20/20 Communications, Inc. *and* Charlie Smith. Case 12–CA–165320

July 15, 2020

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On September 6, 2016, Administrative Law Judge Michael A. Rosas issued the attached decision. The General Counsel filed exceptions with supporting argument, and the Respondent filed an answering brief. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] only to the extent consistent with this Decision and Order.[2]

Background

Since at least May 12, 2014, Respondent 20/20 Communications, Inc. has maintained a Mutual Arbitration Agreement (MAA), which employees are required to sign as a condition of employment. The relevant portions of the MAA read as follows:

> 1. Except as provided below, Employee and Employer . . . both agree that all disputes and claims between them, including those relating to Employee's employment with Employer, and any separation therefrom . . . shall be determined exclusively by final and binding arbitration . . . . Claims subject to arbitration under this Agreement include without limitation claims for discrimination, harassment, or retaliation; wages, overtime, benefits, or other compensation . . . .
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> 2. The only disputes and actions excluded from this Agreement are: (a) claims by Employee for workers' compensation or unemployment benefits; (b) claims by Employee for benefits under an Employer plan or program that provides its own process for dispute resolution; (c) claims by Employer or Employee for declaratory or injunctive relief relating to a confidentiality, non-solicitation, non-competition, or similar obligation (any such proceedings will be without prejudice to the parties' rights under this Agreement to obtain additional relief in arbitration with respect to such matters); (d) any other claim which by law cannot be subject to an arbitration agreement; and (e) actions to enforce this Agreement. . . . Additionally, by agreeing to submit the described claims to binding arbitration, Employee does not waive his or her right to file an administrative complaint with the appropriate administrative agency (*e.g.* the Equal Employment Opportunity Commission or state agencies of a similar nature), but does knowingly and voluntarily waive the right to file, or seek or obtain relief in, a civil action of any nature seeking recovery of money damages or injunctive relief against Employer, except as described above.
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> . . .
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> 6. . . . Employee will not be disciplined, discharged, or otherwise retaliated against for exercising his or her rights under Section 7 of the National Labor Relations Act. Employer may use this Agreement to defeat any attempt by Employee to file or join other employees in a class, collective or joint action lawsuit or arbitration, but Employer shall not retaliate against Employee for any such attempt.

The complaint alleges that the MAA violates Section 8(a)(1) of the National Labor Relations Act in two ways: by requiring employees to waive their right to pursue class or collective actions in all forums, and by requiring "employees to submit all employment related disputes and claims to arbitration, thus interfering with employee access to the National Labor Relations Board." Relying on *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014), enf. den. in relevant part 808 F.3d 1013 (5th Cir. 2015), the judge found that the Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing the MAA based on its class- and collective-action waiver.

The General Counsel excepted to the judge's failure to address the complaint allegation that the maintenance of the MAA violated the Act because employees would reasonably read the MAA to prohibit or restrict the filing of unfair labor practice charges with the Board. See *U-Haul Co. of California*, 347 NLRB 375, 377–378 (2006) (applying the "reasonably construe" prong of *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), to determine if arbitration policy violated the Act by interfering with employees' access to the Board or its processes), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007).

On December 3, 2018, the Board issued a Decision, Order, and Notice to Show Cause in this case. The Board

[1] We have amended the judge's conclusions of law consistent with our findings herein.

[2] We shall modify the judge's recommended Order to conform to our findings and in accordance with our recent decision in *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020). We shall substitute a new notice to conform to the Order as modified.

dismissed the allegation that the maintenance and enforcement of the MAA unlawfully restricted employees' rights to pursue class or collective actions in light of the Supreme Court's decision in *Epic Systems Corp. v. Lewis*, 584 U.S. ___, 138 S. Ct. 1612 (2018). In that case, the Court held that employer-employee agreements that contain class- and collective-action waivers and require individualized arbitration do not violate Section 8(a)(1) of the Act and should be enforced as written pursuant to the Federal Arbitration Act (FAA). Id. at 1632. The Board also gave notice to the parties to show cause why the remaining issue in the case—concerning the alleged restriction on employee access to the Board—should not be remanded to the judge for further proceedings in light of the Board's decision in *Boeing Co.*, 365 NLRB No. 154 (2017).[3] The Respondent and the General Counsel each filed a response to the Notice to Show Cause, and both parties opposed a remand. In doing so, the Respondent stated that "*Boeing* is a purely legal test that does not require additional findings of fact before the ALJ."

In view of the parties' responses, and since the remaining allegation may be decided based on the existing record, we find that a remand is unnecessary. For the reasons explained below, we find that the Respondent violated Section 8(a)(1) of the Act by maintaining the MAA.

Discussion

In *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10 (2019), the Board held that, notwithstanding the Supreme Court's decision in *Epic Systems*, above, the FAA "does not authorize the maintenance or enforcement of agreements that interfere with an employee's right to file charges with the Board." Id., slip op. at 5. This is so because the FAA's requirement that arbitration agreements be enforced as written "may be 'overridden by a contrary congressional command,'" which the Board found to be established in Section 10 of the Act. Id. (quoting *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987)); see *IIG Wireless, Inc.,* 369 NLRB No. 66, slip op. at 2 (2020).

Accordingly, the Board held in *Prime Healthcare* that an arbitration agreement that "explicitly prohibits the filing of claims with the Board or, more generally, with administrative agencies must be found unlawful." 368 NLRB No. 10, slip op. at 5. The Board further held that where an arbitration agreement does not contain such an express prohibition but rather is facially neutral, the Board must apply the standard set forth in *Boeing* and initially "determine whether that agreement, 'when reasonably interpreted, would potentially interfere with the exercise of NLRA rights.'" Id. (quoting *Boeing*, 365 NLRB No. 154, slip op. at 3). The Board found that, under *Boeing*, arbitration agreements violate the Act when, "taken as a whole, [they] make arbitration the *exclusive* forum for the resolution of all claims, including federal statutory claims under the National Labor Relations Act." Id., slip op. at 6. Further, the Board found that, "as a matter of law, there is not and cannot be any legitimate justification for provisions, in an arbitration agreement or otherwise, that restrict employees' access to the Board or its processes." Id.

Here, the MAA requires that "all disputes and claims" "be determined exclusively by final and binding arbitration," and none of the listed exclusions from the MAA's coverage includes claims arising under the National Labor Relations Act. Without more, the MAA thus makes arbitration the exclusive forum for the resolution of federal statutory claims under the Act.

In decisions subsequent to *Prime Healthcare*, however, we made clear that the analysis does not end there if the challenged arbitration agreement includes a savings clause, i.e., a clause providing that employees "retain the right to file charges with the Board, even if the agreement otherwise includes claims arising under the Act within its scope." *Everglades College, Inc. d/b/a Keiser University*, 368 NLRB No. 123, slip op. at 3 fn. 3 (2019). Thus, in *Anderson Enterprises, Inc. d/b/a Royal Motor Sales*, 369 NLRB No. 70 (2020), and *Briad Wenco, LLC d/b/a Wendy's Restaurant*, 368 NLRB No. 72 (2019), the Board found that the agreements at issue, which also required arbitration of claims arising under the Act, were

[3] In *Boeing*, the Board overruled the "reasonably construe" prong of *Lutheran Heritage*, above, and announced a new standard, applied retroactively, for evaluating the lawfulness of a facially neutral policy. 365 NLRB No. 154, slip op. at 2–3, 17. Under *Boeing*, the Board first determines whether a challenged rule or policy, reasonably interpreted, would potentially interfere with the exercise of rights under Sec. 7 of the Act. If not, the rule or policy is lawful and placed in Category 1(a). If so, the Board determines whether an employer violates Sec. 8(a)(1) of the Act by maintaining the rule or policy by balancing "the nature and extent of the potential impact on NLRA rights" against "legitimate justifications associated with the rule," viewing the rule or policy from the employees' perspective. Id., slip op. at 3. As a result of this balancing, the Board places a challenged rule into one of three categories. Category 1(b) consists of rules that are lawful to maintain because, although the rule, reasonably interpreted, potentially interferes with the exercise of Sec. 7 rights, the interference is outweighed by legitimate employer interests. Category 3, in contrast, consists of rules that are unlawful to maintain because their potential to interfere with the exercise of Sec. 7 rights outweighs the legitimate interests they serve. Categories 1(a), 1(b) and 3 designate *types* of rules; once a rule is placed in one of these categories, rules of the same type are categorized accordingly without further case-by-case balancing (for Category 1(b) and 3 rules; balancing is never required for rules in Category 1(a)). Some rules, however, resist designation as either always lawful or always unlawful and instead require case-by-case analysis under *Boeing*'s balancing framework. These rules are placed in Category 2. See id., slip op. at 3–4; *LA Specialty Produce Co.*, 368 NLRB No. 93, slip op. at 2–3 (2019).

nevertheless lawful because they contained savings clauses that explicitly informed employees that they retained the right to file charges with the Board and access its processes.[4] The Board has also indicated that a savings clause may be legally sufficient, even if it does not expressly refer to "the National Labor Relations Board," "the NLRB" or "the Board," if it informs employees of their right to file claims or charges with administrative agencies generally.[5] The Board examines savings-clause language in the context of the arbitration agreement as a whole to ensure that the right of employees to access the Board and its processes is adequately safeguarded. See *Anderson Enterprises*, above, slip op. at 3 (finding arbitration agreement lawful based on both the wording of the savings clause and its sufficiently prominent placement within the agreement); *Briad Wenco*, above, slip op. at 2 (same).

Here, the MAA includes a savings clause providing that an individual who signs the MAA "does not waive his or her right to file an administrative complaint with the appropriate administrative agency (e.g. the Equal Employment Opportunity Commission or state agencies of a similar nature)." Although the only federal administrative agency referenced is the Equal Employment Opportunity Commission (EEOC), the clause includes "e.g.," meaning "for example": permitted administrative complaints are those filed with, *for example*, the EEOC.

We need not decide, however, whether this language, without more, would be legally sufficient to preserve employees' right to file charges with the Board. This is because the savings clause goes on to state that employees "waive the right to file, or seek *or obtain relief in*, a civil action of any nature seeking recovery of money damages or injunctive relief against Employer, except as described above" (emphasis added).[6] Interpreted from the perspective of a reasonable employee, this provision prohibits recovering backpay or other monetary remedies ordered by the Board. Such prohibitions violate the Act. *Kelly Services, Inc.*, 368 NLRB No. 130, slip op. at 3–4 (2019). As the Board explained in *Kelly Services*, a prohibition on recovering backpay or other monetary remedies ordered by the Board interferes with the Section 7 right of employees to utilize the Board's processes, which includes the right to invoke the exercise of the Board's statutory powers under Section 10 of the Act, including its power to determine appropriate relief for violations found. Id., slip op. at 3. Prohibitions on the recovery of a monetary remedy also interfere with employees' access to the Board and its processes by undermining the incentive to file a charge in the first place. Id., slip op. at 3–4.[7]

Those who carry lawbooks for a living may quibble over whether a Board charge may be characterized as a "civil action of any nature seeking recovery of money damages or injunctive relief," but we do not expect the ordinary employee to do so. See *Ingram Book Co.*, 315 NLRB 515, 516 fn. 2 (1994) ("Rank-and-file employees do not generally carry lawbooks to work or apply legal analysis to company rules as do lawyers, and cannot be expected to have the expertise to examine company rules from a legal standpoint."). Moreover, the filing of a Board charge is the first step in a process that eventuates in a complaint seeking injunctive relief (an order to cease and desist from certain unfair labor practices) and, where appropriate, money damages (backpay and related expenses). See Section 10(b) and (c) of the Act; *King Soopers, Inc.*, 364 NLRB No. 93 (2016). Thus, Board-ordered remedies are among those waived by the savings clause. Given this and considering the breadth of the waiver—which applies to civil actions "*of any nature*" (emphasis added)—we find that reasonable employees would believe they are barred from obtaining monetary relief from the Board. On this basis, we find that the MAA impermissibly interferes with employees' access to the Board and its processes.[8]

[4] The arbitration agreement in *Anderson Enterprises* contained a savings clause providing that "[c]laims may be brought before an administrative agency . . . . Such administrative claims include without limitation claims or charges brought before . . . the National Labor Relations Board." 369 NLRB No. 70, slip op. at 1. The arbitration agreement in *Briad Wenco* contained a savings clause providing that "[n]othing in this Agreement shall be construed to prohibit any current or former employee from filing any charge or complaint or participating in any investigation or proceeding conducted by an administrative agency, including . . . the National Labor Relations Board." 368 NLRB No. 72, slip op. at 1.

[5] See *Beena Beauty Holding, Inc. d/b/a Planet Beauty*, 368 NLRB No. 91, slip op. at 2 (2019) (arbitration agreement at issue "contained no exception for filing charges with the Board or other administrative agencies"); *E. A. Renfroe & Co.*, 368 NLRB No. 147, slip op. at 3 (2019) (agreement at issue "[did] not contain a savings clause preserving employees' right to file charges with the Board or, more generally, with administrative agencies"); *Haynes Building Services, LLC*, 369 NLRB No. 2, slip op. at 3 (2019) (agreement at issue "did not contain a savings clause preserving employees' right to file charges with the Board or with administrative agencies generally").

[6] "Except as described above" refers to the MAA's exclusion clause. That clause does not exclude claims arising under the NLRA from the scope of the MAA, so it does not exclude Board charges from the above-quoted waiver.

[7] While the parties did not argue that the MAA violated the Act on this basis, our finding that it did is based on the language of the MAA itself, which is part of the stipulated record.

[8] Par. six of the MAA states: "Employee will not be disciplined, discharged, or otherwise retaliated against for exercising his or her rights under Sec[.]7 of the National Labor Relations Act. Employer may use this Agreement to defeat any attempt by Employee to file or join other employees in a class, collective or joint action lawsuit or arbitration, but Employer shall not retaliate against Employee for any such attempt." This clause does not suggest that employees are permitted to file charges with the Board. Rather, its purpose is to assure employees that if they engage in the Sec. 7–protected act of concertedly filing a class-,

For these reasons, the MAA, when reasonably interpreted, makes arbitration the exclusive forum for resolution of claims arising under the Act. Therefore, the MAA falls within *Boeing* Category 3, and we find that the Respondents violated Section 8(a)(1) of the Act by maintaining it.

AMENDED CONCLUSIONS OF LAW

1. The Respondent violated Section 8(a)(1) of the Act by maintaining a mandatory arbitration agreement that employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

2. The above violation constitutes an unfair labor practice affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

The National Labor Relations Board orders that the Respondent, 20/20 Communications, Inc., Fort Worth, Texas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration policy that employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

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

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

(a) Rescind the Mutual Arbitration Agreement in all its forms or revise it in all its forms to make clear to employees that the Mutual Arbitration Agreement does not bar or restrict employees' right to file charges with the National Labor Relations Board.

(b) Notify all current and former employees who were required to sign or otherwise became bound to the Mutual Arbitration Agreement in any form that the Mutual Arbitration Agreement has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) Post at its Fort Worth, Texas facility copies of the attached notice marked "Appendix."[9] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 12, 2014.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 12 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 15, 2020

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John F. Ring, Chairman

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Marvin E. Kaplan, Member

_____
William J. Emanuel Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

collective-, or joint-action lawsuit or arbitration, the Respondent will use the MAA to defeat that lawsuit in the judicial or arbitral forum, but those employees will *not* be disciplined or discharged or suffer any other adverse employment action in retaliation for that protected concerted act. Thus, par. six does not mitigate the MAA's unlawful interference with Board charge filing.

[9] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facility involved in these proceedings is closed due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work, and the notices may not be posted until a substantial complement of employees have returned to work. Any delay in the physical posting of paper notices also applies to the electronic distribution of the notice if the Respondent customarily communicates with its employees by electronic means. If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration policy that bars or restricts your right to file charges with the National Labor Relations Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the Mutual Arbitration Agreement in all its forms or revise it in all its forms to make clear that the Mutual Arbitration Agreement does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign or otherwise became bound to the Mutual Arbitration Agreement in any form that the Mutual Arbitration Agreement has been rescinded or revised and, if revised, WE WILL provide them a copy of the revised agreement.

20/20 COMMUNICATIONS, INC.

The Board's decision can be found at www.nlrb.gov/case/12-CA-165320 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.

John W. Plympton, Esq., for the General Counsel.
Kevin Zwetsch and *Ina Crawford, Esqs. (Ogletree, Deakins, Nash, Smoak & Stewart, P.C.),* of Tampa, Florida, for the Respondent.
Andrew Frisch, Esq. (Morgan & Morgan), of Plantation, Florida, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This matter is before me on a stipulated record. The Charging Party, Charlie Smith, filed unfair labor practice charges and amended charges against the Respondent, 20/20 Communications, Inc., on December 12, 2015, and February 17, 2016, respectively. The General Counsel issued the complaint on April 29, 2016. The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act)[1] by promulgating, maintaining and enforcing an agreement requiring its employees to waive their right to pursue class and collective employment related actions against it and submit such disputes to arbitration. The Respondent denies that the arbitration agreement at issue violates the Act and contends that the Act does not grant employees a right to access class procedures created by other laws, including the Federal Arbitration Act (FAA) and Fair Labor Standards Act (FLSA).

On July 28, 2016, the parties submitted a Joint Motion and Stipulated Record, requesting that the foregoing allegations be decided without a hearing based on a stipulated record. I granted the parties' motion on July 29, 2016, and on August 10, 2016, the parties submitted their respective post-hearing briefs in this case.

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

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, with an office and place of business located in Fort Worth, Texas, employs employees, including Field Sales Managers, located throughout the United States and has been engaged in the business of providing sales support, marketing support and brand advocacy to clients throughout the United States.[2] In conducting its business operations, the Respondent receives annually at its Fort Worth facility goods and materials valued in excess of $50,000 directly from points outside the State of Texas. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] 29 U.S.C. §§ 158(a)(1), et seq.

[2] At the relevant times herein, Pat Thrianon and Kimberly Warren were employed as supervisors within the meaning of Sec. 2(11) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Mutual Arbitration Agreement

Since on or before May 12, 2014, the Respondent has maintained in effect and enforced a Mutual Arbitration Agreement (MAA) with respect to all of its employees in the United States and its territories. The MAA is part of a series of electronic documents that the Charging Party and other newly hired employees must review as part of the on-boarding process. Those documents are viewed through an online portal. As part of the hiring process, newly hired employees, including the Charging Party, have been required to acknowledge receipt of the MAA before advancing to the next step of the on-line portion of the on-boarding process. The MAA includes the following pertinent provisions:

> 1. Except as provided below, Employee and Employer, on behalf of their affiliates, successors, heirs, and assigns, both agree that all disputes and claims between them, including those relating to Employee's employment with Employer, and any separation therefrom, and including claims by Employee against Employer's subsidiaries, affiliates and directors, employees, or agents, shall be determined exclusively by final and binding arbitration before a single, neutral arbitrator as described herein, and that judgment upon the arbitrator's award may be entered in any court of competent jurisdiction. Claims subject to arbitration under this Agreement include without limitation claims for discrimination, harassment, or retaliation; wages, overtime, benefits, or other compensation; breach of any express or implied contract; violation of public policy; personal injury; and tort claims including defamation, fraud, and emotional distress. Except as expressly provided herein, Employer and Employee voluntarily waive all rights to trial in court before a judge or jury on all claims between them.
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> 2. The only disputes and actions excluded from this Agreement are: (a) claims by Employee for workers' compensation of unemployment benefits; (b) claims by Employee for benefits under an Employer plan or program that provides its own process for dispute resolution; (c) claims by Employer or Employee for declaratory or injunctive relief relating to a confidentiality, non-solicitation, non-competition, or similar obligation (any such proceedings will be without prejudice to the parties' rights under this Agreement to obtain additional relief in arbitration with respect to such matters); (d) any other claim which by law cannot be subject to an arbitration agreement; and (e) actions to enforce this Agreement, such actions to be governed by the Federal Arbitration Act and the law of the state of Texas, both of which the parties agree shall to and govern this Agreement and its enforceability. To the extent there is an conflict between federal and Texas law, Texas law shall control. Additionally, by agreeing to submit the described claims to binding arbitration, Employee does not waive his or her right to file an administrative complaint with the appropriate administrative agency (e.g. the Equal Employment Opportunity Commission or state agencies of a similar nature), but knowingly and voluntarily waive the right to file, or seek or obtain relief in, a civil action of any nature seeking recovery and monetary damages or injunctive relief against Employer, except as described above.
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> 13. By signing this Agreement, Employee acknowledges that he or she is knowingly and voluntarily waiving the right to file a lawsuit or other civil proceeding relating to Employee's employment with Employer as well as the right to resolve disputes in a proceeding before a judge or jury, except as described above. Employee further acknowledges and agrees that this Agreement, while mutually binding on the parties, does not constitute a guarantee of continued employment for any fixed period or under any particular terms except those contained herein, and does not alter in any way the at-will nature of Employee's employment relationship

The MAA also includes a class and collective action waiver requiring employees to resolve all employment related disputes by individual arbitration:

> 6. Arbitration allows Employer and Employee to work directly with each other to resolve any problems as quickly and efficiently as possible. In this spirit, the parties agree that this Agreement prohibits the arbitrator from consolidating the claims of others into one proceeding, to the maximum extent permitted by law. This means that an arbitrator will hear only individual claims and does not have the authority to fashion a proceeding as a class or collective action or to award relief to a group of employees in one proceeding, to the maximum extent permitted by law. Employee will not be disciplined, discharged, or otherwise retaliated against for exercising his or her rights under Section 7 of the National Labor Relations Act. Employer may use this Agreement to defeat any attempt by Employee to file or join other employees in a class, collective or joint action lawsuit or arbitration, but Employer shall not retaliate against Employee for any such attempt.

Since May 12, 2014, the Charging Party and other similarly situated employees of the Respondent, including David Vine, could elect to opt out of the MAA within 15 days, through a procedure specified in the MAA, without being subject to adverse employment action:

> 10. Employee may opt-out of this Agreement by delivering, within 15 days of the date this Agreement is provided to Employee, a completed and signed Opt-Out Form to Employer's Director of Human Resources. An Opt-Out Form is available from the Human Resources office. If Employee does not deliver the form within 15 days, and if Employee accepts or continues employment with Employer after that date, Employee will be deemed to have accepted the terms of this Agreement.

The Charging Party electronically signed the MAA during the onboarding hiring process on May 12, 2014. Vine also followed the same procedure upon commencing employment with the Respondent.[3] Neither choose to opt-out of the MAA.

[3] There is no record of Vine's onboarding information, but his assertion in joining the Florida case that he "likewise was subjected to the illegal pay practices at issue" is not disputed. (Jt. Exh. 6.)

B. Enforcement of The Agreement

The Charging Party was employed by the Respondent as a Field Sales Manager from March 7, 2014, until March 12, 2015. On October 30, 2015, the Charging Party filed a complaint against the Respondent in United States District Court for the Middle District of Florida in Case 2:15-CV-687-FtM-99CM (the Florida case). On November 9, 2015, Vine, another former employee of the Respondent, opted into that proceeding. On November 19, 2015, the Respondent filed Defendant's Motion to Dismiss or in the Alternative, to Stay and Compel Arbitration in Charlie Smith, on behalf of himself and those similarly situated v. 20/20 Communications, Inc., Case 2:15-cv-00687, filed in the United States District Court for the Middle District of Florida (the Florida enforcement case).

On December 1, 2015, counsel for the Charging Party filed Notice of Dismissal Without Prejudice in the Florida case. On December 2, 2015, the Florida case was dismissed without prejudice as to the Charging Party, but otherwise remains pending as to Vine.[4]

Between April 1, 2016, and May 13, 2016, Andrew Frisch of the Morgan and Morgan law firm filed separate arbitration cases with the American Arbitration Association, alleging violations of the FLSA, on behalf of 18 individuals, including the Charging Party and Vine.

The Respondent's Florida enforcement case, filed in response to Florida case brought by the Charging Party and joined by Vine, is not an isolated event. On June 9, 2016, employee James Richmond filed a complaint alleging violations of the FLSA by the Respondent in the United States District Court for the Northern District of Illinois in Case 1:16-CV-06051 (the Illinois case). On June 17, 2016, the Respondent filed a petition to compel arbitration in the United States District Court for the Northern District of Texas in Case 4:16-CV-488 (the Texas case) seeking to compel individual arbitration of Richmond's claims in the Illinois case. On August 18, 2016, the Respondent filed an amended complaint and petition in the Texas case. On June 24, 2016, Richmond filed an amended complaint against the Respondent in the Illinois case.[5]

LEGAL ANALYSIS

The complaint alleges that the class and collective action waiver contained in the MAA violates Section 8(a)(1) of the Act even though the agreement includes an opt-out procedure for employees who do not want to sign the agreement. It is further alleged that enforcement of the class action waiver in the MAA constitutes an additional violation. In support of the allegations, the General Counsel alleges that the administrative law judge is bound to follow extant agency precedent in *D. R. Horton, Inc.,* 357 NLRB 2277 (2012). In that case, the Board held that Section 7 creates a substantive right for employees to pursue collective action and, thus, a required waiver of such right violates Section 8(a)(1) of the act.

The Respondent contends that the MAA does not violate the Act because: (1) the Board decision in *D. R. Horton* was overruled by several federal courts; (2) *D. R. Horton* was wrongly decided because the Act conflicts with several substantive statutes; (3) an employee may opt-out and is not required to sign the MAA as a condition of employment; and (4) Section 7 does not create a substantive right to pursue collective legal action in forums other than arbitration.

I. BOARD PRECEDENT IN D.R. HORTON, INC. GOVERNS THE MAA

The Respondent maintains that the General Counsel and Charging Party cannot rely on Board decisions in *D. R. Horton* and *Murphy Oil* that were reversed by the federal courts upholding class action waivers. *D.R. Horton, Inc. v. NLRB,* 737 F.3d 344, 359–360 (5th Cir. 2013); *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013, 1016 (5th Cir. 2015). In *Murphy Oil*, the Board affirmed the holding in *D. R. Horton* and addressed the Fifth Circuit's rejection of the Board's decision by reiterating its position that the Board is not required to follow their decisions in other cases. *Murphy Oil*, 361 NLRB 774, 775 fn. 17, citing *Enloe Medical Center v. NLRB*, 433 F.3d 834, 838 (D.C. Cir. 2005).

Only the Board or the Supreme Court can reverse extant Board precedent in *D.R. Horton* and *Murphy Oil. Waco, Inc*., 273 NLRB 746, 749 fn. 14 (1984); *Iowa Beef Packers, Inc*., 144 NLRB 615, 616–617 (1963), enf. granted in part, 331 F.2d 176 (1964). As such, unless and until the Supreme Court holds otherwise, an administrative law judge is bound to follow the Board's controlling precedent finding class action waivers unlawful. See, e.g., *Waco, Inc*., 273 NLRB 746, 749 fn. 14 (1984); *Pathmark Stores*, 342 NLRB 378 fn.1 (2004) (finding that the administrative law judge has duty to apply established Board precedent which the Supreme Court has not reversed); *Chesapeake Energy Corp.*, 362 NLRB 681 (2015) (rejecting the administrative law judge's deference of the Act to the FAA and finding that arbitration policies violated Section 8(a)(1)).

Moreover, the federal courts diverge in their opinions regarding the issue. The Seventh and Ninth Circuits recently agreed with the Board's decision in *D.R. Horton* and deferred to the Board's interpretation of Section 7 as prohibiting employers from restraining employees in the pursuit of class action remedies. *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016); Morris v. Ernst & Young, __ F.3d __, Case No. 13-16599 (9th Cir. 8/22/16). Deference to the Board's interpretation of the Act is neither a novel nor new concept, even at the Supreme Court. See, e.g., *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536 (1992).

The Supreme Court has not overturned the Board precedent in *D. R. Horton* and *Murphy Oil* holding that class action waivers in arbitration agreements restricting the right of employees to engage in concerted activity are unlawful. Therefore, *D. R. Horton*

[4] The court order in the Florida case clearly had a typographical error in further stating that the complaint, while dismissed without prejudice as to Smith, remained pending as to Smith. The order obviously was referring to continued pendency as to Vine, who was also added as an opt-in plaintiff at that time. (Jt. Exh. 9.)

[5] On August 25, 2016, the General Counsel moved to reopen the record and amend the complaint to add allegations regarding the Respondent's enforcement efforts in the Texas case in response to the Illinois case. I denied the motion on August 29, 2016, but stated my intent to take administrative notice of the pleadings in the Texas case, both containing facts which the Respondent concedes, pursuant to Fed. R. of Evid. 201.

remains controlling Board law. *Manor West, Inc*., 311 NLRB 655, 667 fn. 43 (1993).

II. D.R. HORTON, INC. WAS NOT WRONGLY DECIDED

The Respondent further contends that the Board's decision in *D. R. Horton* was wrongly decided because it fails to accommodate Congress's policies advanced in other laws. See e.g., *Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 165, 173 (1989) (FLSA); *Ortiz v. Fireboard Corp.*, 527 U.S. 815, 845 (1999) (Rules Enabling Act); *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1746 (2011) (FAA); and *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 669 (2012) (same).

The General Counsel relies on the Board's holding in D. R. Horton that "the right to engage in collective action—including collective legal action—is the core substantive right protected by the [Act] and is the foundation on which the Act and Federal labor policy rest," citing *Murphy Oil*, supra at 780, quoting *D.R. Horton*, supra at 2286. The General also notes the Board's consistent distinction of cases to the contrary. For example, Concepcion was decided in the context of a commercial arbitration agreement and the preemption of a state consumer protection law, not employees' substantive, federal collective action rights under Section 7 of the Act. 357 NLRB at 2288. The *D. R. Horton* Board explained that its holding did not conflict with the FAA because the intent of that statute was to leave substantive rights undisturbed and, thus, the right to join or pursue collective relief was a substantive Section 7 right. In *Murphy Oil*, the Board rejected the Fifth Circuit's reliance on Concepcion's holding that the FAA preempted a California State law finding class-action waivers in consumer contracts unconscionable. *Murphy Oil*, supra, at 782.

In any event, regardless as to whether the Board precedent was wrongly decided, I am bound to follow applicable Board law. *Chesapeake Energy Corp*. supra.

III. RESPONDENT'S VOLUNTARY MAA RESTRICTS SECTION 7 RIGHTS AND VIOLATES THE ACT.

The Respondent further alleges that the Board's decision in *D.R. Horton* is not applicable to the MAA because *D. R. Horton* only applies to mandatory class waivers, "imposed upon" employees and "required" by employers "as a condition of employment." 357 NLRB 2277. The Respondent argues that the MAA is voluntary and agreeing to its terms is not required as a condition of employment.

It is undisputed that the Charging Party signed the MAA and did not voluntarily opt out within 15 days thereafter. Nevertheless, recent Board decisions have further construed D. R. Horton to extend to arbitration agreements that are voluntary. See *On Assignment Staffing Services*, 362 NLRB 1672, 1681 (2015). As such, whether the policy was mandatory or voluntary is not dispositive of whether such policy violates the Act. *On Assignment Staffing Services*, supra, at 1677 (finding the arbitration policy violated the Act even if employees could opt out of arbitration.); *Pama Management*, 363 NLRB 384, 385 (2015) (rejecting employer's assertion that the opt-out provision of its arbitration agreement made the agreement lawful); *U.S. Xpress Enterprises, Inc.,* 363 NLRB 457, 457–458 (2015) (same).

In *On Assignment Staffing Services*, the Board held that voluntary agreements are "contrary to the National Labor Relations Act and to fundamental principles of federal labor policy." Supra, at 1678 The Board found that the opt-out procedure interferes with Section 7 rights by requiring employees to take affirmative steps and burdens the exercise of Section 7 rights. A policy requiring employees to obtain their employer's permission to engage in protected concerted activity is unlawful, even if the rule does not absolutely prohibit such activity and regardless of whether the rule is actually enforced. Chromalloy Gas Turbine Corp., 331 NLRB 858, 858–859 (2000), enfd. 262 F.3d 184 (2d Cir. 2001); *Brunswick Corp*., 282 NLRB 794, 794–795 (1987). The Board also found that the respondents opt-out procedure interfered with Section 7 rights because it required employees who wished to retain their right to pursue class or collective claims to "make 'an observable choice that demonstrated their support for or rejection of'" concerted activity. *On Assignment Staffing Services,* supra, at 1677, citing *Allegheny Ludlum Corp.,* 333 NLRB 734, 740 (2001), enfd. 301 F.3d 167 (3d Cir. 2002).

Applying Board precedent to this case, the Respondent's MAA policy violates the Act. Although the MAA has an opt-out provision, employees have to take affirmative steps to opt out in order to exercise their Section 7 rights. Employees who want to opt out are required to sign and return the form it within 15 days of receipt of the policy. The Board has essentially deemed the additional action that must be taken to sidestep the MAA as an ineffective offset to the coercive nature of the MAA. The rationale there is that it is reasonable to expect that employees would not be inclined to affirmatively opt out of the MAA over concern of standing out as an employee who rejected the employer's request that they waive their Section 7 rights.

IV. THE MAA RESTRAINS EMPLOYEES FROM FILING UNFAIR LABOR PRACTICES WITH THE BOARD.

The Respondent also asserts that the MAA is lawful because employees can exercise their right to "refrain" from concerted activity. Relying on *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), the Respondent notes the absence of evidence that the MAA was adopted in response to union activity or other Section 7 activity.

It is true that federal courts and the Board have recognized the employee's right to waive statutorily protected rights. *BE & K Constr. Co. v. NLRB*, 23 F.3d 1459, 1462 (8th Cir. 1994) (holding that the right to refrain from joining or assisting a union is an equally protected right with that of joining or forming a union). However, the Board already rejected the argument that an opt-out provision affords employees the unfettered freedom to enter into a class waiver, or refrain from doing so. *MasTec Services Co.,* 363 NLRB No. 81 (2015) (not reported in Board volume), enf. denied No. 16-60011 (per curiam) (5th Cir. July 11, 2016). Accordingly, even the voluntary nature of a class action waiver is deemed to restrict the Section 7 rights of employees.

V. RESPONDENT'S MOTIONS TO COMPEL ARBITRATION VIOLATE THE ACT.

The Respondent successfully enforced the MAA as against the Charging Party and continues a similar effort against Vine in the Florida case. As a result, the Charging Party was preventing

from pursuing his FLSA claims in Federal district court and relegated to arbitration. Under the circumstances, the Respondent's enforcement of the MAA constituted additional violations of Section 8(a)(1) of the Act. See *Murphy Oil*, supra at 800. Evidence of the Respondent's enforcement of the MAA in the Illinois and Texas cases, while not a part of the complaint, confirms that the Respondent's coercive actions in the Florida case are not isolated events.

Here, the Respondent insists that the right to engage in class or collective action is not a protected, concerted activity under Section 7 of the Act. The Respondent refers to the voluntary nature of the MAA in support of their contention that the Respondent did not interfere with, restrain or coerce the Charging Party or Vine from opting out of the right to participate in class or collective actions. Board precedent, however, holds otherwise and the Respondent's motions to compel arbitration in the Florida case violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent 20/20 Communications, Inc. is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Since May 12, 2014, the Respondent has violated Section 8(a)(1) of the Act by maintaining and enforcing a Mutual Arbitration Agreement requiring employees to resolve employment-related disputes exclusively through individual arbitration and forego any right they have to resolve such disputes through class or collective action.

3. The aforementioned unfair labor practices affected commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that Respondent has violated the Act by maintaining and enforcing the Mutual Arbitration Agreement, I shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, 20/20 Communications, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and enforcing its Mutual Arbitration Agreement.

(b) Seeking court action to enforce the Mutual Arbitration Agreement that, either expressly or impliedly, or by Respondent's actions or practice, waives the right to maintain employment-related class or collective actions against the Respondent in all forums, whether arbitral or judicial, including the processes of the National Labor Relations Board.

(c) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their 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 or revise the Mutual Arbitration Agreement to make it clear to employees that the agreement does not constitute a waiver of their right to maintain employment related class or collective actions in all forums, or their right to access the National Labor Relations Board processes.

(b) Notify all employees at locations where the policy is in effect, that it will no longer maintain or enforce the provisions contained in the Mutual Arbitration Agreement that waives employees' right to bring or participate in class or collective actions.

(c) Notify arbitral or judicial panels, if any, where the Respondent has attempted to enjoin or otherwise prohibit employees from bringing or participating in class or collective actions, that it is withdrawing those objections and that it no longer seeking to compel arbitration pursuant to the Mutual Arbitration Agreement.

(d) Reimburse the Charging Party, Vine and/or other employees who joined Case 2:15-CV-687-FtM-99CM in the United States District Court for the Middle District of Florida (for any litigation expenses: (i) directly related to opposing Respondent's Motion to Dismiss or in the Alternative, to Stay and Compel Arbitration in Charlie Smith, on behalf of himself and those similarly situated v. 20/20 Communications, Inc., Case 2:15-cv-00687, filed in the United States District Court for the Middle District of Florida; and/or (ii) resulting from any other legal action taken in response to Respondent's efforts to enforce the arbitration agreement; and/or (ii) resulting from any other legal action taken in response to Respondent's efforts to enforce the arbitration agreement.

(e) Within 14 days after service by the Region, post at all facilities where the Mutual Arbitration Agreement is maintained or enforced, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees and former employees by such means. Respondent also shall duplicate and mail, at its expense, a copy of the notice to all former employees who were required to sign the mandatory and binding arbitration policy during their employment with the Respondent. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall

[6] 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.

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

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 May 12, 2014.

(f) 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. September 6, 2016

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce the Mutual Arbitration Agreement that requires our employees, as a condition of employment, to waive the right to maintain employment-related class or collective actions in all forums, whether judicial or arbitral.

WE WILL NOT maintain or enforce the Mutual Arbitration Agreement that interferes with your right to access the processes of, or to file charges with, the National Labor Relations Board.

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

WE WILL rescind or revise the Mutual Arbitration Agreement in all of its forms or revise it to make clear that it does not constitute a waiver of your right to maintain employment-related class or collective actions against the company in all forums, and that it does not constitute a waiver of your right to access the processes of, or file charges with, the National Labor Relations Board.

WE WILL notify any arbitral or judicial panel where we have attempted to prevent or enjoin you from commencing, or participating in, joint or class actions that we are withdrawing our objections to these actions.

WE WILL notify current and former employees who were required to sign the Mutual Arbitration Agreement of the rescinded or revised agreement, including providing them with a copy of the revised agreement or specific notification that the agreement has been rescinded.

WE WILL Reimburse Charlie Smith, David Vine and/or other employees who joined Case 2:15-CV-687-FtM-99CM in the United States District Court for the Middle District of Florida (for any litigation expenses: (i) directly related to opposing Respondent's motion to compel arbitration in Charlie Smith, on behalf of himself and those similarly situated v. 20/20 Communications, Inc., Case 2:15-cv-00687, filed in the United States District Court for the Middle District of Florida; and/or (ii) resulting from any other legal action taken in response to Respondent's efforts to enforce the arbitration agreement.

20/20 COMMUNICATIONS, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/12-CA-165320 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.