

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Division of Administrative Law Judges
San Francisco, CA

**COUNTRYWIDE FINANCIAL CORPORATION,
COUNTRYWIDE HOME LOANS, INC., AND
BANK OF AMERICA CORPORATION**

and

Case No. 31-CA-072916

**JOSHUA D. BUCK and MARK THIERMAN,
THIERMAN LAW FIRM**

and

Case No. 31-CA-072918

PAUL CULLEN, THE CULLEN LAW FIRM

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S
POST-HEARING BRIEF**

To: Honorable William G. Kocol
Administrative Law Judge
National Labor Relations Board
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I. INTRODUCTION

On December 10, 2012, a formal hearing was held before the Honorable William G. Kocol at Region 31 of the National Labor Relations Board, 11150 West Olympic Boulevard, Suite 700, Los Angeles, California 90064, pursuant to an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing issued October 23, 2012, by the Acting Regional Director for Region 31 (Consolidated Complaint).

The Consolidated Complaint alleges that Countrywide Financial Corporation (CFC), Countrywide Home Loans, Inc., (CHL), and Bank of America Corporation (BAC) (collectively, Respondents) have violated the Act by maintaining and enforcing a Mutual Agreement to Arbitrate Claims (Arbitration Agreement) that includes provisions that require employees to arbitrate all employment-related claims, including any claims arising under a federal statute or regulation, asserting the Arbitration Agreement in litigation brought against Respondents in U.S. District Court, Central District of California, and moving the District Court to compel plaintiffs, former employees of CHL, to individually arbitrate their class-wide wage and hour claims against CHL.

At the conclusion of the hearing on December 10, 2012, Administrative Law Judge Kocol closed the record and postponed the hearing indefinitely. On December 18, 2012, Counsel for the Acting General Counsel, Counsel for Respondents, Joshua D. Buck as the Charging Party in Case No. 31-CA-072916, and Paul T. Cullen, Esq. as the Charging Party in Case No. 31-CA-072918 (jointly, the Parties) filed a Joint Motion to Accept Parties' Joint Stipulation of Facts and to Close the Record (the Joint Stipulation).

Pursuant to the Joint Stipulation paragraph 1, the record consists of the facts as stipulated by the Parties in the Joint Stipulation, the Joint Exhibits attached to the Joint Stipulation, the General Counsel's exhibits, and each Party's brief to the Administrative Law Judge.¹

II. ISSUES

Whether the arbitration agreements at issue herein, and Respondents' Motions to Compel Individual Arbitration and subsequently-filed pleadings interfere with employees' Section 7 right to participate in collective and class litigation?

Whether the arbitration agreements at issue herein, and Respondents' Motions to Compel Individual Arbitration and subsequently-filed pleadings interfere with employees' access to the Board and its processes?

III. STATEMENT OF FACTS

A. Jurisdiction

Respondent BAC is engaged in the operation of a financial institution providing financial services and has been the parent company of Respondents CFC and CHL since July 1, 2008. In approximately July 2008, BAC became the ultimate parent company of the entity that was previously named "Countrywide Financial Corporation," but had merged out of existence, and its subsidiaries, including CHL. Respondent CFC was, until at least March 31, 2009, engaged in mortgage lending and other real estate finance-related businesses. Respondent CHL was, until at

¹ Hereafter, all references to the Joint Stipulation are referred to as "Jt. Stip." followed by the paragraph number, and, where applicable, a letter designating the subparagraph. All references to exhibits are noted as "Jt. Exh." All references to the General Counsel's exhibits are noted as "GC" followed by the exhibit number.

least March 31, 2009, a corporation engaged in mortgage lending and other real estate finance-related businesses. At all material times, BAC, CFC, and CHL, each has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (Jt. Stip. (a)-(m)).

B. The Mutual Agreement to arbitrate claims was a term and condition of employment

In August 2007, Dominique Whitaker (Whitaker) applied for employment at CHL. (Jt. Exh. 5 (a)). As part of Whitaker's application process, CHL presented her with a Mutual Agreement to Arbitrate Claims (the Arbitration Agreement) (Jt. Stip. 1 and 5(b)).

The Arbitration Agreements provides, in relevant part:

The Covered Claims subject to this Agreement include, but are not limited to, claims for wages or other compensation due; claims for breach of any contract or covenant, express or implied; tort claims; claims for discrimination or harassment on bases which include but are not limited to race, sex, sexual orientation, religion, national origin, age, marital status, disability or medical condition; claims for benefits; and claims for violation of any federal, state, or other governmental constitution, statute, ordinance, regulation, or public policy. The purpose of this Agreement is to substitute arbitration, instead of a federal or state court, as the exclusive forum for the resolution of Covered Claims.

At the end of Arbitration Agreement – there are 16 separate provisions – and just below the signature of the Senior Managing Director and Chief Human Resources Officer Leora Goren, Whitaker was presented with the choice of checking “I Agree” or “I Disagree” to the terms of the Arbitration Agreement. The Arbitration Agreement explained by the following language the consequence of not accepting the terms and checking “I Disagree”: “By selecting I disagree, I disagree with the above terms and understand that I will not be able to move forward in the application process at this time.” (Jt. Exh. 1). On August 30, 2007, at 9:42 PM, as part of her

application to CHL, Whitaker selected “I agree.” (Jt. Exh. 1). Whitaker was hired and employed by CHL from mid-November 2007 until August 20, 2008. (Jt. Stip. 5(a)-(c)).

John White (White) applied for employment at CHL in September 2008 (Jt. Stip. 6(a)). As part of his application process for employment at CHL, White was presented with an Arbitration Agreement identical to the one CHL had presented to Whitaker, containing the identical language defining the progress of his application if he did not accept the terms of the Arbitration Agreement: “By selecting I disagree, I disagree with the above terms and understand that I will not be able to move forward in the application process at this time.” On September 26, 2008, at 6:42 PM, White chose to continue his efforts to obtain employment and checked “I agree.” White was hired and worked at CHL from November 2008 until November 2009. (Jt. Stip. 6(a)-(c)).²

For at least two years, from 2007 until approximately March 31, 2009, CHL typically presented applicants for employment with an arbitration agreement similar to the Arbitration Agreements that CHL presented to Whitaker and White. (Jt. Stip. 7). Whitaker, White, and others who were looking for jobs and who applied to CHL, would only be considered for employment if they agreed to the terms of the Arbitration Agreement. (Jt. Stip. 5(b) and 6(b)). There is no evidence that applicants were promised employment or offered any other incentive in exchange for checking the agreement. They were warned their efforts to gain employment would not advance beyond the electronic application stage if they did not agree to the terms. (Jt. Stip. 5(b) and 6(b)).

² At the top of the Arbitration Agreement presented to Whitaker and also to White, the name “Countrywide Financial” appears above “Mutual Agreement to Arbitrate Claims,” in bold and in a larger font and CFC’s logo appears next to its name. (Jt. Exh. 1, Jt. Exh. 2).

The Arbitration Agreements are silent as to whether the mandatory arbitration may be heard on a collective or class basis.

C. Chronology in the civil litigation

In June 2009, Whitaker filed a class action lawsuit in California state court alleging that Respondents CFC and BAC had violated California state wage-and-hour laws. (Jt. Exh. 3). Respondents CFC and BAC removed the action to the United States District Court for the Central District of California (District Court) in August 2009. (Jt. Exh. 4). In April 2010, Whitaker filed a Second Amended Complaint in the District Court. (Jt. Exh. 7). Whitaker was joined in the Second Amended Complaint by Debra Foley, a former CHL employee, who subsequently dropped out of the case. In June 2010, Whitaker filed a Third Amended Complaint in District Court, and White joined as a named plaintiff in the action.³ (Jt. Exh. 8).

In March 2011, a stipulation was entered into in a separate action against BAC for Wage and Hour Employment Practices in United States District Court for the District of Kansas, brought by former employees of an entity identified as “Countrywide.” While the stipulation permitted the plaintiffs in the United States District Court for the District of Kansas to move forward as a class, the stipulation explicitly excluded the plaintiffs in Whitaker’s Third Amended Complaint. (Jt. Exh. 5, page 7, Jt. Exh. 6 showing signature).

On August 22, 2011, Respondents BAC, CFC, and CHL, filed a Motion to Compel Individual Arbitration in Plaintiff Dominique Whitaker’s Claims in District Court. (Jt. Exh. 9(A)). On August 22, 2011, Respondents BAC, CFC, CHL also filed a separate Motion to

³ Respondents in the instant unfair labor practice charges are defendants in the civil litigation actions. Plaintiffs in the civil litigation actions are former employees of CHL, represented by their legal counsel, who are the Charging Parties in the instant unfair labor practice charges.

Compel Individual Arbitration of Plaintiff John White's Claims in District Court.⁴ (Jt. Exh.

10(A)). Respondents then:

Move[d] the Court for an order pursuant to the Federal Arbitration Act (the "FAA") . . . compelling Plaintiff[s] to arbitrate individually, and not on a class or collective basis, the claims set forth in [their Complaint], appointing an arbitrator, and staying this action pending the outcome of such individual arbitration.

(Jt. Exh. 9(A), page 8, Jt. Exh. 10(A), page 8).

Plaintiffs in the District Court action responded on August 29, 2011, by filing a Joint Opposition. (Jt. Exh. 11). Respondents filed a Reply in Support of Motions to Compel Individual Arbitrations on September 5, 2011. Respondents argued, inter alia, that plaintiffs in the District Court action failed to meet their burden, had failed to establish any valid basis for not being ordered to submit their claims to arbitration on an individual basis only, and had not established they suffered any prejudice. (Jt. Exh. 12).

On September 19, 2011, the District Court granted Respondents' Motions to Compel Arbitration, although it found that it would be up to the arbitrator to determine whether class or individual arbitration would be appropriate. In particular, the District Court stated in its Order, "[t]he Court . . . finds that the question of whether plaintiffs are subject to individual or class arbitration depends on the parties' intent and is a question for the arbitrator to decide." (Jt. Exh. 13, page 12).

On June 11, 2012, BAC filed a Motion for Partial Reconsideration of Order Granting In Part Defendants' Motions to Compel Individual Arbitrations of Plaintiffs' Claims (the Motion for Partial Reconsideration). (Jt. Exh. 14). The District Court's Order would defer to an arbitrator whether class and collective or only individual arbitration is allowed under the

⁴ These are referred to collectively as the Motions to Compel.

Arbitration Agreements, but Respondents sought once more to have the District Court compel separate and individual arbitration through its Motion for Partial Reconsideration. (Jt. Exh. 14). Whitaker and White filed an Opposition on June 25, 2012. (Jt. Exh. 15). BAC responded on July 16, 2012 by filing a Reply In Support of its Motion for Partial Reconsideration, reiterating its Motion to Compel Individual Arbitration. (Jt. Exh. 16). On August 20, 2012, the District Court denied Respondents' Motion for Partial Reconsideration and reaffirmed its prior Order that the arbitrator should determine whether class or individual arbitration is appropriate. (Jt. Exh. 17).

Both sides filed writs of mandamus. On October 19, 2012, Paul T. Cullen, Esq., Charging Party in Case No. 31-CA-072918, filed a Petition for Writ of Mandamus Compelling the Court to Confine Its Rulings to the Lawful Exercise of its Prescribed Jurisdiction. (Jt. Exh. 19). On October 30, 2012, Respondents filed their Petition for Writ of Mandamus to Modify Order Compelling Arbitration to Require Individual Arbitrations. (Jt. Exh. 20).

In sum, Respondents have filed seven separate pleadings with the District Court in an effort to compel former employees Whitaker and White to arbitrate their claims individually.

IV. ARGUMENT & ANALYSIS

A. Respondents are the “Employer” under the NLRA and are liable for the unfair labor practices at issue.

Respondents have argued that this case is brought against BAC and CFC under a misapplied successorship theory. This is misguided. This case is not about *Golden State* liability.⁵ Counsel for the Acting General Counsel is not seeking liability under any successorship theory. Respondents fall within the definition of “employer” in Section 2(2) of the Act wherein the definition of “employer” explicitly “includes any person acting as an agent of an employer, directly or indirectly[.]” BAC is the party responsible for the Motions to Compel

⁵ *Golden State Bottling Co., Inc., v. NLRB*, 414 U.S. 168 (1973).

Individual Arbitration that are at the heart of the instant case, as well the motions and writs subsequently filed. Thus, BAC is independently liable for the alleged violations.

The two former employees of CHL, Whitaker and White, were employees within the meaning of Section 2(3) of the Act. See, e.g., *Briggs Mfg. Co.*, 75 NLRB 569, 570 (1947) (the Board interprets “employee” “in the broad generic sense...to include members of the working class generally”); *Little Rock Crate & Basket Co.*, 227 NLRB 1406, 1406 (1977) (Section 2(3) of the Act “means ‘members of the working class generally,’ including ‘former employees of a particular employer’”).

CFC, CHL, and BAC filed the Motions to Compel Individual Arbitration in this matter, and the other pleadings that are the gravamen of the allegations in the Consolidated Complaint. In addition, the Arbitration Agreement presented to Whitaker on approximately September 30, 2007, and to White on approximately September 26, 2008, says “Countrywide Financial” in large bold letters accompanied by CFC’s logo. (Jt. Exh. 1, Jt. Exh. 2). Thus, Respondent CFC, in addition to CHL and BAC is liable as an Employer in this matter.

B. Respondents’ maintenance of the Arbitration Agreements violates Section 8(a)(1) of the Act because the Agreements interfere with employees’ Section 7 right to participate in collective and class litigation.

In *D.R. Horton*, 357 NLRB No. 184 (2012), the Board held that a policy or agreement precluding employees from filing employment-related collective or class claims against the employer restricts the employees’ Section 7 right to engage in concerted action for mutual aid or protection, and therefore violates Section 8(a)(1) of the Act. In particular, the Board held in *D.R. Horton* that “an employer violates Section 8(a)(1) of the National Labor Relations Act when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours or

other working conditions against the employer.” *Id.*, slip op. at 1 (2012). The Board stated that such an agreement unlawfully restricts employees’ Section 7 right to engage in concerted action for mutual aid or protection. *Ibid.* The Board reviewed its precedent that “has consistently held that concerted legal action addressing wages, hours or working conditions is protected by Section 7.” *Id.*, slip op. at 2 (2012).

The Board made clear that “the applicable test is that set forth in *Lutheran Heritage Village*, and under that test, a policy such as Respondent’s violates Section 8(a)(1) because it expressly restricts Section 7 activity or, alternatively, because employees would reasonably read it as restricting such activity.” *D.R. Horton*, slip op. at 7 (2012), citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). In sum, the Board definitively held that an employer “violates Section 8(a)(1) by requiring employees to waive their right to collectively pursue employment-related claims.” 357 NLRB No. 184, slip op. at 13 (2012).

In the instant cases, Respondents chose mandatory arbitration as a means of settling disputes. While the Respondents’ mandatory Arbitration Agreement is silent as to whether the mandatory arbitration may be heard on a collective or class basis, Respondents have explicitly taken the position that the Arbitration Agreement requires individual arbitration, and have moved the court for an order “compelling Plaintiff[s] to arbitrate individually, and not on a class or collective basis.”⁶ Since, at Respondents’ choice, the Arbitration Agreement precludes any forum other than arbitration for resolving employment disputes, Respondents have effectively foreclosed all collective employment-related litigation by employees by taking the position that

⁶ While Respondents may argue that the Arbitration Agreement at issue in this case is lawful under *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), that argument is unavailing. While, the Arbitration Agreement in this case is silent as to whether the mandatory arbitration may be heard on a collective or class basis, Respondents’ motions and efforts to compel individual arbitration evidence Respondents’ interpretation of its Arbitration Agreement as foreclosing collective arbitration.

arbitration must be done on an individual basis. The standard in *Lutheran Heritage Village-Livonia* is that a violation of Section 8(a)(1) will be found where a “rule has been applied to restrict the exercise of Section 7 rights[.]” 343 NLRB at 647. The Board specifically applied to this standard to the mandatory arbitration agreements in *D.R. Horton*, 357 NLRB No. 184, slip op. at 4 (2012). Therefore, it is clear that Respondents’ Arbitration Agreement is unlawful as applied, because, under *D.R. Horton*, Respondents’ conduct in enforcing the Arbitration Agreement unlawfully restricts and interferes with employees’ Section 7 right to engage in concerted action for mutual aid or protection, and thus violates Section 8(a)(1) of the Act.

C. Respondents’ efforts to enforce the Arbitration Agreements through the Motions to Compel Individual Arbitration violated Section 8(a)(1) of the Act.

Since the Arbitration Agreements are unlawful as applied, Respondents’ Motions to Compel Individual Arbitration and Respondents’ subsequent litigation efforts for the same purpose are also unlawful as further interference with the employees’ Section 7 right to engage in collective legal activity. Furthermore, as the underlying Arbitration Agreements are unlawful under the Act, nothing in the FAA precludes proceeding against Respondents’ motions. In *D.R. Horton*, the Board held that finding a mandatory arbitration agreement to be unlawful, “consistent with the well established interpretation of the NLRA and with core principles of Federal labor policy, does not conflict with the letter or interfere with the policies underlying the FAA and, even if it did, that the finding represents an appropriate accommodation of the policies underlying the two statutes.” *Id.*, slip op. at 8 (2012).

Initially, the Board noted that: (1) under the FAA, “arbitration may substitute for a judicial forum only so long as the litigant can effectively vindicate his or her statutory rights through arbitration;” and (2) mandatory individual arbitration agreements prohibit employees

from exercising their substantive statutory right to engage in collective legal action. *Id.*, slip op. at 9-11 (2012). Thus, the Board emphasized, “nothing in the text of the FAA suggests that an arbitration agreement that is inconsistent with the NLRA is nevertheless enforceable.” *Id.*, slip op. at 11 (2012). Rather, a refusal to enforce a mandatory arbitration agreement’s class action waiver would directly further core policies underlying the NLRA, and is consistent with the FAA. *Ibid.* Therefore, “holding that an employer violates the NLRA by requiring employees, as a condition of employment, to waive their right to pursue collective legal redress in both judicial and arbitral forums accommodates the policies underlying both the NLRA and the FAA to the greatest extent possible.”⁷ *Id.*, slip op. at 12 (2012). Finally, the Board noted in *D.R. Horton* that, even if there were a direct conflict between the NLRA and the FAA, the terms of the Norris-LaGuardia Act and the rules of statutory interpretation strongly indicated that the FAA would have to yield. *Ibid.*

The Board in *D.R. Horton* specifically addressed two recent Supreme Court decisions which stated that a party cannot be required, without its consent, to submit to arbitration on a class-wide basis. *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, ___ U.S. ___, 130 S.Ct. 1758, 1775–1776 (2010) (arbitration panel exceeded its authority by permitting class antitrust claim when commercial shipping charter agreement’s arbitration clause was silent on class arbitration); *AT&T Mobility v. Concepcion*, ___ U.S. ___, 131 S.Ct. 1740, 1751–1753 (2011) (claim that class-action waiver in consumer arbitration agreement was unconscionable under state law was preempted by FAA). Significantly, these cases establish that an arbitrator cannot order class arbitration unless there is a contractual basis for concluding that the parties affirmatively agreed to do so. The Board found that these cases did not affect its application of the Act, as it was not

⁷ Notwithstanding the faux “voluntarily” language appearing in the Arbitration Agreement above the applicant’s signature line, the Arbitration Agreement made clear that the applicant would not be able to move forward in the application process should he or she check “I Disagree.”

holding that employers were *required* to permit, participate in, or be bound by a class-wide or collective arbitration proceeding. Instead, the Board held only that employers may not compel employees to waive their Section 7 right to collectively pursue litigation of employment claims in *all* forums, arbitral and judicial.

Thus, so long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of class-wide arbitration, and employers remain free to insist that *arbitral* proceedings be conducted on an individual basis. 357 NLRB No. 184, slip op. at 12 (2012).

For all these reasons, the Board in *D.R. Horton* made clear that nothing in the FAA precludes finding mandatory arbitration agreements that prohibit collective and class litigation to be unlawful. Accordingly, as the Respondents' Arbitration Agreements are themselves unlawful as applied, it follows that nothing in the FAA precludes proceeding against the Respondents' Motions to Compel Individual Arbitration seeking to enforce those unlawful agreements.

Respondents have argued that no violation can be found here because Whitaker and White have collectively engaged in activities for their mutual aid and protection by together filing their Demand for Arbitration with the alternative dispute resolution service known as JAMS. Respondents argue that since Whitaker and White have acted together to pursue their claims against Respondents in arbitration, they have no basis to claim an unfair labor practice or otherwise assert they were prevented from engaging in concerted activities for the purpose of mutual aid or protection. Respondents have repeatedly moved to obstruct and prevent Whitaker and White from acting in concert, and the fact that the former employee/plaintiffs have together filed documents with JAMS does not excuse Respondents' continuing, ongoing, and persistent efforts to prevent Whitaker and White from engaging in conduct protected by Section 7 of the

Act.

D. Section 10(b) does not bar the proceeding.

Section 10(b) does not preclude the pursuit of a complaint allegation based on the maintenance and/or enforcement of an unlawful rule within the Section 10(b) period, even if the rule was promulgated earlier. See *Control Services*, 305 NLRB 435, 435 fn. 2, 442 (1991), enfd. mem. 961 F. 2d 1568 (3 Cir. 1992); see also *The Guard Publishing Co.*, 351 NLRB 1110, 1110, fn.2 (2007).

In addition, Respondents' August 2011 Motions to Compel Individual Arbitrations, which is the conduct that established Respondents' unlawful interpretation of the Arbitration Agreements as prohibiting collective legal activity, and attempted to enforce that unlawful interpretation, is well within the Section 10(b) period, as are the motions subsequently filed by Respondents to that same purpose.

E. *Bill Johnson's Restaurants* does not preclude proceeding against Respondents' motions to compel.

In footnote 5 of *Bill Johnson's Restaurants*, the Court stated that it did not intend to preclude the enjoining of suits that have "an objective that is illegal under federal law." 461 U.S. at 737 n.5. In such circumstances, "the legality of the lawsuit enjoys no special protection under *Bill Johnson's*." *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 834 (1991), enfd. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993). The Board has made clear that it will apply footnote 5 to particular litigation tactics, as well as to entire lawsuits. Thus, for example, in *Wright Electric, Inc.*, the Board found that an employer's discovery request had an illegal objective and violated the Act, even though the lawsuit itself could not be enjoined. 327 NLRB 1194, 1195 (1999), enfd. 200 F.3d 1162 (8th Cir. 2000). See also, e.g., *Dilling Mechanical Contractors*, 357 NLRB No. 56, slip op. at 2-3 (2011) (finding that employer's discovery

requests had an illegal objective, although the lawsuit itself did not). Accordingly, a footnote 5 analysis is properly applied to Respondents' motions here, despite the fact they arose as a defense in the course of a lawful lawsuit.

Legal actions that have an illegal objective may be found to be unlawful *ab initio*, in contrast to legal actions against "arguably protected" conduct, which are only unlawful to the extent they are continued after the General Counsel issues complaint, pursuant to *Loehmann's Plaza*, 305 NLRB 663 (1991), rev. denied 74 F.3d 292 (D.C. Cir. 1996). See, e.g., *Manno Electric*, 321 NLRB 278, 298 (1996), enfd. per curiam mem. 127 F.3d 34 (5th Cir. 1997). A lawsuit has a footnote 5 illegal objective "if it is aimed at achieving a result incompatible with the objectives of the Act." *Manno Electric*, 321 NLRB at 297. In particular, an illegal objective may be found for two reasons relevant to the case presented here.

The first of these is where "the underlying acts constitute unfair labor practices and the lawsuit is simply an attempt to enforce the underlying act." *Regional Construction Corp.*, 333 NLRB 313, 319 (2001). This category includes the illegal union fine cases cited by the Court in footnote 5 itself. *Granite State Joint Board, Textile Workers Union*, 187 NLRB 636, 637 (1970), enforcement denied, 446 F.2d 369 (1st Cir. 1971), rev'd, 409 U.S. 213 (1972); *Booster Lodge No. 405, Machinists & Aerospace Workers*, 185 NLRB. 380, 383 (1970), enforced in relevant part, 459 F.2d 1143 (D.C. Cir. 1972), aff'd, 412 U.S. 84 (1973). In those cases, the unions violated Section 8(b)(1)(A) by fining employee/members, and the lawsuits were merely the mechanism to enforce and collect the unlawful fines.

The second of these is where a grievance or lawsuit is itself aimed at preventing employees' protected conduct. In such cases, the lawsuit is not merely retaliatory for employees' protected conduct, but also seeks to use the arbitrator or the court itself to directly interfere with

the Section 7 activity. For example, in *Manno Electric, Inc.*, the Board found that an employer's judicial cause of action attacking employee statements made to the Board was not only preempted, but also had an illegal objective. *Manno Electric*, 321 NLRB at 297.

Here, both of these reasons apply. First, as discussed above, Respondents' Motions to Compel Individual Arbitration in the instant cases seek to enforce Arbitration Agreements that are themselves unlawful. Just as in union fine cases, the underlying acts constitute unfair labor practices and the Motions to Compel are simply attempts to enforce the underlying act. In addition, Respondents' Motions to Compel Individual Arbitration here also have an illegal objective because they are directly aimed at preventing employees from engaging in protected conduct. Indeed, the only objective of Respondents' motions is to prohibit employees from engaging in Section 7 activity because Respondents' Motions would impose individual arbitration, specifically to prevent employees' protected collective legal activity. For this reason, the Motions are unlawful notwithstanding that the District Court, in granting Respondents' Motion to Compel arbitration, stated that, "the question of whether plaintiffs are subject to individual or class arbitration depends on the parties' intent and is a question for the arbitrator to decide." This is a hollow sanctuary. While the employees may be able to argue to an arbitrator that they are entitled to bring their claims as a class, *Stolt-Nielsen* and *AT&T Mobility v. Concepcion* make clear that the arbitrator has no authority to grant such status in the absence of some authorization for class arbitration in the arbitration agreements themselves or where, as here, the agreements are silent as to whether the mandatory arbitration may be heard on a collective or class basis. See *Stolt-Nielsen*, 130 S.Ct. at 1775 ("a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so") (emphasis in original); *AT&T Mobility v. Concepcion*, 131 S.Ct.

at 1750 (“the agreement at issue, which was silent on the question of class procedures, could not be interpreted to allow them”).

In addition, even though the underlying arbitration agreements were facially silent as to individual or class arbitration, Respondents’ Motions to Compel Individual Arbitration and Respondents’ subsequently-filed pleadings in District Court have an illegal objective. It is well established that an illegal objective may be found where a grievance or lawsuit seeks to enforce an interpretation of an agreement that is unlawful under the Act, even if the agreement itself can be read lawfully. In *Elevator Constructors (Long Elevator)*, the Board found an illegal objective and held that a Union violated Section 8(b)(4)(ii)(A) by filing a grievance that was predicated on a reading of the collective-bargaining agreement that, if successful, would have resulted in a *de facto* hot cargo clause. 289 NLRB 1095, 1095 (1988), *enfd.* 902 F.2d 1297 (8th Cir. 1990) (“Because we have concluded that the contract clause as construed by the Respondent would violate Section 8(e), we may properly find the pursuit of the grievance coercive, notwithstanding the Supreme Court’s decision in *Bill Johnson’s Restaurant v. NLRB*”). Here, even if the Arbitration Agreements could be read to lawfully permit collective and class claims, Respondents’ Motion to Compel Individual Arbitration pursuant to the Agreements, and Respondents’ subsequent motions seeking to prohibit collective action in both judicial and arbitral forums must similarly be seen to have an illegal objective.

As such, Respondents’ Motions have a footnote 5 illegal objective and are unlawful under Section 8(a)(1) of the Act.

F. Collateral estoppel principles do not preclude proceeding against the Respondent's motions to compel individual arbitration.

The doctrine of collateral estoppel, or “issue preclusion,” provides that “once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.” *Montana v. United States*, 440 U.S. 147, 153 (1979). Thus, collateral estoppel bars not only the decision-making court, but also any other court, from reconsidering the same issue. *United States v. Stauffer Chemical*, 464 U.S. 165 (1984).

It is well established that three elements must be satisfied in order for collateral estoppel to apply: (1) the issue at stake must be identical to the one alleged in the prior litigation; (2) the issue must have been actually litigated in the prior litigation by the party against whom preclusion is asserted; and (3) the determination of the issue must have been a critical and necessary part of the final judgment in the earlier action. *Town of North Bonneville v. Callaway*, 10 F.3d 1505, 1508 (9th Cir. 1993) (quoting *Clark v. Bear Stearns & Co.*, 966 F.2d 1318, 1320 (9th Cir. 1992)).

As a general rule, the Federal Government is not barred from subsequently litigating an issue involving enforcement of Federal law which the private plaintiff has litigated unsuccessfully, unless the Federal Government was a party in the prior litigation. *United States v. Mendoza*, 464 U.S. 154, 162 (1984); *Field Bridge Associates*, 306 NLRB 322 (1992), *enfd.* sub nom. *Local 32B-32J Service Employees Intern. Union, AFL-CIO v. NLRB*, 982 F.2d 845 (2d Cir. 1993), cert. denied 509 U.S. 904 (1993). The Board has long held that “if the Government was not a party to the prior private litigation, it is not barred from litigating an issue involving enforcement of Federal law which the private plaintiff has litigated unsuccessfully.” *Field Bridge Associates*, 306 NLRB at 322. See also, e.g., *Precision Industries*, 320 NLRB 661, 663

(1996), enfd. 118 F.3d 585 (8th Cir.1997), cert. denied 523 U.S. 1020 (1998). As the Board has stated, “Congress has entrusted to the Board exclusively the prosecution of the proceeding by its own complaint, the conduct of the hearing, the adjudication and the granting of appropriate relief,” and the Board is “the public agency . . . chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce.” *Field Bridge Associates*, 306 NLRB at 322, quoting *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 265 (1940).

Two circuit court decisions have applied collateral estoppel principles to the Board and denied enforcement of Board orders in unfair labor practice cases that turned on the existence of a contract. *Donna-Lee Sportswear*, 836 F.2d 31 (1st Cir. 1987); *NLRB v. Heyman*, 541 F.2d 796 (9th Cir. 1976). In *Donna-Lee Sportswear*, the First Circuit held that the Board was precluded from finding there to be an effective contract because a court had already ruled that no binding contract was in existence. 836 F.2d at 35. The court emphasized there that: (1) it was not unusual for the court to determine whether there was a valid contract; and (2) the private interests of the disputants predominated in that case, rather than any public rights at issue. *Id.* at 36-38. In *NLRB v. Heyman*, the Ninth Circuit denied enforcement of a Board order that the employer had unlawfully repudiated a collective-bargaining agreement and refused to bargain with the union. Instead, the court held that the Board was bound by a previous federal District Court decision in a Section 301 lawsuit that rescinded the collective-bargaining agreement due to the union’s lack of majority status. The Ninth Circuit wrote that “[a]n implicit collateral attack, launched through the filing of charges premised on the contract, may not be entertained by the Board under the guise of different policy considerations.” 541 F.2d at 799. The Board has noted that, in both of those cases, the issue in the unfair labor practice case -- whether there was a

contract or not -- was the same issue as the one that had been decided in the court proceeding. See, e.g., *Precision Industries*, 320 NLRB at 663 n.13 (1996).

However, the Board was not a party in the private court actions between the former employees/plaintiffs and the Respondents in the instant matter. Under established Board law, therefore, it is clear that the Board is not precluded from proceeding against the Respondents' unlawful Motions at issue here. Moreover, the issue here does not concern a private dispute about the mere existence of a contract in which the particular interests of the disputants predominate, and as to which the courts may be at least as capable of determining as the Board. Rather, these cases deal with whether the existing arbitration agreements violate employees' Section 7 rights, public rights issues within the exclusive authority and expertise of the Board. Thus, even under the rationale of *Donna-Lee Sportswear*, the Board is not precluded from finding that Respondents violated Section 8(a)(1) of the Act by moving to compel arbitration based on unlawfully-applied mandatory arbitration agreements, even after the District Court granted the motion.

For all these reasons, Respondents' Motions to Compel Arbitration unlawfully interfered with the employees' Section 7 right to engage in collective legal activity.

G. Respondents' maintenance of the Arbitration Agreements also violates Section 8(a)(1) of the Act because they interfere with employees' access to the Board and its processes.

The Board has made clear that mandatory arbitration policies that interfere with employees' right to file an unfair labor practice charge are unlawful. See, e.g., *Bill's Electric, Inc.*, 350 NLRB 292, 296 (2007); *Dish Network Corp.*, 358 NLRB No. 29, slip op. at 7-8 (2012); *U-Haul Co. of California*, 347 NLRB 375, 377-78 (2006), *enfd. mem.* 255 F. Appx. 527 (D.C. Cir. 2007). For example, in *U-Haul Co. of California*, the Board held that an employer violated

Section 8(a)(1) of the Act by maintaining a mandatory arbitration policy that employees would reasonably construe to prohibit the filing of unfair labor practice charges, and that did not clarify that the policy did not extend to the filing of unfair labor practice charges. 347 NLRB at 377-378.

Here, employees would reasonably conclude that the Arbitration Agreement precludes them from filing unfair labor practice charges. The agreements state that they cover “claims for violation of any federal, state, or other governmental constitution, statute, ordinance, regulation, or public policy” -- which includes National Labor Relations Act unfair labor practice claims. Moreover, the Agreement states that the purpose is “to substitute arbitration, instead of a federal or state court, as the *exclusive forum* for the resolution of Covered Claims” (emphasis added). Thus, by their express terms, the Arbitration Agreements indicate that they require arbitration for unfair labor practice claims, and foreclose filing charges with the Board. In *U-Haul Co. of California*, 347 NLRB 375 (2006), the Board made clear that an arbitration agreement may be found to unlawfully interfere with employees’ right of access to the Board even where, as here, it states that covered claims are those that would otherwise go to courts. As the Board stated there, “[t]he reference to a ‘court of law’ . . . does not by its terms specifically exclude an action governed by an administrative proceeding such as one conducted by the National Labor Relations Board. . . . Further, inasmuch as decisions of the National Labor Relations Board can be appealed to a United States court of appeals, the reference to a “court of law” does nothing to clarify that the arbitration policy does not extend to the filing of unfair labor practice charges.” 347 NLRB at 377-378. Therefore, as employees would reasonably read the Arbitration Agreement to prohibit the filing of charges with the Board, Respondents’ maintenance of the Arbitration Agreements violates Section 8(a)(1) of the Act on this basis as well.

H. Respondents' affirmative defenses should be rejected.

Respondents argue that the Consolidated Complaint should be deferred because *D. R. Horton* is on appeal. This is immaterial. The case is ripe and the Region is bound by Board law. That *D.R. Horton* is on appeal does not excuse the Region from following current Board law, and the brief of the Acting General Counsel provides an abundance of legal citations apart from *D.R. Horton*.

As discussed fully above, by filing their Motions to Compel individual arbitration and their subsequently-filed pleadings, Respondents have violated Section 7 of the Act because, by these actions, Respondents have interfered with employees' Section 7 right to participate in collective and class litigation and with the employees' access to the Board and its processes. Respondents have provided no legal precedent for staying resolution of the Board's processes when the Board has already ruled on a case.

Respondents argue that the allegations in the Consolidated Complaint are premature in that no court, judge, or arbitrator has ruled that Whitaker and White cannot assert their claims on a collective basis. This argument, addressed above, is circuitous and illogical. Respondents have aggressively and relentlessly pursued all avenues of litigation to prevent Whitaker and White from acting in concert. The fact that an arbitrator may permit class or collective arbitration does not excuse Respondents of liability for their conduct in seeking to prevent employees from acting collectively in judicial and arbitral forums.

The Board has jurisdiction over all three Respondents. The Parties stipulated to the applicable jurisdictional information. (Jt. Stip. 4(a) through (m))⁸. The Acting General Counsel has sufficient facts of commerce to issue a Consolidated Complaint and go forward with the

⁸ Paragraph 4 of the Jt. Stip. includes subparagraphs a-i, U, k, and m. It does not contain a subparagraph j or l.

proceedings. Moreover, the Respondents, all three, are the proper parties. Respondents fall within the definition of “employer” in Section 2(2) of the Act and BAC is the party responsible for the Motions to Compel Individual Arbitration that are at the heart of the instant cases, as well the motions and writs subsequently filed.

Respondents’ argument that they are not, each one, “the Employer” is addressed supra at page 9, as is their argument that the Consolidated Complaint is barred by Section 10(b), addressed supra at page 14. Case law supports the issuance of complaint based on maintenance and enforcement of an unlawful rule, promulgated outside the Section 10(b) period. Moreover, within the Section 10(b) period, Respondents filed motions in District Court seeking to enforce the unlawful policy.

Respondents’ final affirmative defense is that the Charging Parties lack standing. As the Administrative Law Judge is well aware, in Board proceedings, legal representatives frequently file charges on behalf of their clients, whether an employer, a labor union, or an individual. On the face of each unfair labor practice charge, each Charging Party clearly states the name of the aggrieved employee, either Dominique Whitaker or John White.

I. The remedies sought are appropriate because Respondents’ Motions to Compel Individual Arbitration are antithetical to the Act.

The remedies sought by the Acting General Counsel are appropriate. (GC Exhibit 2). As part of the remedy sought in this matter, the Acting General Counsel seeks an order precluding Respondents from maintaining that portion of the Arbitration Agreement found to be unlawful. This would include not only cease-and-desist relief, but also notification to all employees subject to such Agreement, including a posting, that Respondents are rescinding the unlawful provisions.

Additionally, the Acting General Counsel seeks an order precluding Respondents from enforcing that portion of its Arbitration Policy found to be unlawful. This would include not only

cease-and-desist relief, but also an order requiring Respondents to notify all judicial and arbitral forums wherein the Arbitration Agreement has been enforced that it no longer opposes the seeking of collective or class action type relief. In particular, to remedy the legal consequences of the Respondents' unlawful motion, and return employees to the *status quo ante*, Respondents should be ordered to withdraw the Motions to Compel Individual Arbitration or to move the District Court to vacate the District Court Order, Jt. Exh. 13, if a motion to vacate can still be timely filed.⁹ Any such motion to vacate should be made jointly with the affected employees, if they so request.¹⁰

Consistent with the Board's usual practice in cases involving unlawful legal actions, Respondents should be ordered to reimburse Whitaker and White for any attorney's fees and litigation expenses directly related to opposing the employer's unlawful motions to compel individual arbitration. See *Bill Johnson's Restaurants*, 461 U.S. at 747 ("If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorney's fees and other expenses" and "any other proper relief that would effectuate the

⁹ Depending on the jurisdiction, a motion for relief from judgment or order due to legal error, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, may be timely filed for a short period beyond the entry of final judgment (see, e.g., *Steinhoff v. Harris*, 698 F.2d 270, 275 (6th Cir. 1983) ("the vast majority of courts that have concluded that legal error comes within the meaning of Rule 60(b)(1) have also determined that. . . the moving party must make his or her motion within the time limits for appeal"), and even beyond the expiration of the period for filing an appeal (see, e.g., *Lairsey v. Advance Abrasives Co.*, 542 F. 2d 928, 930-932 (5th Cir. 1976) (permitting a Rule 60(b) motion after the time limit for appeal had expired, but within one year of the judgment, where there had been a change in the underlying law).

¹⁰ The Board has in the past ordered such a joint motion or petition where an employer has unlawfully used the legal system to interfere with an employee's Section 7 rights. See, e.g., *Baptist Memorial Hospital*, 229 NLRB 45, 46 (1977) ("[w]e shall also require Respondent to rectify the effects of its unlawful conduct by joining with [the employee] in petitioning the Memphis Municipal Court and Police Department to expunge any record of [the employee's] arrest and conviction").

policies of the Act”), on remand, 290 NLRB 29, 30 (1988); *Phoenix Newspapers*, 294 NLRB 47, 51 (1989); *Summitville Tiles, Inc.*, 300 NLRB 64, 67, 77 (1990).

Nothing in the requested order would preclude Respondents from amending the motion to seek lawful collective or class arbitration rather than a class or collective lawsuit, as long as employees were able to exercise their collective legal rights in some forum.

Under Board law, such remedies are appropriate. Specifically, the Board has frequently sought remedies requiring a respondent to take affirmative steps in disavowing positions that are antithetical to the Act. Thus, in *Loehmann’s Plaza*, 305 NLRB 663, 671 (1991), the Board ordered the respondent to seek to have the injunction granted against the union withdrawn. In *Federal Security, Inc.*, 336 NLRB 703 (2001), remanded on other grounds, 2002 WL 31234984 (D.C. Cir. 2002), the Board ordered the respondent to take affirmative steps to file a motion with the court to withdraw its lawsuit and file a motion to vacate the default orders entered and those still operative.¹¹

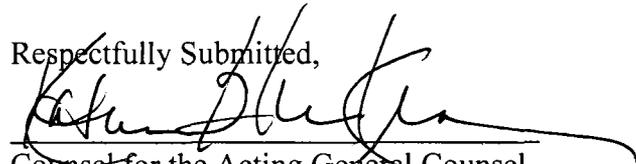
V. CONCLUSION

As set forth above, Respondents have violated Section 8(a)(1) in that the arbitration agreements at issue herein, and Respondents’ Motions to Compel Individual Arbitration and subsequently-filed pleadings interfere with employees’ Section 7 right to participate in collective and class litigation and interfere with employees’ access to the Board and its processes. Moreover, as described above, the remedy sought in the instant matter is appropriate and consistent with Board precedent.

¹¹ As those cases were based on federal-law preemption, rather than a *Bill Johnson’s* “illegal objective,” the timing of the preemption was considered in applying the remedy. Here, of course, there is no point of preemption and, as noted above, Respondent’s motions were unlawful *ab initio*.

DATED AT Los Angeles, California, this 28th day of January 2013.

Respectfully Submitted,



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Re: COUNTRYWIDE FINANCIAL CORPORATION,
COUNTRYWIDE HOME LOANS, INC., AND
BANK OF AMERICA CORPORATION
Cases: 31-CA-072916 and 31-CA-072918

CERTIFICATE OF SERVICE

I hereby certify that I served the attached **COUNSEL FOR THE ACTING GENERAL COUNSEL'S POST-HEARING BRIEF** on the parties listed below on the 28th day of January, 2013:

SERVED VIA E-FILING

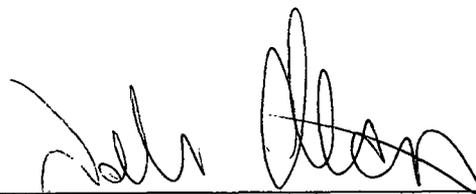
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