

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 20

24 HOUR FITNESS USA, INC.

Case 20-CA-35419

and

ALTON SANDERS, an individual

COUNSEL FOR THE ACTING GENERAL COUNSEL'S BRIEF IN SUPPORT OF  
CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Submitted by  
Carmen León  
Richard McPalmer  
Counsel for the Acting General Counsel  
National Labor Relations Board  
Region 20  
901 Market Street, Suite 400  
San Francisco, California 94103-1735

## I. INTRODUCTION

The Acting General Counsel (AGC) takes only limited cross-exceptions to the Administrative Law Judge's Decision. In *D.R. Horton*, 357 NLRB No. 184 (2012), the Board held that a policy or agreement that is imposed as a condition of employment, and which precludes employees from pursuing employment-related collective claims in any court or arbitral forum, unlawfully restricts employees' Section 7 right to engage in protected concerted activity. In the instant case, Administrative Law Judge William L. Schmidt<sup>1</sup> correctly found 24 Hour Fitness USA, Inc.'s (Respondent) arbitration policy (Arbitration Policy) unlawful under the Act because it restricts protected concerted employee activity.

The ALJ found that both the Arbitration Policy's class action ban and its nondisclosure restriction unlawfully limit Respondent's employees from exercising their Section 7 right to engage in employment-related legal actions with other employees. The ALJ found the Arbitration Policy unlawful despite the opt-out provision offered to employees as of 2007, because the Arbitration Policy requires employees to first waive their Section 7 rights and then take some affirmative action to regain those rights. Additionally, the ALJ found that the nondisclosure provision contained in the Arbitration Policy also violates the Act because it imposes limitations on employees' communications regarding their terms and conditions of employment. However, although the ALJ specifically found the Arbitration Policy's nondisclosure provision unlawful and included cease and desist and affirmative language to

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<sup>1</sup> The National Labor Relations Act will be referred to as the "Act;" the National Labor Relations Board as "the Board;" the Administrative Law Judge as the "ALJ;" and the citations to the ALJ's decision are referred to as "ALJD \_\_\_" followed by applicable page and line numbers.

address it in the Notice to Employees, the ALJ did not include a separate Conclusion of Law regarding the nondisclosure provision and did not include such a paragraph in his recommended Order. The AGC respectfully requests that the Board conform the Conclusions of Law and the Order to the Notice to Employees.

Additionally, although the ALJ found the remedial action sought by the AGC appropriate, he inadvertently failed to include in his Order and Notice to Employees that Respondent be ordered to file in the appropriate courts, jointly with affected employees if they so request, motions to vacate any orders for individual arbitration granted at Respondent's request. The AGC respectfully requests that such a remedy be included in the Order and Notice to Employees.

Lastly, as the ALJ found the Arbitration Policy unlawful, as well as its enforcement in legal actions, the appropriate remedy for such a violation must include reimbursement of employees for any attorney's fees and litigation expenses directly related to opposing Respondent's unlawful motions to compel individual arbitration. The AGC respectfully requests that such a remedy be ordered, consistent with Board law.

## **II. FACTS**

Because the AGC is filing limited cross-exceptions to the ALJ's decision, including his factual findings, only the relevant facts are relayed herein.

Respondent is a California corporation that operates fitness centers in seventeen different states including a facility in San Ramon, California. (ALJD 2) Since about 2005, Respondent has maintained and provided to its newly-hired employees an arbitration policy contained in its employee handbook. (ALJD 4-5) The arbitration policy states that any workplace dispute must be arbitrated, and no party shall have the right to bring such a claim on a class or collective basis.

(ALJD 5) Additionally, the arbitration policy contains nondisclosure language that prohibits employees from disclosing “the existence, content, or results of any arbitration” without the consent of both parties. (ALJD 5) Although new employees were asked to sign a handbook receipt form as part of Respondent’s new employee “on-boarding” process, Respondent applied all of its handbook policies, whether or not employees signed the handbook receipt form, thus making the handbook policies a condition of employment. (ALJD 4-5)

Beginning in 2007, Respondent revised its arbitration policy but continued to maintain the prohibition against class actions and disclosure of arbitration. (ALJD 5) Also at this time, the handbook receipt form was revised to include a process to opt out of the arbitration policy, which required obtaining a form by phone request and submitting the form no later than 30 calendar days after receipt of the handbook. (ALJD 6) The new handbook receipt form states that if employees do not opt out, “disputes arising out of or related to . . . employment will be resolved” under the arbitration policy. (ALJD 6)

In or about February 2009, Respondent changed its new employee on-boarding process so that its employee handbook, containing the arbitration policy, was presented electronically to employees. (ALJD 6) However, the arbitration policy’s prohibition against class actions and disclosure of arbitrations remained intact. (ALJD 6-7) The digital version of the arbitration policy added language wherein employees agree to the arbitration policy, declare their understanding of the opt-out procedure as well as that entering their initials and clicking the “click to accept” button commits them to the arbitration policy. (ALJD 7)

Since August 15, 2010, Respondent has sought to enforce the class action ban contained in the arbitration policy in various court cases.

### **III. ARGUMENT**

#### **A. Cross-Exception 1: The ALJ Inadvertent Failure to Conform the Conclusions of Law and the Order to the Notice to Employees Regarding the Unlawfulness of the Nondisclosure Provision (ALJD 18-21)**

The ALJ correctly found Respondent's arbitration policy unlawful under the Act, because it interferes with employees' collective legal activity.. The ALJ also found that the Arbitration Policy's nondisclosure provision violates the Act because it limits employees' Section 7 activities, including communications about their terms and conditions of employment. (ALJD 17, 18) However, the ALJ's Conclusions of Law do not include a specific conclusion that the nondisclosure provision is unlawful. (ALJD 18-19)

Further, the recommended Order only requires Respondent to cease and desist from maintaining or enforcing, or attempting to enforce, those provisions of the arbitration of disputes section of its Team Member Handbook that prohibit employees from bringing or participating in class or collective actions brought in any arbitral or judicial forum that relate to their wages, hours, or other terms and conditions of employment, but makes no mention as to the maintenance and enforcement of the nondisclosure provision. (ALJD 20) Likewise, the recommended Order fails to include affirmative language to remove the nondisclosure provision from the arbitration of disputes section of the Team Member Handbook.

If the Board finds that the nondisclosure provision issue was fully and fairly litigated, it should conform the conclusions of law and the order to the notice (i.e., include a conclusion of law as to the nondisclosure provision and include a remedy for this violation in the order). to reflect such unlawful conduct by Respondent.

#### **B. Cross-Exception 2: The ALJ's Inadvertent Failure to Include in His Recommended Order and Notice to Employees that Respondent Be Ordered to File Motions to**

Vacate Orders for Individual Arbitration Granted at Respondent's Request (ALJD 19-21)

The ALJ found the remedial action sought by the AGC, including the requirement that Respondent request any appropriate court to vacate its order for individual arbitration granted at Respondent's request if a motion to vacate can still be timely filed, to be an appropriate remedy in this case. (ALJD 19) In addition, the ALJ's recommended Order properly requires Respondent to:

Notify any arbitral or judicial tribunal where it has pursued the enforcement of the prohibition against bringing or participating in class or collective actions relating to the wages, hours, or other terms and conditions of employment of its employees since August 15, 2010, that it desires to withdrawal [sic] any such motion or request, and that it no longer objects to it [sic] employees bringing or participating in such class or collective actions. (ALJD 21)

Respondent, however, also should be ordered to file motions to vacate in any arbitral or judicial tribunal in which it has pursued enforcement of the class action ban, in order to best effectuate the purposes and policies of the Act.<sup>2</sup> Any such motion to vacate should be made jointly with the affected employees, if they so request.<sup>3</sup> AGC notes that nothing in this requested

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<sup>2</sup> It should be noted that, 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).

<sup>3</sup> In this regard, AGC points out that 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)

order would preclude Respondent from amending its motion to seek lawful collective or class arbitration rather than a class or collective lawsuit, as long as employees were free to exercise their collective legal rights in some forum.

Such remedies are appropriate under Board law. 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.<sup>4</sup>

However, the ALJ failed to include in the remedy an affirmative obligation that Respondent move jointly with the affected employees, if they so request, to vacate any orders for individual arbitration granted at Respondent's request. Consistent with the ALJ's findings, this remedy should be included in both the Order and Notice to Employees.

C. Cross-Exception 3: The ALJ's Inadvertent Failure to Order Respondent to Reimburse Employees for Any Attorney's Fees and Litigation Expenses Directly Related to Opposing Respondent's Unlawful Motions to Compel Individual Arbitration

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("[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").

<sup>4</sup> As those cases were based on federal-law preemption, rather than an "illegal objective" under *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 737 n.5 (1983), the timing of the preemption was considered in applying the remedy. Here, of course, there is no point of preemption as Respondent's motions were unlawful *ab initio*.

The ALJ failed to order Respondent to reimburse employees for any attorney's fees and litigation expenses directly related to opposing Respondent's unlawful motions to compel individual arbitration. As argued in the AGC's post-hearing brief to the ALJ, such a remedy is necessary to return employees to the *status quo ante*. This is consistent with the Board's usual practice in cases involving unlawful legal actions. See *Bill Johnson's Restaurants*, 461 U.S. at 747, on remand, 290 NLRB 29, 30 (1988), where the Court found that "[i]f 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 policies of the Act."<sup>5</sup>

Indeed, in *J.A. Croson Company*, the Board recently reaffirmed that the reimbursement of legal fees and expenses to parties defending against unlawful legal actions is "a presumptively appropriate remedy." 359 NLRB No. 2, slip op. at 10 (2012). Though a presumptively appropriate remedy, the Board decided not to award litigation fees and expenses in *Croson* because the lawsuit at issue in that case was not unlawful at its inception and because the charging parties did not file a charge with the Board until long after they were aware that were grounds to do so.<sup>6</sup> The Board determined that the award of attorney's fees and costs, in the

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<sup>5</sup> See also *Phoenix Newspapers*, 294 NLRB 47, 51 (1989); *Summitville Tiles, Inc.*, 300 NLRB 64, 67, 77 (1990). It should be stressed that the AGC is not seeking litigation costs due to frivolous legal positions, rather as part of a make-whole remedy under the cases previously cited. Cf. *Heck's, Inc.*, 215 NLRB 765 (1974).

<sup>6</sup> It was not until after the lawsuit at issue in *Croson* was filed that the Act's protection "attached," by virtue of the Board's decision in *Manno Electric*, 321 NLRB 278, 298 (1996), enfd. mem. 127 F.3d 34 (5th Cir.1997) to the union's utilization of the job targeting program. *J.A. Croson Co.*, 359 NLRB No. 2, slip op. at 4.

particular circumstances of that case, were “not necessary to discourage parties from instituting or maintaining preempted lawsuits against conduct protected from the Act.” *Id.*, slip op. at 10.

Contrary to the circumstances in *Croson*, Respondent’s attempts to compel individual arbitration as detailed in the Complaint were unlawful at their inception because Respondent was seeking to prohibit the employees’ collective legal action concerning employment-related matters -- activity that has long been protected by the Act. See, e.g., *Spandsco Oil & Royalty Co.*, 42 NLRB 942 (1942). Moreover, there is no record evidence whatsoever that Charging Party or the employee plaintiffs in the underlying lawsuits detailed in the Complaint had demonstrable awareness that Respondent’s conduct was unlawful under the Act at an earlier point in those underlying legal proceedings. Most importantly, unlike in *Croson*, a cease and desist order alone would be insufficient to discourage parties from filing unlawful motions to compel individual arbitration of employment-related disputes, given the current widespread nature of such conduct.<sup>7</sup>

To remedy the legal consequences of Respondent’s unlawful motions, and return the employees to the *status quo ante*, Respondent should be required to reimburse employees for any attorney’s fees and litigation expenses directly related to opposing Respondent’s unlawful attempts to compel individual arbitration.

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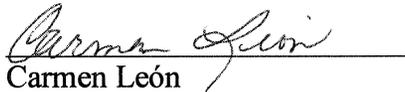
<sup>7</sup> See *Carey v. 24 Hour Fitness USA, Inc.*, 2012 WL 4857562 (S.D.Tex.); *Jasso v. Money Mart Express, Inc.*, 879 F.Supp.2d 1038 (N.D. Cal. 2012); *Morvant v. P.F. Chang’s China Bistro, Inc.*, 870 F.Supp.2d 831, 844 (N.D.Cal.2012); *Delock v. Securitas Security Services USA, Inc.*, 2012 WL 3150391 (E.D.Ark.); *Spears v. Waffle House*, 2012 WL 1677428 (D.Kan.); *De Oliveira v. Citicorp North America, Inc.*, 2012 WL 1831230 (M.D.Fla.); *LaVoice v. UBS Fin. Servs., Inc.*, 2012 WL 124590 (S.D.N.Y.); *Cohen v. UBS Fin. Servs.*, 2012 WL 6041634 (S.D.N.Y.); *Palmer v. Convergys Corp.*, 2012 WL 425256 (M.D.Ga.); *Nelsen v. Legacy Partners Residential, Inc.*, 207 Cal. App. 4th 1115 (2012); *Iskanian v. CLS Transportation Los Angeles LLC*, 206 Cal. App. 4th 949 (2012); *Truly Nolen of America v. Superior Court*, 208 Cal.App.4th 487 (2012).

#### IV. CONCLUSION

For the reasons set forth above, Counsel for the Acting General Counsel respectfully requests that the Board revise the Judge's Conclusions of Law, Order and Notice to Employees as requested in Cross-Exceptions 1, 2 and 3.

Dated at San Francisco, California, this 7th day of February 2013.

Respectfully submitted,



Carmen León

Richard McPalmer

Counsel for the Acting General Counsel

National Labor Relations Board

Region 20

901 Market Street, Suite 400

San Francisco, CA 94103