arbitration policy) under which our employees waive their right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT promulgate and/or maintain our ADR arbitration policy that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT condition eligibility to participate in an annual sales bonus program on our employees' execution of the ADR arbitration policy.

WE WILL NOT withhold bonuses from our employees because they did not execute the ADR arbitration policy or because they executed the ADR arbitration policy but filed or participated in employment-related class or collective claims against us.

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 our unlawful ADR arbitration policy in all of its forms, or revise it in all of its forms to make clear that the arbitration policy does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all current and former employees who signed the policy or to whom the policy was presented

This is entirely different from seeking a waiver of the right to file NLRB charges in connection with the arbitration of NLRA claims because (among other things) an employee would regard such a waiver as precluding him or her from seeking postarbitration NLRB review of the award.

[21] Sec. 10(a) of the Act states that the Board's authority to resolve unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise."

[22] See, e.g., *Spielberg Mfg. Co*., 112 NLRB 1080 (1955); *Olin Corp*., 268 NLRB 573 (1984); *Babcock & Wilcox Construction Co*., above. I dissented from the Board majority's substantial modification in *Babcock* of the standards governing deferral to arbitration, see *Babcock*, above, slip op. at 14–24 (Member Miscimarra, concurring in part and dissenting in part), but I agree that parties cannot lawfully seek to foreclose potential postarbitration NLRB review. Indeed, when the Board prospectively defers an unfair labor practice charge to arbitration under *Collyer Insulated Wire*, 192 NLRB 837 (1971), the Board retains jurisdiction for the purpose of possible postarbitration review. See, e.g., *United Technologies Corp.*, 268 NLRB 557, 561 (1984) ("Jurisdiction of this proceeding is hereby retained for the limited purpose of entertaining an appropriate and timely motion for further consideration upon a proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of this Decision and Order, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result which is repugnant to the Act.").

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 Lynn Woodford, Doug Heffernan, and six coplaintiffs who signed the ADR arbitration policy filed their wage claim that we have rescinded or revised the ADR arbitration policy upon which we based our motion to compel arbitration, and WE WILL inform the court that we no longer oppose the plaintiffs' claim on the basis of the ADR arbitration policy.

WE WILL restore eligibility for participation in our annual sales bonus program to our employees who qualified for bonuses under the performance standards of that year's annual sales bonus plan at any time since the promulgation and implementation of the ADR arbitration policy, for whom eligibility or participation or actual compensation was withheld either because they did not execute the ADR arbitration policy or because, notwithstanding their execution of the ADR arbitration policy they filed or participated in employment-related class or collective claims against us.

WE WILL make employees whole for any losses they may have suffered as a result of our unfair labor practices, plus interest, and WE WILL reimburse the Charging Parties and any other plaintiffs for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing our motion to compel arbitration, plus interest.

ACUITY SPECIALTY PRODUCTS, INC. D/B/A ZEP, INC.

The Board's decision can be found at www.nlrb.gov/case/32–CA–075221 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.

APPENDIX B

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 promulgate and/or maintain an arbitration policy known as the Alternative Dispute Resolution Policy (ADR arbitration policy) under which our employees waive their right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT promulgate and/or maintain our ADR arbitration policy that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT condition eligibility to participate in an annual sales bonus program on our employees' execution of the ADR arbitration policy.

WE WILL NOT withhold bonuses from our employees because they did not execute the ADR arbitration policy or because they executed the ADR arbitration policy but filed or participated in employment-related class or collective claims against us.

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 our unlawful ADR arbitration policy in all of its forms, or revise it in all of its forms to make clear that the arbitration policy does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all current and former employees who signed the policy or to whom the policy was presented that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

WE WILL restore eligibility for participation in our annual sales bonus program to our employees who qualified for bonuses under the performance standards of that year's annual sales bonus plan at any time since the promulgation and implementation of the ADR arbitration policy, for whom eligibility or participation or actual compensation was withheld either because they did not execute the ADR arbitration policy or because, notwithstanding their execution of the ADR arbitration policy

they filed or participated in employment-related class or collective claims against us.

WE WILL make employees whole for any losses they may have suffered as a result of our unfair labor practices, plus interest.

ACUITY SPECIALTY PRODUCTS, INC. D/B/A ZEP, INC.

The Board's decision can be found at www.nlrb.gov/case/32–CA–075221 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.

Amy L. Berbower, Esq., for the General Counsel.
Kurt A. Powell and *Aja D. Moore, Esqs. (Hunton & Williams, LLP),* of Atlanta, Georgia, for the Respondent.

DECISION

STATEMENT OF THE CASE

MINDY E. LANDOW, Administrative Law Judge. This is another case raising issues related to *D. R. Horton, Inc*., 357 NLRB 2277 (2012), enf. granted in part and denied in part 737 F.3d 433 (5th Cir. 2013). It was tried based upon a joint motion and stipulation of facts dated April 15, 2014, which I approved on April 17, 2014.

The initial charge in Case 32–CA–075221 was filed by Lynn Woodford (Woodford) on February 23, 2012, and an amended charge on January 24, 2013. On January 31, 2013, the Regional Director for Region 32 of the National Labor Relations Board (the Board) issued a complaint and notice of hearing in Case 32–CA–075221 alleging that Acuity Specialty Products, Inc. d/b/a Zep inc. (Acuity or Respondent) violated the National Labor Relations Act (the Act). Respondent filed an answer denying the material allegations of the complaint and raising certain affirmative defenses.

On March 13, 2013, the Regional Director for Region 32 of the Board issued an amended complaint and notice of hearing in Case 32–CA–075221 and an answer to this amended complaint was filed on March 26, 2013.

The initial charge in Case 32–CA–102838 was filed by Doug Heffernan (Heffernan) against the Respondent on April 15, 2013. On July 30, 2013, the Woodford case (32–CA–075221) was consolidated with the Heffernan case (32–CA–102838) pursuant to an order consolidating cases, consolidated complaint, and notice of hearing (the consolidated complaint). Respondent filed an answer to the consolidated complaint on August 13, 2013, denying the material allegations of the consolidated complaint and raising certain affirmative defenses.

On the entire record and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Georgia corporation with a principal office and place of business in Atlanta, Georgia, and with various other office locations throughout the United States including Los Gatos, California. Respondent is engaged in the nonretail sale and distribution of various product lines, including chemical cleaning products and equipment, which it sells to customers through its outside and inside sales representatives and other distribution channels.

During the calendar year ending December 31, 2012, Respondent, in conducting its operations described above, sold and shipped goods from its Atlanta, Georgia facility valued in excess of $50,000 to points in states outside the State of Georgia. The parties have stipulated and I find that at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The consolidated complaint alleges that Respondent violated Section 8(a)(1) of the Act by promulgating, maintaining, and enforcing an Alternative Dispute Resolution (ADR) Policy (the ADR Policy or Policy) which: (1) interferes with employees' Section 7 rights to engage in collective legal activity by binding employees to an irrevocable waiver of their rights to participate in collective and class litigation; (2) contains language which employees would reasonably conclude prohibits or restricts their right to file charges with the National Labor Relations Board; (3) conditions employees' eligibility to participate in Respondent's annual sales bonus program on their execution of the ADR Policy; and (4) by construing the ADR Policy to deny annual sales bonuses to employees who executed the Policy but refused to waive their participation in class action or collective legal activity.

Apart from denying the material allegations of the consolidated complaint, and contesting the remedy sought by the General Counsel, Respondent further asserts that: (1) the ADR Policy is not premised on unlawful considerations; (2) the claims of the Charging Parties are preempted by the requirements of the Federal Arbitration Act (FAA) as it relates to the Charging Parties' agreement to arbitrate with Respondent; (3) the consolidated complaint is based upon NLRB precedent which was decided by an unlawfully constituted Board; (4) that Respondent has paid bonuses to the Charging Parties because they satisfied certain bonus program eligibility requirements notwithstanding their execution of the ADR Policy and filing individual claims in court after such execution; and (5) even if the ADR Policy did not contain the provisions alleged to be unlawful in the consolidated complaint, Respondent would have taken the same actions regardless of such provisions.

III. FACTS

A. Respondent's ADR Policy

Since December 2011, Respondent has maintained the following policy applicable to its sales representatives:

> Alternative Dispute Resolution Policy and Agreement for Disputes between a Sales Rep and Acuity Specialty Products, Inc., doing business as Zep Sales and Service
>
> December 1, 2011
>
> Acuity Specialty Products, Inc. (the "Company") is committed to resolving all disputes in a fair, effective, and cost-efficient manner. In an effort to achieve this goal, the Company has designed and is implementing the alternative dispute resolution (ADR) policy set forth below. The policy was adopted to prevent the occurrence of costly and damaging lawsuits between the Company and its Sales Representatives. For the policy to be effective, the Company must rigorously enforce it.
>
> This policy and agreement does not have any effect on the Company's Ethics Hotline. A Sales Representative who believes that Company personnel have committed violations of the Company's Code of Conduct should continue to report the violations by means of the Company's reporting system. The Company reserves the right to exercise discretion in disciplining employees.
>
> If you do not wish to accept this arbitration policy and agreement, you will not be eligible to participate in the sales bonus program, but your employment will not be affected in any other way.
>
> I. COVERED CLAIMS
>
> > A. This policy covers the following types of claims which already exist or may arise in the future ("Covered Claims"):
>
> Commercial claims regarding the amount of money that one party owes the other resulting from a transaction that has been completed, such as the following examples:
>
> Disputes regarding a Sales Representative's entitlement to a commission on a specific sale.
>
> Disputes regarding a Sales Representative's obligation to share a commission with another Sales Representative.
>
> Disputes regarding the Company's deduction of amounts from a Sales Representative's commission.
>
> Disputes among Sales Representatives regarding customers.
>
> Disputes regarding the definition of a Sales Representative's territory or right to service a particular customer.
>
> Disputes regarding the compensation paid, owed or promised to a Sales Representative.
>
> Disputes regarding the Company's Sales Bonus Program.
>
> Claims of discrimination or harassment on the basis of race, sex, religion, national origin, age, disability or other unlawful basis.
>
> Claims of retaliation for complaining about discrimination or harassment.
>
> Claims of violations of any common law or constitutional provision or federal, state, county, municipal or other governmental statute, ordinance, regulation or public policy relating to workplace health and safety, voting, state service letters, minimum wage and overtime, pay days, holiday pay, vacation pay, severance/separation pay, whistleblowing and payment at termination.
>
> Claims of violations of any other common law or constitutional provision or federal, state, county, municipal or other governmental statute, ordinance, regulation or public policy. The following list reflects examples of some, but not all such laws. This list is not intended to be all inclusive but simply representative: Consolidated Omnibus Budget Reconciliation Act (COBRA), Davis Bacon Act, Drug Free Workplace Act of 1988, Electronic Communications Privacy Act of 1986, Employee Polygraph Protection Act of 1988, Fair Credit Reporting Act, Fair Labor Standards Act, Family and Medical Leave Act of 1993, Federal Omnibus Crime Control and Safe Streets Act of 1968, The Hate Crimes Prevention Act of 1999, The Occupational Safety and Health Act, Omnibus Transportation Employee Testing Act of 1991, Privacy Act of 1993, Portal to Portal Act, The Taft-Hartley Act, Veterans Reemployment Rights Act, and Worker Adjustment and Retraining Notification Act (WARN).
>
> Claims for breach of fiduciary duty.
>
> Claims of retaliation for filing a protected claim for benefits (such as workers' compensation) or exercising your protected rights under any statute.
>
> Claims of wrongful termination or constructive discharge.
>
> Claims related to exceptions to the employment-at-will doctrine under applicable law.
>
> Breach of any common law duty of loyalty, or its equivalent.
>
> Claims to remedy a violation of contractual non-compete or non-solicitation agreements, or the use or disclosure of trade secrets or confidential information. However, except as provided in the following sentence, this policy and agreement does not prevent the Company from seeking immediate and temporary injunctive relief in court in connection with a violation of a contractual non-compete or non-solicitation agreement or the use or disclosure of trade secrets or confidential information. The Company will not have the right to seek injunctive relief with respect to a claim involving a Sales Representative who is a resident of the State of California and who is subject to California law.
>
> Any common law claim, including but not limited to defamation, tortious interference, intentional infliction of emotional distress or whistleblowing.
>
> B. SPECIAL NOTICE REGARDING BRITTO LAWSUIT
>
> *Britto, et al v. Zep, Inc*., Case No. VG-10553718, Alameda Superior Court

This putative class action was filed by two sales representatives who allege violations of California Labor Code §§ 221and 2802 and California Business and Professions Code § 17200. The plaintiffs allege that Zep failed to reimburse California sales representatives for out-of-pocket business expenses and also took unlawful commission deductions. Zep's position is that it properly reimbursed its California sales representatives for all out-of-pocket business expenses and did not take any unlawful commission deductions. While this lawsuit was filed as a class action, no class has yet been certified.

YOU MAY BE A PUTATIVE CLASS MEMBER IN THIS CLASS ACTION. IF YOU SIGN THIS ARBITRATION AGREEMENT AND IF THE LAWSUIT IS NOT CERTIFIED AS A CLASS ACTION, YOU WILL BE PRECLUDED FROM FILING A LAWSUIT INDIVIDUALLY AGAINST THE COMPANY WITH RESPECT TO THE MATTERS ALLEGED IN THE LAWSUIT. YOU WOULD STILL BE ABLE TO PURSUE YOUR POTENTIAL CLAIMS WITH RESPECT TO THE MATTERS ALLEGED IN THE BRITTO ACTION BUT ONLY UNDER THE TERMS OF THIS ARBITRATION AGREEMENT.

IF YOU SIGN THIS ARBITRATION AGREEMENT AND IF THE LAWSUIT IS CERTIFIED AS A CLASS ACTION, THIS ARBITRATION AGREEMENT WILL HAVE NO EFFECT ON YOUR CONTINUED OR FUTURE PARTICIPATION IN THE CLASS ACTION. PLEASE CONSULT AN ATTORNEY IF YOU HAVE ANY QUESTIONS ABOUT THIS ARBITRATION AGREEMENT OR ITS EFFECT.

THE ROLE OF GOVERNMENT AGENCIES CONCERNING CERTAIN COVERED CLAIMS

Some Covered Claims are claims that may be filed with a governmental agency, such as the Equal Employment Opportunity Commission (EEOC) or an equivalent state agency. Such claims include those for discrimination or harassment. For these Covered Claims, you may either file a complaint with these agencies or proceed to use the Company's dispute resolution process set forth below. If you choose to proceed directly to the Company's dispute resolution process, you will be asked to sign a voluntary waiver of the right to file charges with an agency. If you file a charge with the EEOC or equivalent state agency, you must file such a claim within the time period permitted by law after the date the alleged event occurred. The agency that receives the claim then has the right under applicable law to investigate the claim. Once this investigation has been completed, the agency will make a determination. The agency may determine that there is not cause to believe that a law was violated and will issue to you a document generally known as a "Notice of Right-to-Sue" letter. If the agency believes that there is cause to believe that a violation of law occurred, then the agency will proceed to see if the charge may be settled. If the charge is not settled, the agency may either sue the Company on your behalf or it will issue a "Notice of Right-to-Sue" letter. Under either circumstance, if you choose to bring a lawsuit, you must resolve the dispute through binding arbitration. If you are employed in California and file a wage claim with the California Division of Labor Standards Enforcement (DLSE), you may proceed through their process and any administrative hearing. Any appeal of a decision made by the DLSE, however, must be resolved through binding arbitration. You must initiate the arbitration process as described below within the applicable statute of limitations for the claim at issue.

WHAT IS NOT A COVERED CLAIM?

Disputes regarding the interpretation of the Sales Representative Exclusive Account Agreement or any similar document between the Company and you that describes the terms of your employment and the basis of your compensation, other than those claims specifically listed under "Covered Claims."

Claims for workers' compensation benefits, except for claims of retaliation.

Claims for benefits under a written employee pension or welfare benefit plan, including claims covered under ERISA.

Claims for unemployment compensation benefits.

Criminal charges.

Matters within the jurisdiction of the National Labor Relations Board.

ii. INTERNAL DISPUTE RESOLUTION PROCEDURES

If a Sales Representative has a dispute concerning a Covered Claim with the Company, the Sales Representative and the Company must follow the procedures described in this Policy to resolve the dispute.

If a Sales Representative believes that he or she has a Covered Claim, the Sales Representative should notify his or her Regional Sales Manager and Director of Sales (Regional Sales Management). If a Sales Representative feels uncomfortable reporting a Covered Claim to his or her supervisor, he or she should immediately report the matter to the Vice President, General Counsel of the Company. The Company's Vice President, General Counsel may use his or her discretion to refer the matter to the appropriate level for handling.

If the Sales Representative and his or her Regional Sales Management cannot resolve a dispute concerning a Covered Claim, and the dispute was not directly reported to the Vice President, General Counsel of the Company, the Sales Representative will refer the dispute to the Executive Vice President of the Eastern Region or the Western Region, as the case may be for Zep Sales and Service, North America.

The Sales Representative will refer the dispute to the Executive Vice President by sending him or her an e-mail, requesting that the dispute be resolved by the Executive Vice President.

The Sales Representative will copy the Vice President, General Counsel of the Company on the e-mail so that he or she can make sure that this procedure is followed.

The Sales Representative will send to the Executive Vice President any information, such as documents, copies of e-mails or summaries of conversations that he or she believes is relevant to the dispute.

The Executive Vice President will arrange a face-to-face meeting with the Sales Representative at a time and place that is mutually convenient for both parties.

The Executive Vice President will attempt to conduct the face-to-face meeting within two weeks of receipt of materials from the Sales Representative. However, for the purpose of minimizing expense, the meeting may be delayed until the Executive Vice President's next visit to the Sales Representative's vicinity, unless the delay would be unreasonable. In any event, the Executive Vice President will conduct the face-to-face meeting with the Sales Representative within six weeks of receipt of material from the Sales Representative.

The Executive Vice President may discuss the dispute with anyone who may, in his or her opinion, have relevant information, including the Sales Representative's Regional Sales Management. However, the Regional Sales Management will not participate in the face-to-face meeting.

The Sales Representative may ask other Company personnel who have knowledge relevant to the dispute to participate in the meeting.

The Executive Vice President will document his or her findings regarding the dispute in a letter to the Sales Representative. The letter will state the Executive Vice President's conclusions regarding the relevant facts, will include a discussion of the relevant Company policies or practices and will explain the decision reached. He or she will assemble a file of the material considered in case it becomes necessary for the dispute to receive further consideration.

If the Sales Representative and the Executive Vice President are unable to resolve the dispute, the dispute will be referred to a panel consisting of the Group President, Zep Sales & Service - North America, the Chief Administrative Officer of the Company and the Vice President, Human Resources of the Company.

The panel will review the file assembled by the Executive Vice President. It may ask the Sales Representative or other Company personnel to supply additional information. It may discuss the dispute with other Company personnel, including the Regional Sales Management and the Executive Vice President.

The panel will conduct a face-to-face meeting with the Sales Representative at a mutually convenient time, generally within two weeks of the referral of the matter to them.

Neither the Executive Vice President nor the Regional Sales Management will participate in the face-to-face meeting.

The panel will document its findings regarding the dispute in a letter to the Sales Representative. Such letter shall be sent by a nationally recognized overnight courier service, with delivery requiring the signature of an adult resident of the household, to the sales representative’s most current home address on file with Human Resources. It is the responsibility of each sales representative to ensure that Human Resources has his or her current home address. The letter will state the panel's conclusions regarding the relevant facts, will include a discussion of the relevant Company policies or practices and will explain the decision reached. The panel will assemble a file of the material considered in case it becomes necessary for the dispute to receive further consideration.

III. ARBITRATION AGREEMENT

If the Sales Representative and the Company are unable to resolve a dispute concerning a Covered Claim through the procedure described above, the dispute will be determined by binding arbitration in Atlanta, Georgia, before a single neutral arbitrator. Any arbitration under this Agreement will take place on an individual basis; class arbitrations and class actions are not permitted and are waived under this Agreement.

NO COVERED CLAIM MAY BE INITIATED OR MAINTAINED ON A CLASS, COLLECTIVE OR REPRESENTATIVE ACTION BASIS EITHER IN COURT OR UNDER THESE RULES, INCLUDING IN ARBITRATION. ANY COVERED CLAIM PURPORTING TO BE BROUGHT AS A CLASS ACTION, COLLECTIVE ACTION OR REPRESENTATIVE ACTION WILL BE DECIDED UNDER THESE RULES AS AN INDIVIDUAL CLAIM. THE EXCLUSIVE PROCEDURE FOR THE RESOLUTION OF ALL CLAIMS THAT MAY OTHERWISE BE BROUGHT ON A CLASS, COLLECTIVE OR REPRESENTATIVE ACTION BASIS, WHETHER PARTICIPATION IS ON AN OPT-IN OR OPT-OUT BASIS, IS THROUGH THESE RULES, INCLUDING FINAL AND BINDING ARBITRATION, ON AN INDIVIDUAL BASIS. A PERSON COVERED BY THESE RULES MAY NOT PARTICIPATE AS A CLASS OR COLLECTIVE ACTION REPRESENTATIVE OF A CLASS, COLLECTIVE OR REPRESENTATIVE ACTION MEMBER OR BE ENTITLED TO A RECOVERY FROM A CLASS,COLLECTIVE OR REPRESENTATIVE ACTION.

ANY ISSUE CONCERNING THE VALIDITY OF THIS CLASS ACTION, COLLECTIVE ACTION AND REPRESENTATIVE ACTION WAIVER MUST BE DECIDED BY A COURT, AND AN ARBITRATOR DOES NOT HAVE AUTHORITY TO CONSIDER THE ISSUE OF THE VALIDITY OF THIS WAIVER. IF FOR ANY REASON THIS CLASS, COLLECTIVE AND REPRESENTATIVE ACTION WAIVER IS FOUND TO BE UNENFORCEABLE, THE CLASS, COLLECTIVE OR REPRESENTATIVE CLAIM MAY ONLY BE HEARD IN COURT AND MAY NOT BE ARBITRATED UNDER THESE RULES. AN ARBITRATOR APPOINTED UNDER THESE RULES SHALL NOT CONDUCT A CLASS, OR COLLECTIVE OR REPRESENTATIVE ACTION ARBITRATION AND SHALL NOT ALLOW YOU TO SERVE AS A REPRESENTATIVE OF OTHERS IN AN ARBITRATION CONDUCTED UNDER THESE RULES.

> This Agreement evidences a transaction in interstate commerce, and thus the Federal Arbitration Act governs the interpretation and enforcement of this Agreement or if that Act is held to be inapplicable for any reason, the arbitration law in the State of Georgia will apply.

A. Notice of Intent to Arbitrate

A Sales Representative who intends to seek arbitration must first send to the Company, by certified mail, a written Notice of Intent to Arbitrate ("Notice"). The Notice to the Company should be addressed to: Vice President, General Counsel, Acuity Specialty Products, Inc., 1310 Seaboard Industrial Dr., Atlanta, GA 30318 ("Notice Address"). The Notice must (a) describe the nature and basis of the claim or dispute; and (b) set forth the specific relief sought. If the Company intends to seek arbitration, it must first send to the Sales Representative, by certified mail, a written Notice of Intent to Arbitrate ("Notice"). The Notice to the Sales Representative should be addressed to the current address on file for the Sales Representative. ("Notice Address for Sales Representative"). The Notice must (a) describe the nature and basis of the claim or dispute; and (b) set forth the specific relief sought. If the Company and the Sales Representative do not reach an agreement to resolve the claim within 30 days after the Notice is received, the Sales Representative or the Company may commence an arbitration proceeding. During the arbitration, the amount of any settlement offer made by the Company or the Sales Representative, if any, shall not be disclosed to the arbitrator.

B. Deadline for Filing Notice of Intent to Arbitrate

Any claim brought under this Agreement must be submitted within the applicable statute of limitations for the claim at issue

C. Arbitration Venue and Rules

The arbitration will be administered by JAMS pursuant to JAMS' Streamlined Arbitration Rules and Procedures. JAMS is a private, for-profit provider of alternative dispute resolution services. The Company does not have any agreement with JAMS related to any subject.

A copy of the JAMS Streamlined Arbitration Rules and Procedures have been attached to this Agreement and are available online at http://www.jamsadr.com/rules¬ streamlined-arbitration/. It is the responsibility of each Sales Representative to review and abide by JAMS' arbitration rules. Sales Representatives agree that they have been advised that they may have counsel of their choosing review and explain the arbitration rules to them at their expense. Sales Representatives may retain a lawyer to assist him or her in the arbitration at their own expense.

JAMS will charge the Company a fee for arbitrating the dispute between the Company and the Sales Representative. The Company will pay the fee unless the arbitrator decides that the Sales Representative was not entitled to any recovery or any aspect of the non-monetary relief sought, in which case, the Sales Representative will pay the fee. In the event that the Sales Representative is required to pay the fee, the amount the Sales Representative will be required to pay will be capped at or below the equivalent state or federal court filing fee, whichever is lower. If state law does not allow for payment of a fee to access arbitration, the requirement for the Sales Representative to pay the fee will be waived or, if the Sales Representative mistakenly sends a fee payment when it is not required, it will be refunded.

Any offers, promises or statements, whether oral or written, made in the course of the negotiation by the Company and the Sales Representative prior to the referral of the dispute for resolution by JAMS are confidential, privileged and inadmissible for any purpose, including impeachment, in the arbitration.

Other than the issues expressly excluded by this Agreement, all issues are for the arbitrator to decide, including the scope of this arbitration provision, but the arbitrator is bound by the terms of this Agreement.

Remedies, including statutory awards of attorneys' fees and costs but excluding class remedies, are available through the arbitration process, if permitted by the applicable state or federal law.

Initiation of, participation in, or removal of a court proceeding does not constitute waiver of the right or obligation to arbitrate under these Rules.

D. Severability

If any one or more of the terms or provisions of this Agreement shall be determined by a court of competent jurisdiction to be unconscionable, invalid, void or unenforceable, the remainder of the terms, provisions, covenants and restrictions shall remain in full force and effect, and the invalid, void or unenforceable provisions shall be deemed severable. Moreover, any term or provision found to be unconscionable, invalid, void or unenforceable shall be reformed by limiting and reducing it to the minimum extent necessary, so as to be enforceable to the extent compatible with the applicable law.

E. Entire Agreement

This Agreement sets forth the entire agreement between the parties hereto and fully supersedes any and all prior agreements or understandings, written or oral, between the parties hereto pertaining to the subject matter hereof.

F. Amendment

This Agreement may be amended only in writing signed by you and by a duly authorized representative of the Company (other than you).

YOU SHOULD READ THE PROVISIONS OF THIS ARBITRATION POLICY AND AGREEMENT CAREFULLY, AS IT PROVIDES THAT ANY EXISTING AND FUTURE DISPUTES RELATED TO YOUR EMPLOYMENT RELATIONSHIP, INCLUDING YOUR INDIVIDUAL CLAIM, IF ANY, WITH RESPECT TO THE MATTERS ALLEGED IN THE BRITTO v. ZEP

> LITIGATION (IF SUCH LAWSUIT IS NOT CERTIFIED AS A CLASS ACTION), MUST BE RESOLVED ONLY THROUGH BINDING ARBITRATION. IF YOU DO NOT WISH TO ACCEPT THIS ARBITRATION AGREEMENT. YOU WILL NOT BE ELIGIBLE TO PARTICIPATE IN THE SALES BONUS PROGRAM. BUT YOUR EMPLOYMENT WILL NOT BE AFFECTED IN ANY OTHER WAY. THIS AGREEMENT TO ARBITRATE DISPUTES WILL SURVIVE THE SALES BONUS PROGRAM AND IS IRREVOCABLE.
>
> By signing and dating below, I am choosing to arbitrate both existing and future claims in accordance with this arbitration policy and agreement. I understand that my decision to sign or not sign this form will not be used as a basis for the Company to take any adverse employment action against me.

B. STIPULATIONS OF THE PARTIES AND SUPPORTING EVIDENCE

The stipulations of the parties and the documents in support thereof reflect the following:

At all material times, Tom Moffett has held the position of President and has been a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.

Woodford has been employed by Respondent as an outside sales representative in Northern California since 1990 and Heffernan was employed by Respondent as an outside sales representative in Northern California from 1983 until June 30, 2013.

Respondent pays its sales representatives, including Woodford and Heffernan (while he was employed), compensation based upon a commission of their sales. For purposes of this litigation only, the Employer admits that all of its sales representatives working in the United States, including Woodford and Heffernan (during his period of employment with Respondent), are employees within the meaning of Section 2(3) of the Act.

During the time period for 2007 to the present, Respondent has offered its sales representatives various bonus programs. The bonus programs have been offered at the discretion of Respondent and at no time have been guaranteed.

During the time period for 2007 to the present, and for each year during that period, Respondent has offered annual sales bonus programs under which sales representatives nationwide have been eligible to earn an annual sales bonus. Under these annual sales bonus programs, sales representatives have been required to satisfy certain performance standards which have changed over time. The basic structure of the program has generally required sales representative to meet baseline sales goals for each year and has provided incentives for increases in sales and commission rates, attaining certain sales targets and managing the past due status of accounts receivable.[1]

On December 30, 2010, two of Respondent's employees filed a putative class action in the Superior Court of the State of California, Alameda County, *Keith Britto et al. v. Zep, Inc.,* et al., Case No. VG 10553718 (the *Britto* Action), alleging violations of California's Labor Code with respect to the sales representatives' expense reimbursements and pay structure. The *Britto* Action involved a putative class of approximately 175 current and former California sales representatives of Respondent, including Woodford and Heffernan.

In November 2011, Respondent presented its sales representatives in the United States with an opportunity to participate in an alternative dispute resolution program that was implemented on a national basis. Sales representatives had the opportunity to participate in the alternative dispute resolution program by executing the "Alternative Dispute Resolution Policy and Agreement for Disputes between a Sales Rep and Acuity Specialty Products, Inc., doing business as Zep Sales and Service" (the ADR Policy, as set forth above).

Respondent communicated the opportunity to participate in the ADR Policy program to its sales representatives in November of 2011. The ADR Policy was explained to its sales representatives, including Woodford and Heffernan in writing via a letter dated November 18, 2011.[2] The letter also enclosed the ADR Policy.[3] Respondent's sales representatives were not required to sign the ADR policy as a condition of continued employment with Respondent.

The ADR Policy was further explained in writing to its sales representatives including Woodford and Heffernan, via a letter dated December 5, 2011.[4]

Beginning in Fiscal Year (FY) 2012, Respondent included participation in the ADR Policy program as an eligibility requirement for the sales bonus program. The requirement of participation is in addition to the performance standards. Prior to FY 2012, Respondent did not require sales representatives to sign an ADR Policy or any other agreement to arbitrate disputes in order to be eligible to participate in its annual sales bonus program.

Respondent's fiscal year runs from September 1 through August 31 of the following year. Sales representatives who qualify for an annual sales bonus are generally paid the bonus in October following the end of the fiscal year in which it was earned.

Bonus payments under the sales bonus programs from FY 2012 to FY 2013 ranged from approximately $1300 to approximately $97,500. The lowest bonus reflected approximately 4 percent of the annual compensation of the sales representative receiving it, and the largest bonus reflected approximately 15 percent of the annual compensation of the sales representative receiving it.

For FY 2012, Respondent offered the ADR Policy to its 651 sales representatives nationwide. Four-hundred fifty-four (454) representatives accepted and executed the ADR Policy. One-hundred ninety-seven (197) representatives declined to participate in the ADR Policy program. Approximately 24 of the 197 sales representatives who did not sign the ADR Policy would have qualified for the annual sales bonus based upon the performance criteria established for the FY 2012 annual sales bonus program, but were not eligible to participate in the FY 2012

[1] Copies of the Fiscal Year (FY) 2008, 2009, 2010, and 2011 bonus plans are reflected in Jt. Exhs. N through Q respectively.

[2] A copy of the letter sent to sales representatives, including Woodford and Heffernan is in the record as Jt. Exh. R.

[3] Jt. Exh. S.

[4] Jt. Exh. T.

annual sales bonus program because they did not sign the ADR Policy. Sales representatives who elected not to sign the ADR Policy were not eligible to participate in the annual bonus program. The General Counsel is unaware of, and does not contend that, any other adverse action was taken by Respondent as a result of a sales representative not signing the ADR Policy. Aside from implementing the ADR Policy, the General Counsel is unaware of, and does not contend that, any adverse action was taken by Respondent as a result of any sales representative bringing any matter before the NLRB.

On or about February 3, 2012, Respondent sent a follow-up letter to sales representatives regarding the ADR Policy.[5]

Woodford signed the ADR Policy on or about February 14, 2012 and Heffernan signed it on February 16, 2012.[6]

The ADR Policy given to Respondent's California sales representatives included a provision permitting participation in the *Britto* Action. The *Britto* Action involved a putative class of approximately 175 current and former California sales representatives of Respondent, including Woodford and Heffernan, until the Superior Court denied class certification on May 7, 2012.

On June 4, 2012, following the denial of class certification in the *Britto* Action, approximately 55 California sales representatives, including Woodford and Heffernan, filed a motion to intervene in the *Britto* Action. While the Superior Court initially granted the motion to intervene, on December 20, 2012, the California Court of Appeal reversed the decision to grant intervention in the *Britto* Action.

On August 30, 2012, Respondent , by Moffett, sent letters to Woodford and Heffernan regarding their eligibility for annual sales bonuses in FY 2012 advising each of them, in pertinent part, as follows:[7]

> On August 1, 2012, you filed a complaint as a named plaintiff in the Superior Court of the State of California against the Company and its parent, Zep, Inc. The Company considers your suit to be a material breach of your ADR Agreement. This letter is your notice that, because of your material breach of the ADR Agreement, you are no longer eligible to participate in the Company's bonus plan for California sales reps. Therefore, you will not receive a bonus for fiscal year 2012.
>
> In the event you notify us by September 7 that you will withdraw the complaint you filed in court and proceed to arbitration, the Company will reconsider its position as to your bonus eligibility

At all material times, sales representatives were not automatically entitled to receive a bonus upon the execution of the ADR Policy. Upon execution of the ADR Policy, sales representatives became eligible to participate in the annual sales bonus program. To earn a bonus under the program, eligible sales representatives must satisfy the performance standards and requirements set forth in the bonus plan for that year.[98]

On or about November 21, 2012, Respondent sent a letter to sales representatives giving them another opportunity to sign the ADR Policy in order to become eligible for the FY 2013 sales bonus plan.[9]

For FY 2013, 428 sales representatives had ADR Policies in place and were eligible to participate in the sales bonus plan. For FY 2013, 169 sales representatives did not sign the ADR Policy. Approximately six (6) of the 169 sales representatives who did not sign the ADR Policy would have qualified for the annual sales bonus based upon the performance criteria established for the FY 2013 annual sales bonus program, but were not eligible to participate in the FY 2013 annual sales bonus program because they did not sign the ADR Policy. Sales representatives who elected not to sign the ADR Policy were not eligible to participate in the annual bonus program. The General Counsel is unaware of, and does not contend that, any other adverse action was taken by Respondent as a result of a sales representative not signing the ADR Policy.

On December 24, 2012, following the denial of class certification and motion to intervene in the *Britto* Action, 54 former putative class members, including Heffernan and Woodford, filed another lawsuit alleging the same or similar claims as in *Britto*. This pending lawsuit is styled *Aguilar et al. v. Zep Inc.,* et al., U.S. District Court for the Northern District of California, Case No. 3:13-CV-0563-RS (the *Aguilar* Action).[10]

After the *Aguilar* Action was filed, Respondent moved to compel arbitration as to Heffernan, Woodford and six (6) other plaintiffs who signed the ADR Policy. The United States District court for the Northern District of California granted Respondent's motion to compel arbitration.[11]

After proceeding to arbitration pursuant to the ADR policy and Court Order compelling arbitration, Respondent paid Heffernan his bonus payment under the sales bonus program for 2012. He received a gross bonus of $27,894.51 for FY 2012.[12] A final award has been issued in Heffernan's arbitration.

After proceeding to arbitration pursuant to the ADR Policy and the Court's Order compelling arbitration, Respondent paid Woodford her bonus payment under the sales bonus program for FY 2012. She received a gross bonus of $17,319.19 for FY 2012.[13] A final award has been issued in Woodford's arbitration.

The ADR Policy was not promulgated in response to union activity. Respondent's sales representatives are not represented by a labor organization.

IV. ANALYSIS AND CONCLUSIONS

A. Positions of the Parties

The General Counsel contends that Respondent has violated Section 8(a)(1) of the Act by soliciting employees to sign, and by maintaining and/or by enforcing the ADR Policy as the Policy interferes with employees' Section 7 rights to engage in collective legal activity. It is also contended that the Policy violates the Act insofar as it interferes with employees' access to the Board and its processes. The complaint further alleges

[5] Jt. Exh. U.

[6] Jt. Exhs. V and W.

[7] Jt. Exhs. X and Y, respectively.

[8] Copies of the FY 2012, 2013, and 2014 bonus plans are set forth in Jt. Exhs. Z through BB, respectively.

[9] Jt. Exh. CC.

[12] A copy of the bonus check paid to Heffernan is Jt. Exh. NN.

[13] A copy of the bonus check paid to Woodford is Jt. Exh. OO.

that Respondent unlawfully conditioned employees' eligibility for and receipt of annual sales bonuses upon their execution of and adherence to this policy. In support of the foregoing contentions, the General Counsel relies primarily upon the Board's decision in *D. R. Horton*, *Inc*., 357 NLRB 2277 (2012).

The General Counsel urges that, notwithstanding the voluntary nature of the Policy, once signed it becomes a condition of employment which precludes participation in Section 7 conduct and that employees may reasonably expect that they may be disciplined or face legal action if they breach the Policy. It is further contended that the Policy interferes with the statutory rights of all employees because even those employees who decline to sign, are precluded from acting concertedly with those who do.

Respondent argues that the ADR policy is lawful and enforceable under applicable Supreme Court precedent. It is further contended that *D.R. Horton* is invalid and even if it was valid such authority it would not be applicable to the instant matter. Respondent further maintains that the Policy does not violate the Act as it is voluntary and not a condition of continued employment; that it unambiguously exempts matters arising under the Act from coverage and does not restrict employees' rights to file charges and seek redress before the Board. Respondent further contends that conditioning employees' eligibility to participate in the annual sales bonus program upon execution of the Policy does not violate the Act.

B. The Board's decision in D. R. Horton

Respondent has raised a number of arguments concerning what it contends is the invalidity of the Board's Decision and Order in *D.R. Horton,* supra.

Respondent has argued that the Board's decision in *D.R.* is invalid, because the Board lacked a valid quorum at the time the decision issued. In particular, it challenged the validity of Member Becker's appointment to the Board. In *National Labor Relations Board v. Noel Canning,* --- S.Ct. --- 2014, WL 2882090 U.C. Dist Col. 2014 (June 26, 2014), the Court found that appointments made during a three day period beginning on January 4, 2012 were unconstitutional. That decision does not affect the composition of the Board at the time *D. R. Horton* was issued, on January 3, 2012.[14] Additionally, as was noted by the Fifth Circuit upon review of *D. R. Horton*, *Horton* did not challenge the constitutionality of Member Becker's appointment, but argued instead that Member Becker's appointment expired before the decision issued, a contention echoed by the Respondent here in its post hearing brief. The Fifth Circuit asked the parties to submit briefing on the issue of the validity of Member Becker's appointment for jurisdictional reasons and concluded review was warranted. In addition, the court found that the issue of whether the Board's decision was entered prior to the expiration of Member Becker's appointment was "unclear from the record" noting an "absence of proof" on that issue. *Noel Canning v. NLRB*, 737 F.3d 344, 350–351 (D.C. Cir. 2013). Moreover, I note that despite continuing challenges to the composition of the Board at any particular time, it has repeatedly held that it "is charged to fulfill its responsibilities under the Act." See, e.g., *Universal Lubricants, LLC*, 359 NLRB No. 157 at fn. 1 (2013); *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. at 1 (2013). I conclude therefore, that unless and until reversed by the Board or the Supreme Court, *D. R. Horton* remains extant Board law which, as an administrative law judge, I am bound to follow. In addition, for the reasons set forth below, I further adopt the reasoning and conclusions reached by the Board in *D. R. Horton*, a result which is supported by decades of well-established Board law and doctrine.[15]

Respondent further relies upon the refusal of the Fifth Circuit to enforce, in relevant part, that portion of the Board's Decision and Order finding that an arbitration agreement which eliminated the right to initiate and pursue class or collective claims violated Section 8(a)(1). *D. R. Horton, Inc. v. NLRB*, 737 F.3d at 362. Respondent notes that other circuits addressing the issue have held that arbitration agreements requiring the waiver of class or collective actions do not violate Section 8(a)(1). *Richards v. Ernst & Young, LLP*, 734 F.3d 871 (9th Cir. 2013); *Sutherland v. Ernst & Young, LLP*, 726 F.3d 290 (2d Cir. 2013); *Owen v. Bistol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013).

With regard to these cited decisions, is well-settled that the Board generally applies a "non-acquiescence policy" with respect to contrary views of the Federal Courts of Appeal. *See D.L. Baker, Inc.*, 351 NLRB 515, 529, fn. 42 (2007); *Pathmark Stores, Inc.*, 342 NLRB 378, fn. 1 (2004). Thus, an administrative law judge is required to "apply established Board precedent which the Supreme Court has not reversed." *Pathmark Stores, Inc.*, 342 NLRB at 378, fn. 1; see also *Gas Spring Co.*, 296 NLRB 84, 97–98 (1989), enf. 908 F.2d 966 (4th Cir. 1990).

Respondent further argues that the Supreme Court has repeatedly recognized a long standing "liberal federal policy favoring arbitration agreements" as embodied in the Federal Arbitration Act ("FAA") *CompuCredit Corp. v. Greenwood*, --- U.S. ---, 132 S.Ct. 665, 668–669 (2012); see also *American*

[14] Although the D.C. Circuit held that then-Members Griffin and Block were not validly appointed because they were appointed during an intrasession recess, the Supreme Court decided the matter on different grounds. In particular, when the Supreme Court granted certiorari it instructed the parties to brief and argue a question not initially presented in the writ for certiorari: "Whether the President's recess-appointment power may be exercised when the Senate is convening every three days in pro forma sessions." Order Granting Certiorari, *NLRB v. Noel Canning,* ---U.S. ---, 133 S.Ct. 2861 (2013); see also *D.R. Horton v. NLRB*, 737 F. 3d at 350, fn. 3.

[15] To the extent Respondent may contest the authority of the General Counsel to issue complaint in this matter, I note that the Board has found that the General Counsel has independent authority to issue and prosecute the complaint in this matter. *Bloomingdale's Inc*., 359 NLRB No. 113, slip op. at 1 (2013): "[u]nder the NLRA, the General Counsel is an independent officer appointed by the President and confirmed by the Senate, and staff engaged in the investigation and prosecution of unfair labor practices are directly accountable to the General Counsel." (citing 29 U.S.C. Sec. 153(d); *NLRB v. Food & Commercial Workers Local 23*, 484 U.S. 112, 127–128 (1987); *NLRB v. FLRA*, 613 F. 3d 275, 278 (D.C. Cir. 2010)). Thus, "[t]he authority of the General counsel to investigate unfair labor practices and prosecute complaints derives not from any 'power delegated' by the Board, but rather directly from the language of the NLRA." Id.

Express Co. v. Italian Colors Restaurant, --- U.S. ---, 133 S.Ct. 2304, 2309 (2013). As the Court has stated, "[t] he principal purpose of the FAA is to ensure that private arbitration agreements are enforced according to their terms. This purpose is readily apparent from the FAA's text." *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1748 (2011). Respondent argues that this holds true for claims that allege a violation of a federal statute, unless the FAA's mandate has been overridden by a "contrary Congressional command." *American Express Co*., supra at 2309. Respondent has concluded therefore that the ADR Policy lawfully precludes class or collective legal actions because no such "contrary Congressional command" exists and there is decisional law in other employment-related contexts which supports the enforceability of arbitration agreements. See *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 24 (1991) (holding that that a claim under the Age Discrimination in Employment Act (ADEA) could be subjected to compulsory arbitration pursuant to an agreement in a securities registration application). Respondent further argues that the right to bring or participate in a class action is a procedural device which is subject to waiver. See *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980).

I note that, in *D. R. Horton*, the Board considered these arguments and related precedent and reached a different conclusion to which I am bound.[16] Moreover, I find, contrary to Respondent, that the above cited precedent is not dispositive in the context of the instant matter. In particular, the above-discussed cases generally involve commercial transactions of a nature not at issue here.[17] The one case relied upon to demonstrate an employment-related context, *Gilmer,* addresses neither the substantive rights guaranteed under Section 7 nor the issue of a class action waiver. The claim asserted in there was an individual one, and the arbitration agreement at issue contained no language specifically waiving class or collective claims.[18]

In short, I conclude that the authority relied upon by Respondent fails to address those fundamental substantive federal labor rights of the nature, established by congressional legislation, as are involved here.

In this regard, I note, as did the Board in *D. R. Horton*, that Section 2 of the FAA provides that arbitration agreements may be invalidated in whole or in part upon any "grounds that exist at law and in equity for the revocation of any contract." 9 U.S.C. Section 2.

Here, the General Counsel does not contend, and it is not subject to question that employees may enter into individual agreements with their employers; the question is whether they may do so at the expense of substantive rights conferred by the Act. As the Supreme Court has found:

> Individual contracts no matter what their circumstances that justify their execution or what the terms, may not be availed to defeat or delay procedures prescribed by the National Labor Relations Act . . . Wherever private contracts conflict with [the Board's] functions, they must obviously yield or the Act would be reduced to a futility.

J.I. Case Co. v. NLRB, 321 U.S. 332, 337 (1944).

Thus, as the Supreme Court has held, Respondent may enter into various agreements with individual employees; however, it is not privileged to reach those agreements with individuals which conflict with rights protected by the Act. See also *National Licorice Co., v. NLRB*, 309 U.S. 350, 360 (1940) (upholding Board's finding that individual employment contracts that included a clause discouraging, if not forbidding, a discharged employee from presenting his grievance to the employer "through a labor organization or his chosen representatives, or any way except personally" was unlawful and unenforceable.)

Moreover, even if one were to find a conflict between the FAA and the NLRA, the Supreme Court has further held that when two federal statutes conflict, the later enacted statute, here the NLRA,[19] must be understood to have impliedly repealed inconsistent provisions in the earlier enacted statute. See *Radzanower v. Touche Ross & Co*., 426 U.S. 148, 154 (1976); *Chicago & N.W. Ry Co., v. United Trans. Union*, 402 U.S. 570, 582 fn. 18 (1971); *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936).

[16] Although the Act does not reference class or collective actions, the Board in *D. R. Horton* distinguished it from other statutes the Court has considered by finding that Section 7 provides substantive guarantees of the right to engage in collective action, including collective legal action, for mutual aid and protection. As the Board stated, "the intent of the FAA was to leave substantive rights undisturbed." 357 NLRB, slip op. at 11.

[17] *AT&T Mobility* involved the claim that a class action waiver in an arbitration clause of any contract of adhesion in the State of California was unconscionable; *CompuCredit Corp*., involved actions brought by consumers against the marketer of credit cards and application of the Federal Credit Repair Organization Act (CROA). The Court held that CROA provisions requiring credit repair organizations disclose to consumers the right to sue over violations of CROA and prohibiting waiver of that right nonetheless did not preclude enforcement of an arbitration agreement the parties had also executed. *American Express Co*., decided after *D. R. Horton*, involved merchants who contracted with American Express to accept American Express cards at their businesses, and were unhappy with the rates charged for use of their cards at their respective businesses. Their agreements with American Express provided for arbitration of disputes arising between the merchant and American Express and further precluded any claims from being arbitrated as a class action. The statutes evaluated there were the Sherman and Clayton Acts, which fail to reference class or collective actions. The Court concluded that the "antitrust laws do not guarantee an affordable procedural path to the vindication of every claim." 133 S.Ct at 2309.

[18] I further note that in *Gilmer*, supra, the Court found that there would be a basis for invalidating an arbitration agreement where there is an "inherent conflict between that arbitration and the underlying purposes of another Federal statute, 500 U.S. at 26.

[19] The FAA was enacted in 1925, the Norris-LaGuardia Act was enacted in 1932 and the NLRA was enacted in 1935. While the FAA was pro forma reenacted in 1947 it was done without substantive amendment. See *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961); see also H.R Rep. No 80–251 (1947), reprinted in 1947 U.S.C.C.A.N. 1511 (expressly stating that the 1947 bill made "no attempt" to amend the existing FAA); H.R. Rep. No. 80–225 (1947), reprinted in 1947 U.S.C.C.A.N 1515 (same).

C. Respondent's ADR Policy as Applied to its Employees Violates Section 8(a)(1) of the Act

Under Section 8(a)(1) of the Act, it is an unfair labor practice for an employer to interfere with, restrain or coerce employees in the exercise of rights guaranteed in Section 7. These rights include the right "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

In *D. R. Horton*, supra, slip op. at 2277, 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 the employer in any forum, arbitral or judicial." [20] The Board, relying upon cases dating back through its tenure as a decisional body, found that concerted legal action addressing wages, hours and working conditions has consistently fallen within the protections of Section 7 of the Act.

For example, in *Trinity Trucking & Materials Corp*., 221 NLRB 364, 365 (1975), enfd. mem. 567 F.2d 391 (7th Cir. 1977), cert. denied 438 U.S. 914 (1978), the Board held that the filing of a lawsuit by a group of employees alleging that their employer had failed to pay them contract scale was protected activity. ("It is settled that the filing of a civil action by employees is protected activity unless done with malice or is in bad faith . . .[B]y joining together to file the lawsuit [the employees] engaged in concerted activity"). In *Le Madri Restaurant*, 331 NLRB 269, 275-76 (2000), the Board found that an employer unlawfully discharged two employees for engaging in protected concerted activity, which included filing a lawsuit in federal court on behalf of 17 other employees. The lawsuit alleged violations of federal and state labor laws. In *Novotel New York*, 321 NLRB 624, 633–636 (1996), the Board found that an "opt-in" class action lawsuit alleging employer violations of the Fair Labor Standards Act (FSLA) was protected concerted activity. In *United Parcel Service, Inc*., 252 NLRB 1015, 1018, 1022 and fn. 26 (1989), enfd. 677 F.2d 421 (6th Cir. 1982), the Board found that an employer unlawfully discharged an employee for bringing a class action lawsuit regarding employee rest breaks. In *Saigon Gourmet Restaurant*, 353 NLRB 1063, 1064 (2009), the Board concluded that the employer violated the Act when it promised to raise delivery workers' wages if they abandoned their plan to file a wage and hour lawsuit and by discharging employees because they engaged in protected concerted activities. See also *D.R. Horton*, slip op. at 2, fn. 4 (and additional authority cited therein).

Respondent contends, in the first instance, that the decision as to whether to agree to the ADR Policy is entirely voluntary, rendering it lawful under the Act. As is evident, the Policy is lengthy and contains numerous references to matters more properly within the purview of a legal professional. Thus, there are questions as to whether employees are fully apprised, in a manner they may appreciate, of the consequences of any such decision and whether the burden of having to decide as to whether one should irrevocably relinquish rights afforded to employees under the Act is an unreasonable one. As discussed in further detail below (see sec. II.D), the Board has long recognized that employees may fail to recognize the full scope of rights they are entitled to under the Act, and therefore, what they may be relinquishing.

Leaving aside, for the moment, the issue of whether conditioning employees' eligibility for the annual sales bonus program is an unlawful inducement to enter into a waiver of statutory rights, I find that, as a more general matter, the purported voluntariness of the ADR Policy does not obviate its unlawful nature.

The question is not whether an employee may choose to forego participation in the program. The issue, rather, is whether an employer and an individual employee may enter into an agreement to waive, irrevocably, future rights protected by the Act. Such rights include a substantive right to engage in collective redress of grievances, which the Board and the Supreme Court have long recognized as being at the core of Section 7 and central to the Act's purposes. *J.I Case*, supra; *National Licorice Co*., supra.

Here, there seems to be little dispute that participation in the Policy has been deemed to be voluntary. However, once an employee decides to enter into this agreement, certain core features of that employee's Section 7 rights are irrevocably waived prospectively and Respondent may seek to enforce such a waiver, as happened in the instant case.

While the Board, in *D.R. Horton*, did not have to consider the issue of voluntary individual agreements, in other contexts, the Board has had the occasion to consider such waivers and, has found that an individual's waiver of core Section 7 rights, central to the purposes of the Act to be unlawful. For example, in *Ishikawa Gasket America, Inc*., 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004), the Board found unlawful a separation agreement between an employee and the employer that restricted for a one-year period the employee from attempting "to hire, influence, or otherwise direct any employee of the Company to leave employment of the Company or to engage in any dispute or work disruption with the Company, or to engage in any conduct which is contrary to the Company's interests in remaining union-free." As the Board found:

In our view, this separation agreement is overly broad in that it forces [the employee] to prospectively waive her lawful Section 7 rights. "Future rights of employees as well as the rights of the public may not be traded away in such a manner." *Mandel Security Bureau, Inc*., 202 NLRB 117, 119 (1973) (release used by employer was overly broad and unlawfully prohibited filing of unfair labor charges concerning future incidents. See generally *Metro Networks, Inc*. 336 NLRB 63 (2001).

[20] In *D. R. Horton*, the Board also found that the arbitration policy at issue violated the Act by requiring all employees to submit all employment-related disputes to arbitration. The Board found that this violated Section 8(a)(1) of the act because it would employees to reasonably believe that they were prohibited from filing unfair labor practices with the Board. Here, the Respondent's ADR Policy excludes from its coverage matters within the jurisdiction of the Board, but the General Counsel has contended that an employee would reasonably believe that such charges were prohibited under the Policy. This contention is discussed below.

From its earliest days, the Board has adhered to this fundamental construction of the Act. In *J. H. Stone & Sons*, 33 NLRB 1014 (1941), enfd. in relevant part 125 F.2d 752 (7th Cir. 1942), the Board found individual employment contracts that required employees to attempt to resolve employment disputes individually with the employer and then provided for arbitration to be unlawful: "The effect of this restriction, is that, at the earliest and most crucial stages of adjustment of any dispute, the employee is denied the right to act through a representative and is compelled to pit his individual bargaining strength against the superior bargaining power of the employer." In affirming the Board's holding, the Seventh Circuit found that the contract clause in question was a per se violation of the act even if "entered into without coercion," because "it obligated [the employee] to bargain individually and was a "restraint upon collective action." *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942).

The foregoing precedent, construed in light of the overarching purpose of the Act, warrants the conclusion that the ADR Policy violates the Act, notwithstanding the fact that employees may choose not to enter into such an agreement with their employer.

D. The ADR Policy is Reasonably Interpreted to Restrict Access to the Board, its Processes and Procedures

General Counsel further contends that the ADR Policy violates Section 8(a)(1) in that it may reasonably be interpreted to preclude or restrict access to the Board and its processes, and would therefore tend to chill employees' exercise of their rights under Section 7. It is well settled that an employer's maintenance of a work rule which reasonably tends to chill employees' exercise of their Section 7 rights violates Section 8(a)(1) of the Act. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). A particular work rule which does not explicitly restrict Section 7 activity will be found unlawful where the evidence establishes one of the following: (i) employees would "reasonably construe the rule's language" to prohibit Section 7 activity; (ii) the rule was "promulgated in response" to union or protected concerted activity; or (iii) "the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). The Board has cautioned that rules must be afforded a "reasonable" interpretation, without "reading particular phrases in isolation" or assuming "improper interference with employee rights." *Lutheran Heritage Village-Livonia*, 343 NLRB at 646. Ambiguities in work rules are construed against the party which promulgated them. See *Supply Technologies, LLC*, 359 NLRB No. 38, slip op at 3 (2012); *Lafayette Park Hotel*, supra at 828. [21]

Under the circumstances here, I find that employees would reasonably interpret Respondent's ADR Policy as restricting their right to file unfair labor practice charges, and that Respondent's promulgation, maintenance and enforcement of the Policy therefore violates Section 8(a)(1) on this basis as well.

The ADR policy contains broad language regarding the scope of its applicability. Although the ADR Policy exempts "matters within the jurisdiction of the National Labor Relations Board" this exception comes after the recitation of a litany of "covered claims" which are defined to include claims of "discrimination or harassment on [an] unlawful basis," "retaliation for complaining about discrimination or harassment," retaliation for . . . "exercising your protected rights under any statute, "wrongful termination or constructive discharge," and "violations of any . . . federal. . .statute," specifically including the Taft Hartley Act as such a law. As the General Counsel notes, all of these categories of claims include matters which could be the subject of unfair labor practice charges. To the extent that the provisions of the Policy are unclear, Respondent, as the proponent of the policy, must bear the burden of such ambiguity. *Supply Technologies*, supra; *Lafayette Park Hotel*, supra; *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218 (1995).[22]

Furthermore, in the context of the reasonable interpretation analysis the Board generally has rejected any assumption that employees have specialized legal knowledge or experience which they would bring to bear on an arbitration agreement's language. For example, in *2 Sisters Food Group, Inc.*, 357 NLRB 1816, 1816–1817, 1829 (2011), the Board found that language limiting the employer's policy to claims "that may be lawfully resolve[d] by arbitration" was not susceptible to the interpretation by "most nonlawyer employees," who would be unfamiliar with the Act's limitations on compulsory arbitration, that unfair labor practice charges were thereby excluded. Similarly, in *U-Haul Co. of California*, supra at 377–378, the Board concluded that employees without legal training could not be reasonably expected to understand that language limiting arbitration to disputes or claims "that a court of law would be authorized to entertain or would have jurisdiction over" consequently excluded unfair labor practice charges from the scope of the agreement. In *Allied Mechanical*, 349 NLRB 1077 at fn. 1 (2007), the Board concluded that the respondent violated the Act by conditioning the settlement of wage claims where the release was "ambiguous and self-contradictory." As the judge there found, the first part of the release waives the signing employees' Section 7 right to assist other employees with their wage claims, and the second part of the release purports to cancel that waiver by excluding conduct "permitted by . . . the National Labor Relations Act." The problem, as the judge observed, is that assumes employees "are knowledgeable enough to understand that the Act permits the very thing prohibited in the first portion" of the release. The Board concluded that the release contained language "calculated to restrain its employees from engaging in specific protected activity while simultaneously shielding itself from liability through a generally worded

[21] In this regard, the Board has repeatedly held that mandatory arbitration policies that interfere with employees' rights to file unfair labor practice charges are unlawful. See *Bill's Electric, Inc*., 350 NLRB 292, 296 (2007); *Dish Network Corp*.,358 NLRB 174, 179–180; *U-haul Co. of California*, 347 NLRB 375, 377–378, enfd. mem. 255 F.Appx. 527 (D. C. Cir. 2007).

[22] Respondent has argued that the Charging Parties were not dissuaded from filing charges in the instant matter and there is no evidence that any other employee construed the ADR Policy as prohibiting them from doing so. This argument overlooks the fact that when evaluating work rules and policies, the Board applies an objective test and does not require actual evidence of interference, coercion or restraint.

'savings clause' it had to know would not negate the Sec. 7 restraint." Id. Similarly, here, there is no basis to assume that a reasonable employee, unversed in labor and employment law, would necessarily glean from the competing terms of the Policy that he or she retained the right to invoke the Board's processes and procedures. This is particularly the case in light of the Policy's otherwise sweeping language relegating virtually all employment-related disputes into the category of "covered claims."

Accordingly, because I conclude that a reasonable employee would be unable to discern the difference between any number of "covered claims" and those which fall within the jurisdiction of the National Labor Relations Board, and that the Policy is otherwise "ambiguous and self-contradictory" I find that the ADR Policy would reasonably tend to interfere with and otherwise chill employees in the exercise of their Section 7 rights, in particular their right to seek redress before the Board, and is therefore unlawful. *Lutheran Heritage-Village Livonia*, supra; *D. R. Horton*, supra, at 2289.

E. Respondent Unlawfully Conditioned Participation in its Employee Bonus Program upon Execution of and Adherence to its ADR Policy

The General Counsel has argued that Respondent further violated Section 8(a)(1) by conditioning employees' annual sales bonuses under its long-standing bonus program on employees' executing the unlawful ADR Policy. It is further urged that an employer violates the Act by threatening or acting to adversely affect employees' terms and conditions of employment in reprisal for their engaging in union or other protected conduct, or by promising employees benefits if they refrain from engaging in protected activity, as Respondent did here.

Respondent argues that the General Counsel's contentions are dependent upon a finding that the ADR Policy was unlawful and that, as has been argued above, the Policy is lawful and enforceable under binding Supreme Court precedent. It is further contended that the ADR policy did not interfere with the exercise of Section 7 rights because the class action is a procedural device and not a substantive right guaranteed by the Act. In support of this contention , Respondent relies upon *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. at 332 (1980) ("the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims); *D. R. Horton, v. NLRB*, 737 F.3d at 357 (5th Cir. 2013) (The use of class action procedures . . . is not a substantive right"); see also *Gilmer v. Interstate/Johnson Lane Corp*., 111 S.Ct. at 1655 (1991). The sum and substance of Respondent's argument as a point of law is that conditioning employees' eligibility to participate in the bonus program does not interfere with, restrain or coerce employees in the exercise of their Section 7 rights because the ability to bring or participate in a class action is not a right guaranteed by Section 7.

In disagreement with Respondent, I conclude that conditioning employee eligibility for its ongoing sales bonus program upon the execution and continuing adherence to its ADR Policy is violative of Section 8(a)(1) of the Act.

As has been noted above, but bears repetition in this context, the Act provides that employees shall have the right to "engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid and protection. . ." As has been well noted, Section 7 of the Act protects a broad range of concerted activities, because, "[Congress] knew well enough that labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context." *Eastex, Inc., v. NLRB*, 437 U.S. 556, 566 (1978)"[Congress] recognized this fact by choosing as the language of [Section] 7 makes clear, to protect concerted activities for the somewhat broader purpose of 'mutual aid and protection' as well as for the narrower purposes of 'self-organization' and 'collective bargaining.'" Id.

As discussed above, the Board historically has found protected, concerted activity to include the filing of collective and class action lawsuits involving employment matters. In other words, the Board found that the right to engage in collective legal action is a core substantive right conferred by the Act. Thus, class action lawsuits that can be characterized as having been filed for mutual aid and protection implicate fundamental rights under the Act. Unlike other statutory contexts—where a class action lawsuit might well be viewed as merely a procedural mechanism for enforcing a separate underlying right—the Act's cornerstone principle is that employees are empowered to band together to advance their work-related interests on a collective basis.

Here, the ADR Policy requires that employees forego not a merely procedural device, as Respondent suggests, but a substantive right conferred by the Act, as has been defined by decades of decisional law. Further I agree with the General Counsel that employees' eligibility for the annual sales bonus program, a program which had been in existence since 2007, had become a term and condition of employment upon which employees had come to rely. And as the stipulations of the parties reflect, employees were thereby offered the opportunity to significantly increase their wages. Accordingly, I find that by conditioning employees' eligibility to participate in this program, and increase their compensation, upon their waiver of core, substantive rights conferred by the Act, Respondent has violated Section 8(a)(1) of the Act. See, e.g., *Pittsburg & Midway Coal Mining Co*., 355 NLRB 1210, 1214 (2010)(employer violated Act by modifying employees' bonus plan in response to their protected activity); *Saigon Grill Restaurant*, supra at 1064 (employer violated Section 8(a)(1) by promising benefits conditioned upon cessation of protected, concerted activity).

CONCLUSIONS OF LAW

1. The Respondent, Acuity Specialty Products, Inc., d/b/a/ Zep, Inc., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. By promulgating, maintaining and enforcing an Alternative Dispute Resolution Policy (ADR Policy) which (a) interferes with employees' Section 7 rights to engage in collective legal activity by binding employees to an irrevocable waiver of their rights to participate in class or collective litigation; (b) contains language that employees would reasonably conclude prohibits or restricts their right to file charges with the National Labor Relations Board; (c) conditions employees' eligibility to participate in Respondent's annual sales bonus program on

their execution of the ADR Policy and (d) by denying eligibility for participation in its annual sales bonus program to employees to employees who executed the ADR Policy but refused to waive their participation in class action or collective legal activity, Respondent has violated Section 8(a)(1) of the Act.

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

REMEDY

Having found that the Respondent has 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.

Having found that Respondent's ADR Policy is unlawful, the Respondent shall be ordered to rescind or revise it to make clear to employees in all of its facilities in which the ADR Policy has been implemented that it does not require a waiver in all forums of their right to maintain class or collective action, and shall notify employees of the rescinded or revised policy by providing them with a copy of the revised policy or specific notification that the ADR Policy has been rescinded. Employees shall also be advised that any revised ADR Policy does not require arbitration of claims or unfair labor practice charges falling under the jurisdiction of the National Labor Relations Act, as amended.

Respondent shall also be required to withdraw any motions for individual arbitration, if pending, or move the appropriate court to vacate its order for individual arbitration, if Respondent's motion has already been granted and a motion to vacate can be timely filed. Any such motion to vacate should be made jointly with the affected employees, if they so request. This remedy should not be construed so as to preclude Respondent from amending its motion to seek lawful class or collective arbitration rather than a class or collective lawsuit.

Respondent also shall be required to make employees whole by restoring their eligibility for participation in the annual sales bonus programs to which they would have been entitled but for the unlawful ADR Policy, paying to employees any bonus that they qualified for under the performance standards of that year's annual sales bonus plan but which was withheld because they did not execute the ADR Policy or otherwise participated in class or collective legal action and reimbursing employees for any litigation expenses, including attorney's fees that they incurred that are directly related to Respondent's motion to compel individual arbitration. Interest on all monies owed to employees will be determined at the applicable rate of interest as outlined in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and shall be computed on a daily basis as prescribed in *Kentucky River Medical Center*, 356 NLRM 8(2010), enf. denied on other grounds sub. nom *Jackson Hospital Corp. v. NLRB* 647 F.3d 1137 (D.C. Cir. 2011).

Respondent shall post an appropriate informational notice, as set forth in the attached appendix. This notice shall be posted in all of Respondent's facilities where the ADR Policy has been in effect, wherever notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In additional to the 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. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed a facility at which the ADR Policy has been in effect, the Respondent shall duplicate and mail at its own expense a copy of the notice to all affected employees and former employees employed by Respondent since December 1, 2011. The Respondent shall also disseminate, on the first day of notice posting as required herein, a copy of this notice on the same basis and to the same group or class of employees as the ADR Policy was made available to them.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[23]

ORDER

The Respondent, Acuity Specialty Products, Inc, d/b/a Zep, Inc., Los Gatos, California, (Respondent) its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating, maintaining and enforcing its Alternative Dispute Resolution Policy (ADR Policy) which requires employees to waive their right to maintain employment-related class and collective claims in all forums, whether arbitral or judicial;

(b) Promulgating, maintaining and enforcing its ADR Policy that restricts access to the Board and its processes;

(c) Conditioning eligibility to participate in an annual sales bonus program on employees' execution of the ADR Policy;

(d) Withholding bonuses from employees because: (1) they did not execute the ADR Policy; or (2) because they executed the ADR Policy but filed or participated in employment-related class or collective claims against Respondent; and

(e) 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 which is necessary to effectuate the purposes of the Act.

(a) Rescind or revise the ADR Policy that requires employees to waive their right to maintain employment related class and collective claims in all forums, whether arbitral or judicial;

(b) Rescind or revise the ADR Policy so as to ensure that employees are aware that claims arising under the National Labor Relations Act, as amended, are not required to be submitted to arbitration and they are free to seek the processes and procedures of the National Labor Relations Board (the Board), including its administrative procedures and that employees are not prohibited from filing unfair labor practice charges before the Board.

(c) Advise all employees to whom the ADR Policy was promulgated, by all means that employees are customarily ad-

[23] 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.

vised of matters pertaining to their terms and conditions of employment, including the manner in which they were initially informed of the ADR Policy, that the Policy has been rescinded or revised and that employees are not prohibited from filing charges and participating in matters before the Board;

(d) Restore eligibility for participation in Respondent's annual sales bonus program to employees who qualified for bonuses under the performance standards of that year's annual sales bonus plan at any time since the promulgation and implementation of the ADR Policy, for whom eligibility or participation or actual compensation was withheld either because they did not execute the ADR Policy or because, notwithstanding their execution of the ADR Policy they filed or participated in employment-related class or collective claims against Respondent;

(e) Make employees whole for any losses they may have suffered as a result of Respondent's unfair labor practices, with interest as set forth in the Remedy section of this Decision;

(f) Withdraw any pending motions for individual arbitration in which Respondent seeks enforcement of the ADR Policy's unlawful restriction on class or collective claims; or if such a motion has already been granted, move the appropriate court to vacate any orders for individual arbitration, if agreed to by the affected employee and if such a motion can timely be made; and reimburse employees for any litigation expenses including attorney's fees, directly related to opposing Respondent's motions to compel individual arbitration;

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of reimbursement or other sums due under the terms of this Order;

(h) Within 14 days after service by the Region, post at its locations nationwide where the ADR Policy has been promulgated, maintained or enforced copies of the attached notice marked "Appendix."[24] Copies of the notice, on forms provided by the Regional Director for Region 32 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 the physical posting of paper notices, the 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 addition, a copy of this notice will be made available to employees on the same basis and to the same group or class of employees as the ADR Policy was made available to them. In the event that, during the pendency of these proceedings, 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 December 1, 2011.

(i) 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 Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 21, 2014

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 promulgate, maintain, or enforce an alternative dispute resolution policy that interferes with your Section 7 rights to engage in collective legal activity by precluding your rights to participate in class and collective claims against us.

WE WILL NOT promulgate, maintain, or enforce an alternative dispute resolution policy that contains ambiguous language regarding filing unfair labor practice charges at the National Labor Relations Board suggesting that you are prohibited or restricted from filing unfair labor practice charges or otherwise interfering with your access to the Board and its processes.

WE WILL NOT condition your eligibility to participate in our annual sales bonus program on your execution of an alternative dispute resolution policy or withhold eligibility for bonuses from you if you signed such a policy but filed or participated in employment-related class and collective claims against us.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL rescind or revise our alternative dispute resolution policy to make it clear to you that any such policy does not waive your rights to participate in employment-related class and collective litigation, does not interfere with your access to the Board to file unfair labor practice charges and participate in proceedings before the Board, and does not condition your eligibility to participate in our annual sales bonus program on execution of the alternative dispute resolution policy.

WE WILL notify you of the rescinded or revised policy, including by providing you with a copy of the revised policy or

[24] I f 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."

specific notification that the policy has been rescinded.

WE WILL make whole those employees who were denied a bonus because they failed or refused to sign the alternative dispute resolution policy as well as those employees who signed the alternative dispute resolution policy but were denied a bonus because they still filed or participated in employment-related collective or class claims against us.

WE WILL withdraw any pending motions for individual arbitration in which we seek to enforce our alternative dispute resolution policy; and if such a motion has already been granted, WE WILL move the appropriate court to vacate any orders for individual arbitration, if it is possible and agreed to by the affected employee, and reimburse those employees for any litigation expenses, including attorney's fees, they incurred that were directly related to opposing our motions to compel individual arbitration.

ACUITY SPECIALTY PRODUCTS, INC. D/B/A ZEP, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/32–CA–075221 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.