UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

VALLEY RADIOLOGY, P.A.

Case 10-CA-324512

and

LEENA MAMMEN, AN INDIVIDUAL

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO THE RESPONDENT'S EXCEPTIONS

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I. INTRODUCTION

Shortly after Charging Party Dr. Leena Mammen voluntarily separated from employment, Respondent Valley Radiology, P.A. proffered a separation and release agreement (the Severance Agreement) containing, among other provisions, non-disparagement and confidentiality clauses that are somewhat similar to the clauses the Board found unlawfully overbroad in *McLaren Macomb*, 372 NLRB No. 58 (2023). Dr. Mammen did not sign the Severance Agreement, nor has she alleged a constructive discharge, and the case does not involve any other alleged unfair labor practices. In a brief decision applying *McLaren Macomb*, Administrative Law Judge Giannasi concluded that the Employer violated Section 8(a)(1) by unlawfully proffering the Severance Agreement to Dr. Mammen.

The Respondent conceded that the Severance Agreement is unlawful under *McLaren Macomb*. It argues that the Board should overturn *McLaren Macomb* and return to its prior precedent under *Baylor University Medical Center*, 369 NLRB No. 43 (2020), and *IGT d/b/a International Game Technology*, 370 NLRB No. 50 (2020).

The General Counsel agrees with the Respondent's position that the Board should overturn *McLaren Macomb* and proposes that the Board analyze severance agreements in a manner that is more consistent with the Board's longstanding policy favoring private resolution of workplace disputes. Specifically, the Board should find severance agreement provisions that waive Section 7 rights without being narrowly tailored to be unlawful, but only if they contain an *explicit* waiver. In the alternative, the Board should overrule *McLaren Macomb* and reaffirm *Baylor* and *IGT* as the standard for assessing whether the proffer of severance agreement provisions violates Section 8(a)(1).

Applying the General Counsel's proposed standard in this case, the Board should conclude that the Respondent violated Section 8(a)(1) by proffering the Severance Agreement because it conditioned loan forgiveness on agreeing to the non-disparagement provision that contains an unlawful waiver of the right to assist others before the Board. However, the Board should conclude that the confidentiality of agreement provision was lawful.

II. STATEMENT OF THE CASE

A. Factual Background

On August 31, 2022, Dr. Mammen signed an employment agreement to work as a radiologist for the Respondent in exchange for compensation including a signing bonus of $50,000 (the Signing Bonus). The employment agreement provided that the Signing Bonus would be treated like a loan for the term of one year, subject to proportional forgiveness for every month she worked with the Respondent. If Dr. Mammen ended her employment within one year, the contract provides that she would be required to repay any remaining unforgiven portion of the Signing Bonus within ten days of her separation. (ALJD 3:2-19).[1]

On July 16, 2023, Dr. Mammen voluntarily resigned her position. At that time, a significant portion of the Signing Bonus had not been forgiven and she would have otherwise been required to remit it to the Respondent within ten days. (ALJD 3:17-22).

On July 25, 2023, the Respondent sent Dr. Mammen a letter extending the Signing Bonus repayment date ten days and offering her a Severance Agreement. (ALJD 3:22-26). The Severance Agreement provides that Dr. Mammen may keep the balance of the Signing Bonus

[1] References to the decision of the ALJ are noted as (ALJD _:_), which reflects the decision page and line or footnote number.

owed in exchange for agreeing to certain terms, including a release of claims, and the non-disparagement and confidentiality provisions set forth below:

> **Non-disparagement**. Employee will not say, write, or do anything (to include causing others to say, write, or do anything) to disparage or defame Company or, to the extent any of the same is known by Employee to be an Affiliate of Company, any Affiliate of Company. The term "Affiliate" means any or all of Company's members, managers, owners, officers, contractors, directors, employees, affiliated entities, investment funds, limited partners, clients, or vendors. Further, Employee will not knowingly say, write, or do anything (to include causing others to say, write, or do anything) that is likely to injure or harm Company or its relationships with current or prospective employees, limited partners, investment funds, current or targeted portfolio companies, clients, vendors, or the public; except that Employee may respond truthfully to enforce this Agreement or when called upon by subpoena or court order to testify or provide information in a legal or administrative proceeding.
>
> **Confidentiality of Agreement**. Employee agrees that the terms of this Agreement are strictly confidential. Employee agrees that Employee will not disclose the fact or contents of this Agreement, including the amount of monetary payment, to anyone other than Employee's attorneys, financial advisers, government taxing authority, or Employee's spouse or partner, or as part of Employee's application for unemployment benefits, pursuant to an appropriate order from a court or other entity with competent jurisdiction, or as otherwise allowed under applicable law.

(ALJD 3:26-35; 4:1-29).

Dr. Mammen took no action in response other than filing the instant Board charge. She did not sign the Severance Agreement or otherwise reply to the Respondent, and she kept the balance of the Signing Bonus. (ALJD 4:31-33).

Dr. Mammen does not allege that she was constructively discharged and no other unfair labor practices have been alleged in this case.

B. Procedural History

On August 25, 2023, Dr. Mammen filed an unfair labor practice charge with Region 10 of the National Labor Relations Board, alleging that Respondent violated Section 8(a)(1) of the National Labor Relations Act, as amended, by proffering a Severance Agreement on July 25,

2023, containing unlawfully overbroad non-disparagement and confidentiality clauses. Dr. Mammen filed amended charges on January 16 and July 29, 2025. The Regional Director issued a complaint on September 10, 2025, alleging that the Respondent's proffer of the Severance Agreement violated Section 8(a)(1).

On September 23, 2025, the Respondent filed an answer to the complaint, admitting that it proffered the Severance Agreement containing the provisions at issue, but denying that it violated the Act. A hearing was held before Administrative Law Judge Robert A. Giannasi on January 27, 2026. On February 24, 2026, the Respondent filed a post-hearing brief stating that it "does not dispute" that the confidentiality and non-disparagement provisions are overbroad under *McLaren Macomb* and arguing that *McLaren Macomb* should be overturned.

C. Judge Giannasi's Decision

On March 3, 2026, Judge Giannasi issued a brief decision applying *McLaren Macomb* and concluding that the Respondent violated Section 8(a)(1) as alleged by proffering the Severance Agreement containing the unlawfully overbroad non-disparagement and confidentiality clauses.[2] (ALJD 7:21-25). He ordered the Respondent to post an appropriate notice and reoffer the terms of the Severance Agreement without the unlawful provisions but agreed with the Respondent that ordering the Respondent to forgive the balance of the Signing Bonus owed was unwarranted. (ALJD 8:1-35; 9:1-5).

In concluding that the Respondent violated the Act, Judge Giannasi explained that he was required to apply *McLaren Macomb* and noted that the Respondent had conceded that the provisions are unlawful under current law. (ALJD 6:13-20). He reasoned that the non-

[2] Although the Respondent's answer raised certain affirmative defenses, its post-hearing brief did not mention them and the ALJ determined that the Respondent had waived them. (ALJD 2: n.2).

disparagement provision is "in the same category as the one considered in *McLaren*" inasmuch as it prohibits employees from doing anything to "disparage," "injure," or "harm" the Respondent. (ALJD: 6:22-27). Since *McLaren Macomb* viewed similar language as unlawfully banning employees from asserting their employer violated the Act, filing charges, participating in Board investigations, or engaging in conduct regarding a labor dispute, Judge Giannasi concluded that the Respondent's non-disparagement provision likewise violated Section 8(a)(1). (ALJD 6:27-34; 7:1-2). In addition, he concluded that "the same result governs Respondent's confidentiality provision" because it "mirrors the language found unlawful in *McLaren*." (ALJD 7:4-12). In both cases, employees were prohibited from disclosing the terms of the severance agreement, which *McLaren Macomb* interpreted as banning the filing of Board charges over the agreement as well as assisting the Board in its investigation of the legality of the agreement. (ALJD 7:4-19). Accordingly, Judge Giannasi found Respondent's confidentiality provision violated Section 8(a)(1). (ALJD 7:18-19).

III. BACKGROUND

A. The Board's Decisions in *Baylor* and *IGT*.

In 2020, the Board formulated a new approach to severance agreements in *Baylor*, 369 NLRB No. 43, as applied and clarified in *IGT*, 370 NLRB No. 50. Under that precedent, proffering a severance agreement to an employee would not violate Section 8(a)(1)—even where it limited Section 7 activity on its face—if the agreement: (1) was entered into voluntarily; (2) only applied to post-employment activities and had no impact on employment terms or accrued benefits; and (3) was offered under non-coercive circumstances, that is, no employees were unlawfully discharged for protected conduct, the employer had not discriminated within the meaning of Section 8(a)(3), and no other circumstances existed that would tend to infringe on the

Section 7 rights of the discharged employees or their co-workers.[3] *Baylor*, 369 NLRB No. 43, slip op. at 1-2; *IGT*, 370 NLRB No. 50, slip op. at 2. Applying this standard, the Board found the proffer of the following provisions to be lawful: a non-assistance clause (*Baylor*), a confidentiality-of-employment-information clause (*Baylor*), and non-disparagement clauses (*Baylor* and *IGT*).

In so doing, *Baylor* overruled several cases to the extent they held that certain provisions are categorically unlawful to proffer, concluding instead that the proffer of such provisions can be unlawful only when accompanied by unlawful discharges or other coercive conduct. In this regard, *Baylor* overruled *Clark Distribution Systems, Inc.,* 336 NLRB 747 (2001), to the extent it held that offering a severance agreement with a non-assistance clause *invariably* violates the Act. *Baylor*, 369 NLRB No. 43, slip op. at 2 n.6. Thus, *Baylor* limited *Clark*'s applicability to cases where a non-assistance clause is offered to employees who had been unlawfully discharged. *Id.* In the Board's view, the mere proffer of such a provision only "*reasonably* tend[s] to interfere with the free exercise of employee rights under the Act" if an employer has shown that it harbors animus toward Section 7 activity and is willing to terminate employees on that basis. *Id.* For the same reasons, the Board also overruled *Metro Networks*, 336 NLRB 63 (2001), which involved unlawful non-assistance and confidentiality-of-employment-information clauses, and *Shamrock Foods, Co*., 366 NLRB No. 117 (2018), which involved unlawful non-disclosure-of-confidential-business-information and non-disparagement clauses. *Baylor*, 369 NLRB No. 43, slip op. at 2 n.6. Thus, *Baylor* likewise limited *Metro Networks*' and *Shamrock*'s holdings to situations

[3] *IGT* held that an unlawful refusal to bargain over a subcontracting decision and threats of loss of overtime did not establish discriminatory or coercive circumstances so as to render the non-disparagement clause unlawful. 370 NLRB No. 50, slip op. at 2 n.7.

where employees had been discharged in violation of the Act or where there were other coercive circumstances.

Baylor adopted the above standard in lieu of former General Counsel Peter Robb's proposal to apply longstanding precedent involving settlement agreements. *Id.*, slip op. at 2 n.7. *Baylor* distinguished that precedent on the bases that the severance agreements there were not related to any labor dispute and the challenged provisions did not affect employees' terms and conditions of employment. *Id.*

B. The Board's Decision in *McLaren Macomb.*

In *McLaren Macomb*, 372 NLRB No. 58, slip op. at 1 (2023), the Board explicitly overruled *Baylor* and *IGT* and held that "unlawful provisions in a severance agreement proffered to employees have a reasonable tendency to interfere with, restrain, or coerce the exercise of employee rights under the Act" even absent other, related unfair labor practices. Provisions would be unlawful if any relinquishment of Section 7 rights was not narrowly tailored. *Id.*, slip op. at 4. In effect, however, the Board considered any "chilling tendency" to be a "relinquishment" of rights. *Id.*, slip op. at 8.

Accordingly, the Board found that the employer unlawfully proffered a severance agreement offering payments to 11 permanently furloughed employees in exchange for, among other things, a release of claims arising out of their employment or termination of that employment as well as the following provisions:

> Confidentiality Agreement. The [e]mployee acknowledges that the terms of this [a]greement are confidential and agrees not to disclose them to any third person, other than [their] spouse, or as necessary to professional advisors for the purposes of obtaining legal counsel or tax advice, or unless legally compelled to do so by a court or administrative agency of competent jurisdiction.
>
> Non-Disclosure [Non-Disparagement]. At all times hereafter, the [e]mployee promises and agrees not to disclose information, knowledge or materials of a

> confidential, privileged, or proprietary nature of which the [e]mployee has or had knowledge of, or involvement with, by reason of the [e]mployee's employment. At all times hereafter, the [e]mployee agrees not to make statements to [e]mployer's employees or to the general public which could disparage or harm the image of [e]mployer, its parent and affiliated entities and their officers, directors, employees, agents and representatives.

Id., slip op. at 1-2.

The Board began its analysis by explaining that before *Baylor*, the Board "focused on the language of the severance agreement to determine whether proffering the agreement had a reasonable tendency to interfere with, restrain, or coerce employees' exercise of Section 7 rights," citing the prior decisions in *Metro Networks*, 336 NLRB 63, *Clark,* 336 NLRB 747, and *Shamrock*, 366 NLRB No. 117. *McLaren Macomb,* 372 NLRB No. 58, slip op. at 3. The *McLaren Macomb* Board noted that those decisions found the proffer of a facially unlawful severance agreement to be unlawful without relying on the presence of additional unlawful employer conduct. *Id*. *Baylor* and *IGT* abandoned that approach and "shifted focus instead to the circumstances under which the agreement was presented to employees." *Id*., slip op. at 3-4.

The *McLaren Macomb* Board reasoned that *Baylor* and *IGT* were "flawed in multiple respects," particularly because (1) the absence of other unfair labor practices does not eliminate the chilling effect of a facially unlawful severance agreement, (2) the *Baylor* and *IGT* Boards erred when considering employer animus because Section 8(a)(1) involves an objective test, and (3) those decisions provided no policy explanation for their change in law. *Id*., slip op. at 4-5.

In addition, the Board emphasized the "broad scope and the wide protection to employees by Section 7." *Id*., slip op. at 6. It underscored that such rights extend to *former* employees and that these rights may be exercised via channels outside the immediate employee-employer relationship. *Id*. (emphasis added). It is "through the lens of this broad grant of rights and the Board's duty to protect them" that severance agreements should be scrutinized. *Id*., slip op. at 6-

7. Under this standard, "an employer violates Section 8(a)(1) of the Act when it proffers a severance agreement with provisions that would restrict employees' exercise of their NLRA rights." *Id*., slip op. at 7. The Board further explained that "[i]nherent in any proffered severance agreement requiring workers not to engage in protected concerted activity is the coercive potential of the overly broad surrender of NLRA rights if they wish to receive the benefits of the agreement." *Id*., slip op. at 7, 10 n.51 ("coercion . . . inherent in the agreement itself"). In the same vein, although the majority agreed that a work rules-type analysis was inapt, it rejected the dissent's proposition that severance agreements are "inherently less coercive" than overbroad work rules. *Id*., slip op. at 7 & n.36, 10 n.51. It reasoned that a "broad voluntary waiver of statutory rights undermines the public purposes of the Act, which depend on the freedom of all employees to engage in Sec. 7 activity, to support each other in doing so, and to assist the Board in vindicating employee rights under the Act." *Id*., slip op. at 10 n.51.

Applying its new standard, the Board concluded that the non-disparagement and confidentiality-of-contract-terms provisions at issue were unlawful and that the employer violated Section 8(a)(1) by proffering the severance agreement to its furloughed employees. *Id*., slip op. at 7-8. The Board concluded that the non-disparagement provision contained a "far-reaching proscription"—not even limited to past employment issues—that effectively prohibited the signatory from making any "statements to [the] [e]mployer's employees or to the general public which could disparage or harm the image of [the] [e]mployer." This "comprehensive ban" would encompass "[p]ublic statements by employees about the workplace" that are "central" to the Act and was not cabined to disparaging statements that would lose the protection of the Act under *NLRB v. Electrical Workers Local 1229* (*Jefferson Standard Broad. Co*.), 346

U.S. 464 (1953). 372 NLRB No. 58, slip op. at 8.[4] In aoes nddition, the Board viewed the ban as an "extreme circumscription" of statutory rights in that it would effectively prohibit cooperation with both the Board's investigation and litigation of unfair labor practices as well as efforts by furloughed employees to raise or assist complaints about the employer with their co-workers, the union, the media, or federal agencies. *Id*., slip op. at 8 & n.41.

Similarly, the Board found the confidentiality-of-contract-terms provision broadly forfeited statutory rights because it prohibited disclosing the severance's terms "to *any* third person." *Id*., slip op. at 8. The Board interpreted this language to preclude the signatory from assisting the Board's investigation into the lawfulness of the agreement and discussing the terms of the agreement with the union, former employees in the same predicament deciding whether to accept the deal, and even future co-workers. *Id*., slip op. at 8-9. In other words, it treated the clause as having the "same deterrent effect as the explicit non-assistance provision found unlawful in *Clark*." *Id*., slip op. at 8 n.45. In finding this clause to be an overbroad waiver of rights, *McLaren Macomb* overruled two cases—*Shamrock*, 366 NLRB No. 117, discussed above, as well as *S. Freedman & Sons*, 364 NLRB 1203 (2016), *enforced mem. per curiam*, 713 F. App'x 152 (4th Cir. 2017)—to the extent they found "broadly worded" confidentiality-of-contract-terms provisions to be lawful, reasoning that those provisions would impair employees' Section 7 rights in precisely the same ways as the one in *McLaren Macomb*. 372 NLRB No. 58, slip op. at 9 & n.48.

The *McLaren Macomb* majority disagreed with then-Member Kaplan's partial dissent, which argued, among other things, that the Board should adhere to *Baylor* and *IGT* and that the

[4] The Board further noted that the ban was sweeping in that it applied to statements made to the employer's "parents and affiliated entities and their officers, directors, employees, agents and representatives" and contained no temporal limitation. 372 NLRB No. 58, slip op. at 8.

majority erroneously applied a work rules analysis.[5] *Id*., slip op. at 10, 12-15. The majority also rejected Kaplan's assertion that *Baylor* and *IGT* concerned "facially neutral" provisions because the Board in those cases never analyzed the language of provisions at issue. *Id*., slip op. at 9-10, 13 n.4, 14-15.

IV. ARGUMENT

The Board should overrule *McLaren Macomb*[6] and analyze severance agreements in a way that protects employees' Section 7 rights while honoring the Board's longstanding policy favoring private resolution of workplace disputes. To accommodate these goals, the Board should only find severance agreements, or their proffer, to be unlawful if they contain an *explicit* waiver of Section 7 rights that is not narrowly tailored. Respecting parties' private agreements, including the severance agreements at issue here, unless they actually contain an explicit overly broad forfeiture of statutory rights furthers the Board's bedrock policy favoring private resolution of potential workplace disputes through settlements, enables parties to agree to commonplace clauses, and promotes agreements that benefit employees while protecting employers' legitimate business interests. *Cf. H. K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970) (although not "absolute," freedom of contract is one of the "fundamental policies" under the Act).

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[5] Then-Member Kaplan only partially dissented in *McLaren Macomb* because the severance agreement was the product of direct dealing, which provided sufficient coercive circumstances to render the proffer unlawful under *Baylor* and *IGT*. 372 NLRB No. 58, slip op. at 12, 14.

[6] Chairman Murphy and Member Mayer have indicated that they would be open to overruling *McLaren Macomb* once they have a three-member majority. *Prime Communications, LP*, 374 NLRB No. 88, slip op. at 1 n.1 (2026).

Applying the General Counsel's proposed standard, the Board should conclude that the Respondent violated Section 8(a)(1) by proffering the severance agreement because the non-disparagement provision is facially unlawful inasmuch as it contains an unlawful non-assistance clause. However, the Board should find the confidentiality-of-contract-terms provision to be facially lawful and therefore lawfully proffered.

Although the General Counsel prefers this approach to returning to *Baylor* and *IGT*, if the Board is not persuaded by her proposal, it should return to those precedents.

A. Severance Agreements Serve the Public Interest by Fostering Private Resolution of Disputes.

As a critical starting point, the Board should evaluate severance agreements through the lens of its longstanding policy "favor[ing] 'private, amicable resolution of labor disputes, whenever possible.'" *S. Freedman*, 364 NLRB at 1204 (quoting *Hotel Holiday Inn De Isla Verde*, 278 NLRB 1027, 1028 (1986)), *overruled by McLaren Macomb*, 372 NLRB No. 58; *see Wallace Corp. v. NLRB*, 323 U.S. 248, 253-54 (1944) ("the Board has from the very beginning encouraged compromises and settlements"). Severance agreements commonly contain a broad release of claims against the employer as a quid pro quo for the severance payment because such agreements are a means of avoiding potential litigation. *See Baylor*, 369 NLRB No. 43, slip op. at 3 (severance agreement included release of claims); *IGT*, 370 NLRB No. 50, slip op. at 1 (same); *Regal Cinemas*, 334 NLRB 304, 305 (2001) (same), *enforced*, 317 F.3d 300 (D.C. Cir. 2003); *Hughes Christensen Co.*, 317 NLRB 633, 633-34 (1995) (same), *enf. denied on other grounds*, 101 F.3d 28 (5th Cir. 1996); *Phillips Pipe Line Co.*, 302 NLRB 732, 732 (1991) (same); LHH, *Why Do Companies Offer Severance Packages?*, Feb. 13, 2025, https://www.lhh.com/en-us/insights/why-companies-offer-severance-pay (survey of human resources leaders shows that "reducing litigation risk remains an important factor in severance

policies" and "[c]ompanies typically tie severance benefits to the signing of release agreements, helping protect the organization from potential legal challenges while ensuring departing employees receive meaningful support"). Thus, in the case of both potential and pending claims, the Board's policy favoring private agreements helps parties achieve labor peace, the fundamental goal of the NLRA. *Cf. Independent Stave Co.*, 287 NLRB 740, 743 (1987) (settlements allow parties to side-step "the very risks that [the private parties] have decided to avoid," allowing them to "reach an early restoration of industrial peace, which . . . is a fundamental aim of the Act"). Moreover, because they are designed for similar aims, the Board is often called upon to adjudicate the lawfulness of the same central provisions in settlement and severance agreement cases—such as a release of claims, confidentiality, and non-disparagement clauses—provisions that are included as standard practice in many settlement and severance agreements.[7] Accordingly, it is unsurprising that the Board has applied its severance agreement caselaw when analyzing settlement agreements, and vice versa. *See, e.g., S. Freedman*, 364 NLRB at 1204 (in settlement context, relying on principles from severance cases, *Clark*, 336 NLRB 747, and *Metro Networks*, 336 NLRB 63); *Shamrock*, 366 NLRB No. 117, slip op. at 3 n.12 (applying *S. Freedman* in severance context).

Moreover, as a practical matter, the Board's role in this area should be circumscribed. The Board should not view itself as the arbiter of every private agreement in the workplace that

[7] *See, e.g., Drafting a Settlement and General Release Agreement: Single Plaintiff Employment Dispute Checklist*, Practical Law Checklist 9-522-0993 (available on Westlaw) (listing common employment settlement agreement terms as including release of claims, confidentiality, and non-disparagement); *Breach of a Non-Disparagement Clause*, 13 Bus. & Com. Litig. Fed. Cts. § 144:42 (5th ed.) ("employment severance agreements . . . and contracts to settle pending litigation often include non-disparagement clauses").

could be read to encompass Section 7 rights under the broadest possible interpretation. *See Alpha Beta Co.*, 273 NLRB 1546, 1547 (1985) ("[a]s an administrative agency the Board should not . . . seek to rule on every dispute that may fall within the letter of the Act"), *enforced sub nom. Mahon v. NLRB*, 808 F.2d 1342 (9th Cir. 1987). By inserting itself into private negotiations between parties, including the severance agreements at issue here, and finding common provisions to be universally unlawful, the Board does a disservice to the public. Scrutinizing severance clauses to such an extreme degree hurts employer interests, especially their ability to amicably resolve potential litigation, and employee interests by preventing them from entering into agreements they otherwise would have absent an overreading by a completely uninvolved party. Such agreements, which are negotiated as an employee exits a company, have common (often standard) industry provisions meant to avoid potential disputes unrelated to the NLRA. For example, employers understandably desire some post-employment protections from their former employees given that they no longer owe a duty of loyalty and may harbor ill will toward the company depending on the circumstances of their departure. *See Hawaii Tribune Herald*, 356 NLRB 661, 661-63 (2011) (*Jefferson Standard* concerns a "duty [of loyalty] possessed by current employees"), *enforced sub nom. Stephens Media, LLC v. NLRB*, 677 F.3d 1241 (D.C. Cir. 2012); *Trustees of Boston University*, 224 NLRB 1385, 1409 (1976) ("wholly natural for an employee to react with some vehemence to an unlawful discharge"), *enforced*, 548 F.2d 391 (1st Cir. 1977); *see also Why Do Companies Offer Severance Packages?*, *supra* p. 12 ("In an era where company reputations can be made or broken on social media and employer review sites, how organizations treat departing employees significantly impacts their ability to attract future talent.").

The Board's hyper-scrutiny of severance agreements can also hurt employee interests, especially given that employees do not "view every employer document . . . through the prism of Sec[tion] 7." *IGT*, 370 NLRB No. 50, slip op. at 2 n.8. Departing employees often rely on severance payments to make ends meet during a potential gap in employment. *See Why Do Companies Offer Severance Packages?*, *supra* p. 12. An employer's demonstrated willingness to offer severance agreements further provides current and prospective employees with peace of mind in uncertain economic times that they too would have a cushion if they experience job loss. *Id.* The Board's hyper-regulation of severance agreements thus becomes an obstacle for parties trying to get the benefit of a deal that is not generally designed (and is not understood) to constitute a waiver of Section 7 rights.

B. The Board Should Overrule *McLaren Macomb* and Only Find Severance Agreements, or their Proffer, to be Unlawful if they Contain an Explicit Waiver of Section 7 Rights that is Not Narrowly Tailored.

i. Explicit employee waivers of the right to assist other employees with their claims before the Board or file their own future claims are not narrowly tailored.

In light of these policies and practical concerns, the Board should overrule *McLaren Macomb* and only find severance agreements, or their proffer, to be unlawful if they contain an explicit waiver of Section 7 rights that is not narrowly tailored. Under this approach, many common severance provisions would be lawful. For example, a departing employee's waiver of their own present NLRA rights would be narrowly tailored, and thus lawful. In contrast, a severance agreement that explicitly waives the departing employee's Section 7 rights to assist other employees before the Board or file their own future claims would be overbroad and thus unlawful.

Indeed, the Board has long found its ability to effectively enforce the Act is infringed upon by overbroad employee waivers of the right to assist *other* employees with *their* claims. This Section 7 right—the right to cooperate with the investigation and prosecution of unfair labor practices—continues to be important at the post-employment stage. The Supreme Court has made clear that "'all persons with information about [unfair labor] practices [must] be completely free from coercion against reporting to the Board'" and that such freedom is necessary to protect the Board's "channels of information from being dried up by employer intimidation of prospective complainants and witnesses." *NLRB v. Scrivener*, 405 U.S. 117, 121-22 (1972) (quoting *Nash v. Fla. Indus. Comm'n*, 389 U.S. 235, 238 (1967)). Former employees often have valuable information to share with Board agents and are especially important resources when current employees are too afraid of possible retaliation to cooperate with the Board. *See, e.g.*, *Flexsteel Industries,* 316 NLRB 745, 745, 749 (1995) (judge credited former employee witness because he had "no reason to lie" and noted that current employees must testify "adversely to their pecuniary interest") (cited repeatedly for these propositions), *enforced mem.*, 83 F.3d 419 (5th Cir. 1996); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 240 (1978) ("the danger of witness intimidation is particularly acute with respect to current employees—whether rank and file, supervisory, or managerial—over whom the employer, by virtue of the employment relationship, may exercise intense leverage"). Thus, the Board has found unlawful severance agreements barring employees from lending assistance to others' claims, reasoning that such waivers did not arise from the facts giving rise to the settlements. For example, in *Metro Networks,* 336 NLRB at 64, 67 & n.20, the Board found, with former Chairman Hurtgen agreeing, that a non-assistance provision was unlawful because the promise not to "assist or otherwise participate, except as may be required by law, in any claim . . . [or]

investigation . . . of any kind which relates to any matter that involves [the employer]" would have prohibited the employee from voluntarily assisting other employees with matters under the Act. Likewise, in *Clark,* 336 NLRB at 748, an inaptly named "confidentiality" provision in a severance agreement was found unlawful because it contained a ban on employees "voluntarily appear[ing] as a witness, voluntarily provid[ing] documents or information, or otherwise assist[ing] in the prosecution of any claims . . . against the company," thereby barring them from assisting a Board investigation of a claim filed by another individual.[8]

Similarly, the Board has found that waivers were unlawfully overbroad if they waived the right to engage in *future* Section 7 activity. For example, in *Ishikawa Gasket America*, the employer violated Section 8(a)(1) based on language in a separation agreement prohibiting the employee from engaging in, among other things, "any conduct which is contrary to the [c]ompany's interests in remaining union-free" for one year post-employment. 337 NLRB 175, 175-76 (2001), *enforced*, 354 F.3d 534 (6th Cir. 2004). The Board explained that "future rights of employees as well as the rights of the public may not be traded away in this manner." *Id.* at 176 (quoting *Mandel Security Bureau, Inc.*, 202 NLRB 117, 119 (1973)). The Board also considered a release of claims lawful where it pertained to existing or pending claims and did not reach future incidents. *See, e.g., Phillips Pipe Line,* 302 NLRB at 732-33 (release lawfully waived right to file Board charge where it was "clear from the language of the release itself that it applies only to claims . . . resulting from circumstances predating the execution of the release"); *Coca-Cola*, 243 NLRB at 502 (lawful settlement of employee suspension where

[8] As discussed in the Background section, *Baylor* overruled and limited *Clark* and *Metro Networks* to the extent they held that non-assistance clauses are categorically unlawful, even absent unfair labor practices that reflect hostility to employee rights. 369 NLRB No. 43, slip op. at 2 n.6.

release interpreted not to apply to future claims); *Mandel*, 202 NLRB at 119 (employer unlawfully conditioned reinstatement on forbearance from future charges and concerted activities).

Indeed, the Board narrowly construed a release of claims unless it was clear from the language and surrounding context that the release waived the filing of future claims over future incidents. Thus, in *First National Supermarkets*, the Board construed a release "narrowly" such that it was limited to past employment claims notwithstanding that it was "broadly worded." 302 NLRB 727, 727 (1991). By its terms, the release waived "claims of any kind which are now pending or which could be filed in the future relating to or arising out of my total employment and my termination with [the employer]." *Id.* The Board observed that "the phrase 'total employment' may appear ambiguous in isolation" but that "its meaning becomes evident when examined in the context of the release itself, as well as the circumstances surrounding [the employee's] discharge," namely that it was proffered after a "lengthy dispute" over his discharge and vacation pay. *Id.* Given this context, the majority rejected the dissent's view that "total employment" could be interpreted to mean claims arising during future reemployment. *Id.* at 727-28. The majority observed that the dissent's interpretation "ignores the context in which releases are generally negotiated with a terminated employee," namely, that an employer is "seeking final repose for all claims which have arisen out of any and all aspects . . . of the employment being concluded." *Id.* Thus, it "would not be reasonable to conclude that the parties, by signing the present release, intended to compromise the rights and obligations that would grow out of any future employment relationship." *Id.* at 728. In justifying its narrow reading of the release, the Board relied on the fact that the Board had undertaken a similar approach in *Coca-Cola*, where it "implicitly interpreted a release providing 'that no actions of

any kind will ensue' narrowly based on the entire document and the surrounding circumstances." *Id.* at 727 (quoting *Coca-Cola*, 243 NLRB at 501-02).[9]

Under the General Counsel's proposed standard, clauses that prohibit an employee from cooperating with the Board in others' ULP cases—as in *Baylor*,[10] *Clark*,[11] and *Metro Networks*[12] or filing claims over future incidents—as in *Mandel*, 202 NLRB at 119 would be unlawful inasmuch as they constitute explicit waivers of Section 7 rights that are not narrowly tailored.[13]

[9] This is consistent with the approach the Board employs when assessing whether the statutory right to bargain has been waived. *See, e.g.*, *Metro. Edison Co. v. NLRB*, 460 U.S. 693, 709 (1983); *KOIN-TV*, 369 NLRB No. 61, slip op. at 2 n.5, 7-8 (2020) (applying clear and unmistakable waiver principles in assessing whether post-contract change was unlawful where relevant provisions did not survive expiration of the agreement), *enforced sub nom. NLRB v. Nexstar Broad., Inc.*, 4 F.4th 801 (9th Cir. 2021).

[10] The non-assistance provision in *Baylor* (included under the misleading heading "No Participation in Claims") stated that the signatory "agrees that, unless compelled to do so by law, [he or she] will not pursue, assist or participate in any [c]laim brought by any third party against [employer]." 369 NLRB No. 43, slip op. at 1.

[11] The non-assistance provision in *Clark* (tucked inside in a paragraph entitled "Confidentiality") stated: "You further agree that You will not . . . voluntarily appear as a witness, voluntarily provide documents or information, or otherwise assist in the prosecution of any claims . . . against the company." 336 NLRB at 748, 761.

[12] The non-assistance provision in *Metro Networks* provided: "you agree not to sue or file a charge . . . in any forum or assist or otherwise participate, except as may be required by law, in any claim, arbitration, suit, action, investigation or other proceeding of any kind which relates to any matter that involves [the employer] . . . and that occurred on or before your execution of this [a]greement." 336 NLRB at 64, 69.

[13] Should the Board adopt the proposed test, it should nevertheless reaffirm in an appropriate case that an otherwise facially lawful severance provision cannot be applied in an unlawful manner—for instance, by using it as a basis to sue a signatory former employee for providing Board testimony.

ii. *McLaren Macomb* and two earlier cases should be overturned because they treat broadly-worded or ambiguous proscriptions as explicit waivers.

The *McLaren Macomb* standard sweepingly emphasizes the "broad scope and the wide protection to employees by Section 7" and that it is "through the lens of this broad grant of rights and the Board's duty to protect them" that severance agreements should be scrutinized. 372 NLRB No. 58, slip op. at 6-7. That "lens," however, effectively turns any severance clause into a waiver of statutory rights whenever it *could possibly* be read to encompass Section 7 activities. This is anathema to the Board's longstanding policy favoring private settlement agreements, is contrary to the approach applied in *First National Supermarkets*, 302 NLRB at 727-28—a case that *McLaren Macomb* purportedly followed—and creates unnecessary obstacles to parties trying to get the benefit of a deal that was not designed or understood to constitute a waiver of Section 7 rights.

Specifically, in overturning *Baylor* and *IGT*, *McLaren Macomb* claimed a return to "long-standing precedent," but it actually compounded an analytical error that emerged in earlier cases applying the narrowly-tailored-waiver standard. *Id.*, slip op. at 9. *McLaren Macomb* stated, without limitation, that "an employer violates Section 8(a)(1) of the Act when it proffers a severance agreement with provisions that would restrict employees' exercise of their NLRA rights." 372 NLRB No. 58, slip op. at 7. Applying that test, it found any provision that had a "chilling tendency on the exercise of Section 7 rights" to be overbroad and unlawful. *Id*. slip op.

at 8. Yet, before *Metro Networks*[14] and *Shamrock*,[15] those decisions never painted in such broad strokes. Rather, as set forth above, they held that an employer could lawfully condition a settlement or severance on an employee's waiver of Section 7 rights where the waiver was narrowly tailored to the facts giving rise to the agreement and the employee received a benefit for the waiver. *See, e.g.*, *Coca-Cola*, 243 NLRB at 502. And this earlier precedent expressly cautioned against interpreting "broadly-worded" or "ambiguous" phrases "in isolation" and ignoring the context in which they were offered. *First National Supermarkets*, 302 NLRB at 727-28 (observing that in *Coca-Cola*, 243 NLRB at 501-02, the Board "implicitly interpreted a release providing 'that no actions of any kind will ensue' narrowly based on the entire document and the surrounding circumstances").

In its misapplication of longstanding precedent, the Board in *McLaren Macomb* effectively employed a work rule-type analysis to severance provisions. Although the Board denied using this framework in response to then-Member Kaplan's partial dissent, its work rule approach is apparent from its exacting scrutiny of each provision at issue in the case, assessing whether it could possibly be interpreted to restrict Section 7. *Id.*, slip op. at 10.

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[14] *Metro Networks* found a confidentiality-of-employment-information to be unlawfully proffered, seemingly independent of the fact that the employees had been unlawfully discharged. The nondisclosure clause in that case, 336 NLRB at 64, provided in relevant part that employees will not publicize or communicate to any entity "information concerning your employment" with the employer. Although the provision also contained a confidentiality-of-contract-terms provision, that was not the basis for the Board's finding that the paragraph was unlawful. *Id.* at 67 & n.18 (interpreting paragraph to prohibit employee from "communicating with anyone about his employment").

[15] *Shamrock* also found a common non-disclosure-of-confidential-business-information clause to be unlawfully proffered, as well as a commonplace non-disparagement clause, apparently independent of the other unfair labor practices in the case. The non-disclosure clause provided that the employee may not disclose any confidential or proprietary information, which it defined as including "personnel or corporate information." The non-disparagement provision stated that the employee may not make "disparaging" remarks that could be "detrimental" to the company. *Shamrock*, 366 NLRB No. 117, slip op. at 28-29.

Once this longstanding precedent is properly understood, it is clear that *McLaren Macomb* erred in concluding that a non-disparagement provision was unlawful despite it being a commonplace severance agreement provision that contained no explicit reference to Section 7 rights. The Board read its terms broadly—filtering them through the "lens of [the Act's] broad grant of rights"—and finding they could be interpreted to encompass Section 7. *Id.*, slip op. at 6. Thus, the Board reasoned that the prohibition on making statements to employees or the public that "could disparage or harm the image of [the] [e]mployer" was unlawful because it could encompass a statement that the employer had violated the Act, "conduct regarding any labor issue [or] dispute," or cooperation with a Board investigation "at any time in the future" because it lacked a temporal limitation. *Id*., slip op. at 8. Tellingly, the Board reasoned that the provision was overbroad in that it failed to reference the Board's standard in *Jefferson Standard*, 377 U.S. at 477—essentially creating a requirement that employers write the NLRA law into severance provisions that were not intended to reach Section 7 activities. 372 NLRB No. 58, slip op. at 8. In short, *McLaren Macomb*'s finding that a general non-disparagement clause was unlawful — one that did not reference clearly protected activities such as cooperating with an administrative agency or supporting employees in a labor dispute—is ripe for overruling.

McLaren Macomb also deviated from prior precedent in finding a confidentiality-of-contract-terms provision unlawful and should be overruled on this basis as well. ***Such a provision had never been held unlawful***. Tellingly, *McLaren Macomb* overturned prior precedent (*S. Freedman*, 364 NLRB 1203, and *Shamrock*, 366 NLRB No. 117) to reach this result, undermining its assertion that its decision represented a "return to the approach followed by Board precedent before *Baylor.* " *Id*., slip op. at 7, 9 n.48. Notably, *S. Freedman* construed a confidentiality-of-contract-terms clause to be a "narrowly tailored," "limited waiver" of the right

to discuss discipline with coworkers in the context of an employee who was being reinstated and waiving his right to pursue the matter further through a grievance.[16] 364 NLRB at 1203-04. The Board found that clause lawful, specifically invoking the policy favoring the private resolution of labor disputes. *Id.* Following *S. Freedman*, the Board in *Shamrock* found lawful a confidentiality-of-contract-terms provision in a separation agreement since it did not waive the employee's right to discuss his discharge. 366 NLRB No. 117, slip op. at 3 n.12, 29. Indeed, the Board recently observed that confidential settlement agreements may "facilitate the resolution of workplace conflicts and thus 'further the Board's policy of encouraging the peaceful, nonlitigious resolution of disputes.'" *Dish Network, LLC*, 370 NLRB No. 97, slip op. at 4 (2021) (quoting *Independent Stave*, 287 NLRB at 741). Accordingly, the Board should overrule *McLaren Macomb* and restore *S. Freedman* and *Shamrock* on this point.

Finally, by prioritizing departing employees' Section 7 rights above all else, the *McLaren Macomb* Board ignored the basic tenet of appropriately accommodating Section 7 rights and private interests based on the nature and relative strength of the Section 7 right at issue. Pursuant to longstanding Supreme Court precedent, Section 7 rights are "not unlimited." *Republic Aviation Corp v. NLRB*, 324 U.S. 793, 797-98 (1945). Rather, they fall along a spectrum that requires balancing of the nature and strength of the respective Section 7 rights against legitimate employer interests. *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976). In the context of settling claims—including settlements concurrent with the end of employment—the narrowly-tailored-waiver test reflects an appropriate balance between employees' statutory rights and employers' legitimate interests, including "seeking final repose for all claims which have arisen out of any

[16] *S. Freedman* did not construe this broadly worded confidentiality-of-contract-terms clause to preclude the employee from providing information to the Board, distinguishing *Metro Networks* on this basis. 364 NLRB at 1204 & n.4.

and all aspects . . . of the employment being concluded." *First National Supermarkets*, 302 NLRB at 727-28.

Contrary to this case law, *McLaren Macomb* gave no weight to legitimate employer interests in entering into severance agreements, while finding the mere possibility of Section 7 infringement to be of sole, dispositive importance. As explained above, employer interests in maintaining industrial peace, resolving potential claims, protecting its reputation, and safeguarding its confidential and proprietary information are relatively strong. *See supra* pp. 12-14-employassist. To be sure, departing and former employees are statutory employees with Section 7 rights. *See, e.g., Briggs Manufacturing*, 75 NLRB 569, 570-71 (1947) (holding that "employee" as defined in Section 2(3) "covers . . . former employees of a particular employer"); *Eastex v. NLRB*, 437 U.S. 556, 564 (1978) (Section 2(3) "definition [of 'employee'] was intended to protect employees when they engage in otherwise proper concerted activities in support of employees of employers other than their own"). However, their right to engage in protected concerted activities post-employment is comparatively low on the *Hudgens* spectrum because, generally speaking, they are no longer personally invested in improving the terms and conditions of employment at their former employer since any improved terms would not affect them. That said, as explained above at pp. 15-17, one Section 7 right is especially important at the post-employment stage—the right to cooperate with the investigation and prosecution of unfair labor practices.

In effectively outlawing many commonplace severance clauses by failing to adequately balance employee and employer interests, *McLaren Macomb* gives undue weight to the right to engage in concerted activities post-employment while virtually ignoring legitimate employer interests. In contrast, the narrowly-tailored-waiver standard proposed by the General Counsel

reflects a better balance. That standard will safeguard access to the Board, ensure that employees are not coerced into trading away future rights, and respect employers' legitimate interest in reaching private settlements that protect their businesses, including facing disparagement and defamation from prior employees as well as protecting business-related confidential information, while benefiting both parties.

For all these reasons, the Board should overturn *McLaren Macomb*—as well as *Metro Networks* and *Shamrock* to the extent they found broadly-worded but commonplace non-disparagement and confidentiality clauses to be unlawful independent of the other unfair labor practices in those cases—and readopt *S. Freedman* and *Shamrock* to the extent they held that confidentiality-of-contract-terms provisions were lawful. *See supra* pp. 16, 21-22.

C. The General Counsel's Proposed Standard is Preferable to *Baylor* and *IGT*.

The General Counsel respectfully submits that the proposed approach outlined herein is preferable to the standard set forth in *Baylor* and *IGT*. While both would significantly narrow the circumstances in which the Board interjects itself into severance agreements, the General Counsel's standard has some distinct advantages. It is more consistent with longstanding precedent, namely, *Mandel*, 202 NLRB at 119, 122, which found that conditioning reinstatement on waiving the right to file future charges with the Board was unlawful notwithstanding that *all the other unfair labor practice allegations were dismissed*. Applying *Baylor*'s approach, that condition would have been lawful to proffer because there was "no reason to believe that the [employer] harbor[ed] animus against Sec. 7 activity." *Baylor*, 369 NLRB No. 43, slip op. at 2 n.6.[17] In addition, the General Counsel's approach is more protective of the right to cooperate

[17] While it appears that the discriminatee in *Mandel* may have accepted the unlawful condition because he did, in fact, withdraw his charges, it is not entirely clear if he agreed to refrain from filing any future charges and the Board's decision certainly does not rely on his acceptance for

with the Board, which is a strong statutory right in this context, as explained above. The General Counsel's proposed approach also recognizes that the proffer of a facially unlawful agreement—when combined with a valuable benefit such as a severance payment at a time when the departing employee could use a financial cushion—tends to encourage employees to accept the terms and nominally forfeit unwaivable rights. In any event, as a practical matter, there is little benefit in permitting employers to propose overbroad waivers to employees if those same waivers would be unlawful if signed and maintained. This is especially so if the overbroad waiver discourages employees from cooperating with the Board because it erects a barrier for the Board to ever learn of the violation.

Admittedly, *Baylor* rejected former General Counsel Peter Robb's argument that settlement agreement precedent should be applicable in the severance agreement context. 369 NLRB No. 43, slip op. at 2 n.7. However, the General Counsel respectfully submits that the Board should revisit this conclusion. As to the argument in *Baylor* that severance agreements are not related to a labor dispute, as explained above, a primary purpose of severance agreements is to resolve potential labor-related claims, some of which may be on the precipice of litigation. Thus, many severance agreements do resolve potential labor disputes. Moreover, settlement and severance agreements contain many of the same standard terms and both have labor peace as their goal. Accordingly, settlement and severance agreement principles and precedents align well. *See* Section IV.A. The *Baylor* Board's observation that severance agreement provisions do not impact terms and conditions of employment is equally unpersuasive. *Id.* A severance agreement clause explicitly waiving Section 7 rights in an overbroad manner is no less chilling

finding it coercive within the meaning of Section 8(a)(1). 202 NLRB at 118-19 (supervisor promised that discriminatee would stop petitions, not discriminatee).

on a former employee's willingness to participate in Board proceedings or assist the Board in its investigations than it would be in a settlement agreement context. In either case, an employee's exercise of Section 7 rights comes at the potential cost of forfeiting the severance payment or being forced to defend against a costly employer lawsuit—significant disincentives notwithstanding that they do not affect employment terms.

D. If the Board Does Not Adopt the General Counsel's Proposed Standard, It Should Overturn *McLaren Macomb* and Return to *Baylor* and *IGT*.

Although the General Counsel recommends that the Board adopt the proposed standard set forth herein, should the Board disagree, it should return to *Baylor* and *IGT* instead of continuing to apply *McLaren Macomb*. Despite their shortcomings, *Baylor* and *IGT* are more closely aligned with the Board's policy favoring private agreements, they constrain the Board's role in policing such agreements, and they allow employers to proffer severance agreements without undue concern about running afoul of the Act, thereby benefitting employees. Indeed, while *McLaren Macomb* reads severance provisions too broadly, the main strength of *Baylor* and *IGT* is that they respect the Board's policy favoring private resolution of disputes, allowing employees and employers to offer and negotiate severance agreements without concern that a provision that does not reference Section 7 rights could result in an unfair labor practice. Because this represents a better balance of interests, returning to *Baylor* and *IGT* would be an improvement over current law should the Board decide not to adopt the General Counsel's position.

E. Applying the General Counsel's Proposed Standard, the Board Should Find that the Severance Agreement Was Unlawfully Proffered Because the Non-Disparagement Provision is Unlawful, Even Though the Confidentiality Provision Is Lawful.

Applying the General Counsel's proposed standard in this case, the Board should find that the Respondent violated Section 8(a)(1) by proffering the Severance Agreement because it

conditioned loan forgiveness on agreeing to the non-disparagement provision, which explicitly applies to administrative proceedings and therefore amounts to an unlawful non-assistance clause. However, the Board should conclude that the commonplace confidentiality-of-contract-terms provision was lawful and reverse the ALJ on that issue.

i. The non-disparagement provision contains a facially unlawful non-assistance clause.

The ALJ concluded that based on the non-disparagement provision's similarities to the one in *McLaren Macomb*, he was constrained to find a violation here. (ALJD 6:21-35; 7:1-2). In this regard, the ALJ focused on the broad language prohibiting employees from doing anything to "disparage," "injure," or "harm" the Respondent. (ALJD 6:22-24). Applying *McLaren Macomb*, which involved a commonplace non-disparagement clause with similar language to the terms above, the ALJ concluded that such language would be read as banning statements asserting that the Respondent violated the Act, filing charges or participating in Board investigations, and engaging in conduct regarding a labor dispute. (ALJD 6:24-35, 7:1-2).

Applying the General Counsel's proposed standard, however, this language would not amount to a waiver because it does not specifically mention statements about a labor dispute or statements to a government agency. Taking into account the severance context and the fact that employees do not always interpret language through the prism of Section 7, employees would understand that this language is meant to prevent statements in the public domain that hurt the Respondent's reputation, not statements in support of a labor dispute—at least absent evidence that the parties were contemplating those issues when the provision was drafted. *Cf. First National Supermarkets*, 302 NLRB at 727-28 (considering "context in which releases are generally negotiated with a terminated employee . . . [i]t is highly doubtful that the parties [were] thinking about the prospects of any future [employment]" and absent "evidence pertaining to

reemployment customs," "it simply would not be reasonable to conclude that the parties . . . intended to compromise" rights surrounding a future employment relationship"). In short, if the non-disparagement provision ended there, it would have been lawful under the narrowly-tailored-waiver standard because it does not contain an explicit waiver of any Section 7 rights.[18]

However, there is a key difference distinguishing the Respondent's provision. Specifically, at the end of the provision, the agreement states: "except that Employee may respond truthfully to enforce this agreement or when called upon by subpoena or court order to testify or provide information in a legal or administrative proceeding." By explicitly mentioning "administrative proceeding[s]," it is evident that the non-disparagement provision *does* apply to statements made to an administrative agency. Accordingly, we must assess whether the provision waives the right to provide information or testimony to the Board in the course of a ULP investigation or hearing prompted by a charge filed by other employees, since the severance agreement contains a release of claims as to signer. Inasmuch as the Respondent's exception is limited to providing information in compelled situations involving a subpoena or court order, the provision clearly waives Dr. Mammen's right to *voluntarily* cooperate with the Board in support of other employees. Since the waiver is not narrowly tailored to the facts giving rise to the severance agreement because it extends beyond Dr. Mammen's claims, it amounts to waiver of the right to assist others before the Board and should be found facially unlawful and therefore unlawful to proffer.

[18] Likewise, a reasonable employee would view the prohibition on "injur[ing] or harm[ing] Company or its relationships with current or prospective employees" as concerning poaching other employees or discouraging others from working for Respondent, which are unrelated to Section 7 activities.

Similarly, the Board in *Metro Networks* persuasively found a non-assistance provision prohibiting the employee from participating in any investigation involving the employer unlawful despite its "except as required by law" exception. 336 NLRB at 67. The Board reasoned that this narrow exception would prohibit the employee from voluntarily providing information to the Board regarding other employees' charges. This would limit the Board's ability to effectively investigate charges, which "often rely heavily on the voluntary assistance of individuals." *Id., see also id.* at 67 n.20 (former Chairman Hurtgen, concurring) (agreeing with the majority that the exception was insufficient because it waived the employee's right to "voluntarily assist others"). Accordingly, the Board should find that the non-assistance clause contained within the non-disparagement provision constitutes an explicit waiver of Dr. Mammen's Section 7 rights that is not narrowly tailored and thus is facially unlawful and was unlawfully proffered.

ii. The Confidentiality of Agreement provision is facially lawful.

In contrast to the non-disparagement provision, the confidentiality-of-contract-terms provision is lawful because it does not contain an explicit waiver of Section 7 rights. That provision prohibits Dr. Mammen from disclosing the terms of the Severance Agreement to "anyone other than Employee's attorneys, financial advisors, government taxing authority, or Employee's spouse or partner, or as part of Employee's application for unemployment benefits, pursuant to an appropriate order from a court or other entity with competent jurisdiction, or as otherwise allowed under applicable law."

The Board should analyze this provision consistent with its well-reasoned decision in *S. Freedman*, which found lawful a settlement agreement clause promising that "the terms of this agreement will remain confidential" and that "any disclosure" could result in discipline. 364

NLRB at 1203-04. Relying on the policy favoring amicable resolution of labor disputes, the Board found that the waiver was narrowly tailored to the facts giving rise to the settlement inasmuch as it was "limited to resolving this one incident," "not any future discipline" and "[n]othing in the agreement limited [the employee's] right to discuss discipline, file grievances, or pursue litigation concerning unrelated matters." *Id*. at 1204. It further contrasted the case from *Metro Networks* on the basis that the confidentiality agreement in *S. Freedman* only restricted the employee's ability to discuss the settlement terms with others, not his ability to assist other employees in unfair labor practices cases before the Board. *Id*. at 1204 n.4. In this regard, the majority implicitly declined to construe the broad language prohibiting "any disclosure" to waive the right to provide information or the agreement to the Board.

While the provision in this case is more detailed than in *S. Freedman*, the additional language does not explicitly waive Section 7 rights. Although the Confidentiality of Agreement provision uses the term "government taxing authority," that clearly refers to the Internal Revenue Service and state taxing authorities. This is a standard provision that does not imply that Dr. Mammen may disclose the agreement terms to tax authorities *to the exclusion of all other government agencies*. Indeed, the phrase "government taxing authority" is preceded by the words "attorneys, financial advisors," clarifying that the context of this part of the exception encompasses Dr. Mammen's ability to seek personal financial advice and otherwise deal with the financial consequences of the loan forgiveness. Employees therefore would not reasonably interpret this provision as limiting their ability to assist the Board's investigation or prosecution of charges impacting other workers merely because it contains the word "government."

Moreover, even if the exception were construed to generally prohibit sharing the agreement with other government agencies, the provision does not constitute a waiver of the

right to share information with the Board because it explicitly permits the Dr. Mammen to disclose the terms of the agreement "as otherwise *allowed* under applicable law" (emphasis added). This stands in stark contrast to the exception in the Severance Agreement's non-disparagement provision—that Dr. Mammen may make disclosures only when compelled by subpoena or court order. Because both voluntary and compelled disclosure of information to the Board to assist other workers' charges is "allowed" by law, this provision does not explicitly waive Section 7 rights and was therefore lawfully proffered to Dr. Mammen.[19]

iii. The ALJ's proposed remedy is appropriate.

The General Counsel agrees that the ALJ's remedy is appropriate except that it should be modified to only require recission of the non-disparagement provision, not the confidentiality of agreement provision. (ALJD 9:17-32). Despite its order that the Respondent must offer the Charging Party a lawful severance agreement (ALJD 9:31-10:1), the ALJD elsewhere makes clear that the Respondent is not required to forgive the outstanding loan amount of the Signing Bonus. (ALJD 8:9-35, 9:1-5). Thus, the Respondent's challenge to this aspect of the remedy should be rejected.

[19] Should the Board overturn *McLaren Macomb* and revert to its prior *Baylor* and *IGT* standard for assessing severance agreements rather than adopting the General Counsel's proposed approach, both provisions in this case would be lawful because the Severance Agreement was not mandatory, it did not impact any accrued severance pay credit or benefits arising out of the employment relationship, Dr. Mammen was not unlawfully discharged, and there were no other circumstances suggesting that the Respondent's proffer of the Severance Agreement tended to infringe on the Section 7 rights of the Charging Party or any other employees. *See Baylor*, 369 NLRB No. 43, slip op. at 1-2.

V. CONCLUSION

Based on the foregoing, the General Counsel respectfully requests that the Board adopt the framework set forth herein, overrule *McLaren Macomb*, and find that proffering the non-disparagement clause violated Section 8(a)(1) but proffering the confidentiality-of-contract-terms clause did not violate the Act.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the Counsel for the General Counsel's Answering Brief to the Respondent's Exceptions in Case 10-CA-324512 was electronically filed via NLRB E-Filing System with the National Labor Relations Board and served in the manner indicated to the parties listed below on this 5th day of May 2026.

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