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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31

COUNTRYWIDE FINANCIAL CORPORATION, COUNTRYWIDE HOME LOANS, INC., AND BANKOF AMERICA CORPORATION and JOSHUA D. BUCK and MARK THIERMAN, THIERMAN LAW FIRM and PAUL CULLEN, THE CULLEN LAW FIRM	Consolidated Cases No. 31-CA-072916 and 31-CA-072918 CHARGING PARTIES' POST-HEARING BRIEF

Charging Parties JOSHUA D. BUCK and MARK THIERMAN of the THIERMAN LAW FIRM and PAUL CULLEN of THE CULLEN LAW FIRM, on behalf of their clients Dominique Whitaker and John White and all other similarly situated and aggrieved employees of the Respondents, hereby submit their Post-Hearing Brief following the hearing in the above-captioned case that was held on December 10, 2012. This Brief is based on the following Memorandum of Points and Authorities, the Parties' Joint Stipulation of Facts and the Exhibits submitted in this case, all the pleadings and papers on file in the related litigation in state and federal court, and any and all documents already on file with the Board.

Dated: January 28, 2013

Respectfully submitted:

/s/Mark R. Thierman
Mark R. Thierman
On behalf of all Charging Parties

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

"By maintaining [a class action waiver] ***as well as enforcing it*** as to the pending cases described above against individuals who are employees within the meaning of *Section 2(3)*, Respondent has violated, and is continuing to violate, *Section 8(a)(1)*." *24 Hour Fitness USA,* 2012 NLRB LEXIS 761*,* at 49 (Nov. 6, 2012) (emphasis added). This quote can be cut from the *24 Hour Fitness USA* decision and pasted in the decision in this case. *In 24 Hour Fitness*, the Judge not only determined that the express class action ban contained in the parties' arbitration agreement violated the National Labor Relations Act (the "Act"), the Judge also concluded that the act of enforcing the group ban and seeking to restrict collective activity, in of itself, violated the Act. Here, the arbitration agreement ("Agreement") does not expressly bar group action; thus, the Agreement standing alone and free from legal manipulation does not violate any provisions of the Act. The manner in which the Agreement is being used, however, does run afoul of the Act. Respondents litigation position that the Agreement bars group action pursuant to *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp*., 130 S. Ct. 1758 (2010) and, therefore, Dominique Whitaker and John White ("Plaintiffs") cannot seek group action in any forum, violates Plaintiffs' rights under Section 8(a)(1).

Respondents' argument that their litigation position is somehow protected by *Bill Johnson Restaurants v. NLRB*, 461 U.S. 731 (1983) and its progeny, is unfounded and the reason is simple. In *Bill Johnson* the employer didn't seek to end all concerted activity (i.e., picketing), it just sought to end violent concerted activity that interfered with its business operations. The employer in *Bill Johnson* would accept peaceful concerted activity which is severable from the unlawful violence. In other words, the litigation position pursued by the employer sought an end result that, if successful, would have only collaterally run afoul of employees' Section 7 rights under the Act, if at all. *See Bill Johnson Rest.*, 461 U.S. at 733. Here, there is no severance possible. The end result that Respondents seek by pursuing their litigation position is the complete and utter annihilation of Plaintiffs' Section 7 rights. If Respondents have their way, Plaintiffs will not be able to act together with others that they seek

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to represent. As a result, by continuing to advance their respective legal position, Respondents' violate Plaintiffs' rights each and every day they seek to limit Plaintiffs ability to seek group wide redress of their respective grievances.

II. STATEMENT OF FACTS

A. The Whitaker and White Actions.

On or about June 16, 2009, Charging Party Mark R. Thierman filed class action lawsuit on behalf of plaintiff Dominique Whitaker and all other similarly situated and aggrieved employees against her employer, Countrywide Financial Corporation and Bank of America Corporation, for various wage and hour violations under federal and California law.[1] Plaintiff Whitaker filed her action both individually and on behalf of a collective group of employees of Respondents. Procedurally, plaintiff Whitaker sought to pursue her employment grievances collectively via three legal mechanisms: (1) as an opt-out class action pursuant to Fed. R. Civ. P. 23, (2) as an opt-in collective action pursuant to section 16(b) of the Fair Labor Standards Act ("FLSA"), and (3) as representative action pursuant to the California Labor Code Private Attorney General Act ("PAGA"). *See Joint Stipulation of Facts ("JT Stip of Facts")*, at ¶ 8, Jt. Exh. 3.

Shortly after the initial filing, Respondents removed the action to federal court. *JT Stip of Facts*, at ¶ 9, Jt. Exh. 4 ("On June 16, 2009, Plaintiffs initiated their lawsuit against Respondents in Ventura County Superior Court, Case No. 56-2009-00347462-CU-OE-VTA.

[1] The case was filed originally in state court but removed to federal court within 30 days. The removal papers filed in the United States District Court contain a true and correct copy of the state court. To the extent necessary to have a complete record, Charging Parties ask the Administrative Law Judge to take Judicial Notice pursuant to Federal Rules of Evidence Rule 201 of all the pleadings, papers and declarations filed by Respondents in the case of *Whitaker v. Countrywide Financial Corporation*, case number CV 09-5898 CAS (PJWx) in the United States District Court for the Central District of California and Docket Nos. 11-73146 and 12-73549 in the United States Court of Appeals for the Ninth Circuit, which are available on line (All parties, including the Board, have electronic access to the federal court filings in the underlying case via the ECF-Pacer system.)

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On August 12, 2009, Respondents removed the case to federal district court, Case No. VC 09-5898 CAS (PJWx)").[2]

A few weeks before the *Whitaker* action was filed, Charging Party Attorney Paul Cullen filed a similar group action against Respondents on behalf of Debra Foley in a different state court venue on May 26, 2009. The parties to the action agreed it was in the best interests of the putative classes to join forces and prosecute their cases in one action. Accordingly, the *Foley* and *Whitaker* actions were ultimately consolidated by stipulation on June 30, 2010.

Almost one year later on June 27, 2011, the parties agreed to substitute new plaintiff John White in for plaintiff Foley. On that same day, Plaintiffs Whitaker and White filed the operative Third Amended Complaint ("TAC"). *JT Stip of Facts*, at ¶ 12, Jt. Exh. 8. Generally, Plaintiffs alleged that Respondents failed to compensate California call center employees to work off-the-clock when booting up their computers and connecting to Countrywide's telephone system at the beginning of the day and when shutting down their computers and logging off the telephone system at the end of the day. Specifically, they alleged the following seven causes of action: (1) failure to pay overtime in violation of California Labor Code sections 510 and 1194 and IWC Wage Order No. 4-200 I; (2) waiting time penalties under Labor Code section 203; (3) failure to provide an accurate itemized wage statement in violation of California Labor Code section 226; (4) failure to pay minimum wage in violation of California Labor Code section 1194 and IWC Wage Order No. 4-2001; (5) failure to pay minimum and overtime wages in violation of the Fair Labor Standards Act (FLSA); (6) unfair competition pursuant to Business & Professions Code sections 17200, et seq.; and (7) failure to provide meal periods and rest breaks.

B. Respondents Seek to Compel Individual Arbitration.

The case was litigated for approximately two years in federal court before Respondents raised the issue of waiver of class, representative or collective actions by operation of the

[2] Respondents refer to the Plaintiff employees in the underlying litigation as "Plaintiffs" since their attorneys were listed as "Charging Parties" by the Board in this case.

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arbitration provisions of the employment agreement. It is no coincidence that Respondents raised this defense just a few months after the Supreme Court decision *in AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011). As Respondents state in their motion for summary judgment in this case, on July 6, 2011, Respondents' counsel made a formal demand on Plaintiffs' counsel that Plaintiffs immediately proceed to arbitration of Plaintiffs' ***individual*** claims and with the selection of an arbitrator pursuant to the Arbitration Agreement. *See* Mandel Decl., Exh. C. That letter constitutes a "stand-alone" violation of the Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §158(a)(1), and the arbitration agreement is now a "code word" for the employer's demand that he employees relinquish their attempt to engage in any class, representative, or collective action. On July 18, 2011, Respondents filed their Answer to the TAC, and specifically asserted as its Third Affirmative Defense that Plaintiffs' group claims were barred by the Arbitration Agreement:

> Plaintiffs' claims are barred in whole or in part because they entered into valid, binding and enforceable arbitration agreements under which they agreed and are required to resolve any dispute with the Defendants by way of individual arbitration.

Id. at 14:8-11.

On August 22, 2011, Respondents filed two identical motions to dismiss in favor of arbitration. *See JT Stip of Facts*, at ¶¶ 13 -14, Jt. Exh. 9-10. In each motion, Respondents make clear that they seek arbitration solely on an individual basis, because either the employees had agreed to such a waiver, or the law would infer that they had so agreed, because there was no explicit mention of classwide relief in the arbitration agreement. Tellingly, Respondents' motion argued the following:

> **B. PLAINTIFF'S ARBITRATION AGREEMENT CONTAINS NO PROVISIONS PERMITTING CLASS OR COLLECTIVE ARBITRATION, AND SPEAKS SOLELY IN TERMS OF ARBITRATING INDIVIDUAL CLAIMS.**
>
> Nowhere in Plaintiffs' Arbitration Agreement is there any provision authorizing any type of class or collective arbitration proceeding. To the contrary, through the use of only the singular form of the defined term "Employee," the provisions speak solely to the arbitration

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of Plaintiffs' (referred to as "Employee" therein) individual Covered Claims against Defendants (referred to as "Company" therein):

- "In recognition of the fact that differences may arise between the Company … and the undersigned ("Employee") which are related to Employee's employment …" Id., Exh. A, preamble ¶ (emph. added).
- "…the Company and the Employee have entered into this [Arbitration Agreement]…" Id. (emph. added).
- "…the Company and the Employee hereby consent to the resolution by arbitration of all claims … associated with Employee's employement … that the Employee may have …" Id., Exh. A, ¶ 1 (emph. added).
- "…Arbitration hearings covered by this Agreement are to be held within the Federal Judicial District in which the Employee was last employed with the Company…." Id., Exh. A, ¶ 5 (emph. added).
- "…nor shall this Agreement be construed in any way to change the status of the Employee from at-will." Id., Exh. A, ¶ 12 (emph. added).
- "This Agreement shall survive the employer-employee relationship between the Company and the Employee and shall apply … after termination of the Employee's employment. Id., Exh. A, ¶ 13 (emph. added).
- "…the Company and Employee each knowingly and voluntarily waive… trial before a jury." Id., Exh. A, ¶ 16 (emph. added).

Id. at pp. 3-4.

Respondents are not naïve, and devote a considerable portion of their August 22, 2011, motions to compel arbitration to an argument that the net effect of the interplay between the Supreme Court's rulings in *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp*., 130 S. Ct. 1758 (U.S. 2010) and *AT&T Mobility LLC v. Concepcion*,131 S.Ct. 1740 (2011) is to effectuate a class action waiver by compelling arbitration. Of course, Respondents insist that said arbitration must be on an individual basis unless otherwise agreed in writing. Indeed, Respondents vigorously advocated this position in their Motion as follows:

C. PLAINTIFF MUST BE COMPELLED TO ARBITRATE ON AN *INDIVIDUAL* BASIS BECAUSE THE PARTIES HAVE NOT AGREED TO CLASS OR COLLECTIVE ARBITRATION

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> Plaintiff must be compelled to arbitrate his claims on an individual basis, and not be permitted to arbitrate on a class or collective basis, because "[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." *Stolt-Nielsen v.AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758, 1775 (2010) (emphasis in original).

Id. at p. 9.

Respondents then argue at length that whenever the agreement to arbitrate is silent on the issue of class wide arbitration, which is the case here, then classwide, representative and/or collective relief is not available for the reasons stated in *Stolt-Nielsen. See id.* at p. 11-12 ("Plaintiff's Arbitration Agreement, like the one at issue in *Stolt-Nielsen*, does not expressly state whether or not the parties agreed to class or collective arbitration. But the only fair reading of it is that the parties contemplated only *individual* arbitration." (Emphasis in original)).

Respondents also argue that just because the net result is a waiver of class, representative or collective action rights, it does not make the agreement unconscionable according to the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion.*

Plaintiffs Whitaker and White opposed Respondent's motion and argued that the Court lacked jurisdiction to order arbitration because, in addition to the waiver arguments, such individual arbitration would deny the employees their rights to engage in collective, concerted activity:

> Just as representation of employees by the named Plaintiffs in a class action against an employer for wages and adherence to the labor code may duplicate and/or supplant many of the benefits of representation by a union, any agreement that inhibits an employee from engaging in that class action lawsuit over wages and working conditions, whether it be as a class member or a leader (named Plaintiff) is just as unlawful as an agreement not to join a labor organization, a so-called "yellow dog" contract. If the term "other mutual aid or protection" in Section 2 of the Norris-LaGuardia Act has the same meaning as it has in Section 7 of the National Labor Relations Act, and if that phrase is not a mere redundancy coming after the terms union activity and collective bargaining, then federal courts, and maybe state courts as well, are constitutionally powerless to give any effect to the class action arbitration provisions of an employment agreement and lack jurisdiction to compel arbitration of group employee disputes against their employer.

JT Stip of Facts, at ¶¶ 15(a), Jt. Exh. 11, pp. 15-16.

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In their Reply, Respondents again argued vociferously that Plaintiffs White and Whitaker must be compelled to ***individual*** arbitration. *See JT Stip of Facts*, at ¶¶ 13 -14, Jt. Exh. 9-10. By just looking at the headings, it is clear that Respondents have always asserted that Plaintiffs can never assert anything other than individual claims in any forum:

> **III. SUPREME COURT PRECEDENT REQUIRES THAT PLAINTIFFS'CLAIMS BE COMPELLED TO INDIVIDUAL ARBITRATIONS**
>
> **A. INDIVIDUAL ARBITRATION MUST BE COMPELLED BECAUSE, UNDER THE UNDISPUTED FACTS PRESENTED, AN ARBITRATOR WILL HAVE NO AUTHORITY TO PRESIDE OVER A CLASS ARBITRATION**
>
> **B. THE NORRIS-LA GUARDIA ACT DOES NOT APPLY TO THIS CASE, MUCH LESS PRECLUDE COMPELLING INDIVIDUAL ARBITRATION**
>
> **C. PLAINTIFFS HAVE FAILED TO ESTABLISH THAT A CLASS-ACTIONWAIVER—DE FACTO OR DE JURE—IS UNENFORCEABLE HERE**

Id. at pp. 13-17.

C. United Stated District Court Judge Christina A. Snyder Orders the Whitaker and White Actions to Arbitration.

On September 19, 2011, Judge Christina A. Snyder of the United States District Court granted the Respondents' motion to send the case to arbitration. *See JT Stip of Facts*, at ¶ 16, Jt. Exh. 13. Although "Countrywide has unequivocally expressed its intent to compel individual, and not class, arbitration in this case[,]" Judge Snyder did not resolve the issue of whether the action could or would proceed as a group action on an individual basis: "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." *Id.*, at pp. 6, n.2, and 8.

D. Plaintiffs' Writ Petition.

Following the District Court's Order, the Charging Parties (upon behalf of the Plaintiffs), filed a writ of mandamus with the Ninth Circuit Court of Appeals, *See JT Stip of Facts*, at ¶ 22, Jt. Exh. 19. Essentially, Charging Parties argued that under the provisions of the

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Norris LaGuardia Act, 29 U.S.C. §102, the United States District Court did not have jurisdiction to order the parties to arbitration where even a potential result would be denial of class, representative or collective relief based solely upon the agreement of the employees.

Respondents answered the petition by mostly arguing that the matter was not ripe for appellate review but confirmed that the purpose of their motion was to compel employees to forgo any and all class, representative or collective relief. Case: 11-73146 (Dkt Entry: 7-1) ("Answer to Petition for Writ of Mandamus") (repeating that "Defendants filed their Motion, seeking to compel Petitioners to submit their claims to *individual* arbitration in light of the fact that the Arbitration Agreement was silent with regard to class arbitration." (citing *Stolt-Nielsen v. AnimalFeeds Int'l Corp.*, 130 S.Ct. 1758, 1775 (2010))).

Following Charging Parties' reply, *see* Case: 11-73146 (Dkt Entry: 8) ("Reply to Opposition to Petition for Writ of Mandamus"), the Court of Appeals issued its Order denying the writ, simply stating that " petitioners have not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus." *See* Case No. 2:09-cv-05898-CAS-PJW, Docket No. 71 ("Order").

E. Respondents' Writ Petition.

Most recently, Respondents filed their own writ of mandamus with the Ninth Circuit Court of Appeals complaining that the trial court should have decided that as a matter of law, the arbitration agreements preclude class, representative or collective relief, and that the trial judge should not have left the issue for the arbitrator to decide. *See JT Stip of Facts*, at ¶ 23, Jt. Exh. 20. Respondents' Writ was denied by the Ninth Circuit. *See* Case No. 2:09-cv-05898-CAS-PJW, Docket No. 81 ("Order").

As evidenced by the two competing writ petitions, both parties agree that the District Court should have addressed the class action waiver issue as a matter of law but each side advocates for the exact opposite result.

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III. ARGUMENT

A. RESPONDENTS VIOLATE THE ACT BY INSISTING THAT PLAINTIFFS HAVE WAIVED THEIR RIGHTS TO ASSERT COLLECTIVE, CLASS , OR REPRESENTATIVE ACTION CLAIMS IN ANY FORUM

Ever since Respondents moved to compel Plaintiffs to arbitration, their litigation position has remained the same—***Plaintiffs have waived their right to assert a collective, class or representative action in any forum.*** See, e.g., *JT Stip of Facts*, at ¶ 23, Jt. Exh. 20 (Respondents' Writ Petition) (arguing that the District Court should have held that Plaintiffs cannot assert their claims on a class, collective, or representative basis). This position, in of itself, violates the Act.

Merely attempting to enforce a group waiver constitutes a violation of the Act. *See Convergys Corp. and Grant*, 2012 NLRB LEXIS 742, at *6 (Oct. 25, 2012); *24 Hour Fitness USA,* 2012 NLRB LEXIS 761*,* at 49 (Nov. 6, 2012); *Lutheran Heritage Village -- Livonia,* 343 NLRB 646 (2004) (holding that even where an employer rule does not expressly restrict Section 7 activity, an employer's conduct may be deemed to restrict employee Section 7 activity). Indeed, in *Convergys Corp.*, ALJ Arthur J. Amchan concluded that an employer violates the Act in seeking dismissal of the class action suit on the basis of a waiver. 2012 NLRB LEXIS 761*,* at 49 (recognizing that in *D.R. Horton*, the Board explicitly rejected the notion that an employer may seek to have a suit dismissed on the ground that the employees executed a valid waiver). Just like an agreement barred by Section 8(e) of the Act, the very act of enforcing a waiver is the same as coercing or entering into one.

Here, Respondents have aggressively sought to preclude Plaintiffs from asserting their group action claims because, as Respondents allege, Plaintiffs have impliedly waived their right to do so by signing a mandatory arbitration agreement. Respondents' position is based on the United States Supreme Court case *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp*., 130 S. Ct. 1758 (2010). Respondents contend that pursuant to *Stolt-Nielson*, Plaintiffs are only permitted to assert their claims individually in arbitration and are prohibited from asserting any group claims. Respondents claim that because the arbitration agreement is silent on the issue of

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whether Plaintiffs' claims can be asserted in a group action, Plaintiffs have impliedly waived the right to assert their claims in a collective, class, or representative fashion. This argument, and Respondents' attempt to enforce the Agreement so that Plaintiffs can only pursue their wage and hour claims on an individual basis in arbitration, violates Plaintiffs' rights under the Act. Indeed, by having Plaintiffs' collective, class, and representative action thrown out of court and now seeking to prevent Plaintiffs' from pursuing those claims collectively in arbitration, Respondents have foreclosed Plaintiffs' ability to engage in concerted activity.[3] *See D.R. Horton and Cuda,* 2012 NLRB LEXIS 11, at 55.

B. NEITHER *BILL JOHNSON* NOR ITS PROGENY SUPPORT RESPONDENTS' POSITION THAT IT IS SOMEHOW INSULATED FROM CULPABILITY UNDER A CONCOCTED LITIGATION PRIVILEGE

Respondents rebut Plaintiffs' argument that their litigation position violates the Act by arguing that their position is protected, because it is advanced during litigation. The only superficial support for Respondents' argument lies in the *Bill Johnson* progeny of cases. But even a cursory reading of those cases exposes Respondents' argument as unsound and without merit.

The circumstances involving the *Bill Johnson* line of cases are not present here. The *Bill Johnson* line of cases deal with employers' retaliatory legal action against employees who previously filed charges with the Board. *Bill Johnson Restaurants v. NLRB*, 461 U.S. 731 (1983); *BE & K Construction Co.*, 351 NLRB 451. The critical question in those cases was whether the legal action taken against the employee(s) was itself a violation of the Act, not whether the ultimate legal relief sought by the employer was in violation of the Act. For

[3] In *D.R. Horton*, the Board stated that "We need not and do not mandate class arbitration in order to protect employees' rights under the NLRA. Rather, we hold only that employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in *all* forums, arbitral and judicial. 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 classwide arbitration. Employers remain free to insist that *arbitral* proceedings be conducted on an individual basis." 2012 NLRB LEXIS 11, at 55.

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example, in *Bill Johnson*, the employer filed a complaint against various employees for essentially obstructing customer access and libel. 461 U.S. 731 at 734. The end result of the employers' legal action arguably was not the annihilation of the employees' section 7 rights; rather, on its face, the employers' complaint was innocuous and was arguably filed to protect the restaurants' economic base—i.e., customer ingress and egress. Thus, if any Section 7 rights were to be curtailed in *Bill Johnson*, they were collaterally affected.

The same was true in *BE & K Construction Co*., 351 NLRB 451. The employer's retaliatory lawsuit was principally based on the theory that the adversary union had engaged in anti-trust activities in violation of the Sherman Act. 351 NLRB 451 at 459 (The employer filed suit "believing that the Unions were improperly attempting to delay its steel mill modernization project, brought suit against them, contending that the Unions' actions violated Section 303 of the LMRA and Sections 1 and 2 of the Sherman Act."). Again, as in *Bill Johnson*, the employer lawsuit in *BE & K* was not directly targeting the curtailment of Section 7 rights; even if the employer was successful on its claims, the nature consequence would have been that some Section 7 rights may have been tangentially affected.

In essence, what *the Bill Johnson* line of cases say is that a litigation position may not be condemned as an unfair labor practice if it does not directly target conduct protected by the act and if its ultimate goal is not the elimination of an employee's Section 7 rights. *BE & K Construction Co.*, 351 NLRB 451, 458 (Sept. 29, 2007). Or, in using the standard articulated by the Board in *BE & K*, a litigation position would be deemed to be an unfair labor practice if it is objectively baseless and no reasonable litigant could realistically expect success on the merits. *BE & K Construction Co.*, 351 NLRB at 457-59 (Sept. 29, 2007)("[A] lawsuit that targets conduct protected by the Act can be condemned as an unfair labor practice if it lacks a reasonable basis and was brought with the requisite kind of retaliatory purpose. . . . [A] lawsuit lacks a reasonable basis, or is "objectively baseless," if "no reasonable litigant could realistically expect success on the merits." *Id.* at 457.

Here, Respondents cannot realistically expect success on the merits of their position, because the end objective that they seek is the total and complete prohibition of any and all

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forms of concerted legal action. As set forth in *D.R. Horton*, "[t]he Board has long held, with uniform judicial approval, that the NLRA protects employees' ability to join together to pursue workplace grievances, including through litigation." 2012 NLRB LEXIS 11, at *6. By seeking judicial decree (first from the federal District Court, then from the Ninth Circuit) that Plaintiffs shall be forbidden from pursuing their claims in an concerted fashion (i.e., through a collective, class and representative capacity), Respondents have pursued a baseless litigation position that directly attacks Plaintiffs' rights under the Act. Their position cannot be afforded any deference or privilege, because the end result that they seek is simply incompatible with everything that that Act stands for. Accordingly, any attempt that Respondents' make to hide behind *Bill Johnson's* cloak must be rejected.

C. RESPONDENTS HAVE VIOLATED THE ACT BY INSISTING ON THE FORFITURE OF COLLECTIVE ACTION WHETHER OR NOT THEY ARE THE CURRENT EMPLOYERS OF THESE EMPLOYEES.

First, Section 2(3) of the National Labor relations Act, 29 U.S.C. 152(3), covers the participants in this lawsuit—i.e., the "Plaintiffs". Specifically, section 2(3) says:

> The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

This broad definition of an employee applies to anyone who was an employee at the time the grievance arose or who subsequently became an employee at any relevant time. *See*, *Convergys Corp.,* 2012 NLRB LEXIS 742 (noting that applicants for employment are employees within the meaning of section 2(3) of the NLRA); *Phelps Dodge Corporation v*

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NLRB, 313 U.S. 177, 61 S. Ct. 845, 85 L. Ed. 1271 (1944); *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 88, 116 S. Ct. 450, 133 L. Ed. 2d 371 (1995).

In the case of *Eastex, Inc. v. NLRB*, 437 U.S. 556, 564 (U.S. 1978), the United States Supreme Court held that claimants need not be employees of Respondents in an unfair labor practice case in order to be engaged in protected concerted activity by filing litigation on behalf of Respondents' employees as a group. As the Supreme Court stated:

> We believe that petitioner misconceives the reach of the "mutual aid or protection" clause. The "employees" who may engage in concerted activities for "mutual aid or protection" are defined by § 2 (3) of the Act, 29 U. S. C. § 152 (3), to "include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise . . . ." This definition was intended to protect employees when they engage in otherwise proper concerted activities in support of employees of employers other than their own. In recognition of this intent, the Board and the courts long have held that the "mutual aid or protection" clause encompasses such activity.

Second, there can be little doubt that Section 7 applies to Plaintiffs seeking to protect the rights of employees even if they are employed elsewhere. The United States Supreme Court in *NLRB v. Town & Country Elec.*, 516 U.S. 85, 91-92 (U.S. 1995) affirmed the Board's broad reading the term employee to include paid union organizers working as "salts" for a company at the same time they were working for the union. In upholding that the Act covers undocumented aliens in the case of *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984) the Supreme Court noted that the "breadth of § 2(3)'s definition is striking: the Act squarely applies to 'any employee.'" 467 U.S. at 891. The only limitations are specific exemptions for agricultural laborers, domestic workers, individuals employed by their spouses or parents, individuals employed as independent contractors or supervisors, and individuals employed by a person who is not an employer under the NLRA. *See NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 189-190, 70 L. Ed. 2d 323, 102 S. Ct. 216 (1981) (certain "confidential employees" fall within the definition of "employees"); *Phelps Dodge Corp. v. NLRB*, 313 U.S. at 185-186 (job applicants are "employees").

There certainly are NLRB cases protecting former employees who file legal actions against retaliation by former employers. In *Federal Security, Inc.*, *336 N.L.R.B. 703, (*October

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1, 2001) affirmed on remand at *Fed. Sec., Inc.,* 2012 NLRB LEXIS 710 (N.L.R.B. Sept. 28, 2012), the Board held that the Respondents violated Section 8(a)(1) of the Act by filing and maintaining a State-court lawsuit alleging that 17 *former* employees engaged in malicious prosecution and an abuse of process by filing an unfair labor practice charges and providing supporting evidence to the Board. When the employer argued that the former employees were not protected by Section 7 of the Act, Administrative Law Judge Robert A. Giannasi wrote:

> Respondent's second argument is equally unpersuasive. It asserts that the former employees -- the defendants in the state court action -- are no longer employees of Federal Security or employees under the Act. To the extent that this is a variant of its first argument, it must fail for the same reason as set forth above. But to the extent that it focuses on employee status alone, I do not understand the argument. Board jurisdiction turns on employer status, not employee status. Not only employees, but any person may file an unfair labor practice charge. See *Apex Investigation & Security Co*., 302 NLRB 815, 818 (1991). As discussed more fully below, free access to the Board's processes is vital to enforcement of employee rights under the Act, irrespective of the identity of those filing unfair labor practice charges. In any event, the defendants were sued in state court for actions taken as employees in the earlier unfair labor practice case. I find, therefore, that, for the purposes of this case, the defendants in the state court lawsuit are employees within the meaning of the Act, as they were in the earlier case.

Third, if Respondents are acting as assignees or agents of the employer to enforce the agreement to arbitrate then they must stand in the shoes of the employer whose rights they seek to enforce. Respondents cannot claim the perceived benefits of an agreement between and employer and employee to force the employee into arbitrating wage claims and at the same time say it is not an employer or agent of an employer subject to the Act. The Third Amended Complaint alleges a class of the employees of Respondents,[4] and the subject matter of the

[4] Paragraph 10 of the Third Amended Complaint, states:

> The central allegation to this complaint is that Plaintiffs and all others similarly situated, who are or were employed by Defendants during the Relevant Time Period were required to boot up their computers and connect to Defendants' telephone system prior to clocking in each day. Defendants similarly required Plaintiffs and all others similarly situated to shut their computers down and disconnect from Defendants' telephone system after clocking out each day. This

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arbitration is the employment claims of those employees. Just like the former employees of *Federal Security, Inc*., even if the Plaintiffs were not the employees of the Respondents, their claims arose out of the employment relationship, and Respondents are each an employer engaged in commerce. Under established Board policy, where the person for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished, the relationship is one of employment. *See Coca-Cola Bottling Company of New York, Inc.,* 133 NLRB 762; *Mound City Yellow Cab Company*, 132 NLRB 484. If Respondents want to hide behind an implied class action waiver within an arbitration clause in an employment agreement, then they are certainly affecting the terms and conditions of employment of these employees sufficiently to be covered by the rulings of the NLRB in this case.

D. *D.R. HORTON* MUST BE FOLLOWED BECAUSE THE FACTS ARE NOT MATERIALLY DIFFERENT IN THIS CASE AND THE NLRB HAS NOT RECONSIDERED ITS DECISION NOR HAS THE UNITED STATES SUPEME COURT REVERSED THE BOARD ON THIS MATTER

As stated by ALJ Amchan in *Convergys Corp.*: "The parties appear to recognize that I am bound by the Board's decision in *D. R. Horton, Inc*., 357 NLRB No. 184 (2012) which is pending before the United States Court of Appeals for the Fifth Circuit. Respondent submits that the Board wrongly decided that case. However, unless it is materially distinguishable from the instant case, I am bound to conclude that Respondent violated the Act as alleged." 2012 NLRB LEXIS 742.

The facts presented by this case parallel those in *D.R. Horton*. In January 2006, D.R. Horton, on a corporate-wide basis, began to require each new and current employee to execute a "Mutual Arbitration Agreement" (MAA) as a condition of employment. In both *D.R. Horton*

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off the clock time worked by Plaintiffs and all others similarly situated, was systematic and continuous."

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and in this case, employees were required as a condition of employment to agree that all employment-related disputes had to be resolved through individual arbitration rather than in court. Two years later, a D.R. Horton employee filed a class action lawsuit for overtime wages under the FLSA, and the employer moved to compel arbitration on an individual basis, just as is being done in this case. Pursuant to *Bill's Electric,* 350 NLRB 292, 296 (2007), and U-*Haul Co. of California*, 347 NLRB 375 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007), the NLRB held that by forcing the arbitration of only individual complaints, "prohibits the exercise of substantive rights protected by Section 7 of the NLRA".

The facts of this case are essentially the same as the facts in D.R. Horton.

Specifically, Respondents have repeatedly admitted that they filed a motion to enforce an arbitration agreement on an individual basis only and attempted to preclude class action claims. And although the written arbitration agreement does not expressly exclude class actions in this case, Respondents insist that a class action waiver must be implied under the United States Supreme Court's opinion in *Stolt-Nielsen v. AnimalFeeds* Int'l Corp., 130 S.Ct. 1758, 1775 (2010), because class action arbitration is not expressly included in the agreement itself. As Respondents stated in their papers before the Ninth Circuit:

> On August 22, 2011 Defendants filed their Motion, seeking to compel Petitioners to submit their claims to individual arbitration in light of the fact that the Arbitration Agreement was silent with regard to class arbitration. See, e.g., *Stolt-Nielsen v. AnimalFeeds Int'l Corp*., 130 S.Ct. 1758, 1775 (2010) ("[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.")

Mere silence in the agreement is not enough to distinguish this case from *D.R. Horton*, because the conduct prohibited in *D.R.Horton* is the result Respondents seek here—a class, collective, and group action waiver. Under the Board's precedent, Respondents' conduct is impermissible.

Indeed, in *D.R. Horton* the Board unambiguously held that an employer who maintained or enforced an arbitration agreement containing a class action waiver provisions violated the rights of employees to freely associate and combine for "other mutual aid and protection" under

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the NLRA. It doesn't matter whether the waiver language is expressed or implied by law; it is still unlawful to insist on the waiver:

> The Norris-LaGuardia Act, in sum, protects concerted employment-related litigation by employees against federal judicial restraint based upon agreements between employees and their employer. Consistent with the terms and policy of the Norris-LaGuardia Act, an arbitration agreement imposed upon individual employees as a condition of employment cannot be held to prohibit employees from pursuing an employment related class, collective, or joint action in a Federal or State court. Such a lawsuit would involve a "labor dispute" under Section 13 of the Norris-LaGuardia Act: a "controversy concerning terms or conditions of employment." The arbitration agreement, insofar as it sought to prohibit a "lawful means [of] aiding any person participating or interested in" the lawsuit (Sec. 4) such as pursuing or joining a putative class action-- would be an "undertaking or promise in conflict with the public policy" of the statute (Sec. 3).

Further, the language of Section 8(a)(1) of the NLRA should be read broadly to prohibit seeking to enforce any agreement, express of implied, in such a way as to force employees to give up their section 7 rights. Traditionally, a yellow dog contract was a promise not to engage in union activity, or a promise not to join an employee organization opposed to the employer. There is no practical difference between an agreement not to join a union and an agreement not to join a litigation class. And the listing of two types of yellow dog contracts in section 3(a) and (b) of the NLGA begins with the phrase "including. . ." thus indicating these are not the only type of yellow dog contracts prohibited by the statute. Thus, the NLRB statement in *D.R. Horton* about section 7 of the NLRA applies as well to Section 2 and 3 of the NLGA: "Any contention that the Section 7 right to bring a class or collective action is merely "procedural" must fail. The right to engage in collective action--including collective legal action--is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest."

Clearly, an attempt by any employer to prohibit employees from pursing class, representative or collective relief is an unfair labor practice. *Harco Trucking, LLC,* 344 N.L.R.B. 478, 482 (N.L.R.B. 2005) (ALJ Pollack: "Respondent does not deny that Wood was engaged in protected concerted activities in filing and maintaining the class action lawsuit against Harco Company."); United Parcel Service, 252 NLRB 1015, 1018, 1022 fn. 26 (1980),

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enfd. 677 F.2d 421 (6th Cir. 1982) (class-action lawsuit alleging that employer failed to provide rest periods required by state statute was protected concerted activity); *see also* Ann C. Hodges, "Can Compulsory Arbitration Be Reconciled with Section 7 Rights?", 38 Wake Forest L. Rev. 173, 187-200 (2003) (tracing doctrinal developments). The Board's position has been uniformly upheld by the courts of appeals. *See, e.g.*, *Brady v. National Football League*, 644 F.3d 661, 673 (8th Cir. 2011) ("a lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is 'concerted activity' under § 7 of the National Labor Relations Act") (emphasis in original); *Mohave Elec. Co-op, Inc. v. NLRB*, 206 F.3d 1183, 1188, 340 U.S. App. D.C. 391 (D.C. Cir. 2000) (petition for injunction supported by fellow employees and co-signed by a coworker was protected concerted activity).[5]

As set forth in the statement of facts section above, the language of the motion to compel individual arbitration makes clear that the Respondents seek to enforce a waiver of the right to engage in protected concerted activity of class, representative and collective actions. And the content of their opposition to the writ, and their filing of a second writ, all shows that Respondents seek solely to deprive employees of the right to file a class, representative or collective action. As the NLRB said in *D.R. Horton*, "In fact, the provisions of the Norris-LaGuardia Act prohibit the enforcement of a broad array of "yellow dog"-like contracts, including agreements comparable to that at issue here."

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[5] Footnote 4 of *D.R. Horton* contains a veritable laundry list of federal district and appellate court rulings affirming the Board's position that the filing of a civil action as well as a class action is a protected, concerted activity under the NLRA. In footnote 18 of *D.R. Horton*, the NLRB distinguishes two district court opinions holding that class action waivers do not violate the NLRA. In addition to the reasons given by the NLRB, there is another reason to disregard such opinions: district courts do not have jurisdiction to decide unfair labor practice charges that privilege being delegated to the NLRB. Review by the Court of Appeals for any Circuit is not binding on the board, except in that case alone. Only the Board itself, or the United States Supreme Court, can change the Board's position on waiver of class action rights embedded within an arbitration agreement.

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E. THIS IS NOT A MERE FORUM SELECTION PROVISION— RESPONDENTS ADMIT THAT THEY ARE SEEKING TO ENFORCE A CLASS, REPRESENTATIVE AND COLLECTIVE ACTION WAIVER AGAINST EMPLOYEES CLAIMING WAGE LAW VIOLATIONS

In this case, Respondents are not seeking the mere change of forum; Respondents are demanding that the forum hear claims only on an individual basis, because that is what the employees ostensibly have allegedly agreed to by legal implication from not including class remedies in the arbitration agreement. Respondents have asserted that "Plaintiff should not only be ordered to submit his[/her] claims to arbitration, but to do so on an individual basis, because class or collective arbitration would be patently incompatible with the parties' agreement to arbitrate." Respondents further assert that "the only fair reading of … [the arbitration agreement] is that the parties contemplated only *individual* arbitration." If the language of the arbitration clause didn't prohibit class actions at the time of signing, it does now. Unless the Respondents are forced to abandon their claims that the employees have waived by agreement their rights to class action treatment, which Respondents do not, then the insistence of arbitration is merely code for an enforcement of a class action waiver.

F. THERE IS NO 'FREE WILL' EXCEPTION TO SECTION 7 OF THE NLRA

Respondents impliedly argue that workers ought to be able to voluntarily waive the right to bring a class action lawsuit as a matter of free will. Just as a person may not voluntarily indenture himself into slavery, social policy prohibits any employee from agreeing to waive his Section 7 rights. In *24 Hour Fitness USA, Inc*., 2012 NLRB LEXIS 761 (N.L.R.B. Nov. 6, 2012), the arbitration provision had an "opt out" provision, which the Administrative Law Judge considered merely illusionary, because the vast majority of employees would not opt out, and therefore, the employees who did opt out were precluded from engaging in concerted activity with those who did. In the words of the opinion:

> Respondent's arbitration policy unlawfully requires its employees to surrender core Section 7 rights by imposing significant restraints on concerted action regardless of whether the employee opts to be covered by it or not. For the purposes of worker rights protected by Section 7, the opt-out process designed by the Respondent is an illusion. The requirement that employees must affirmatively act to preserve rights already

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> protected by Section 7 rights through the opt-out process is, as the Acting General Counsel argues, an unlawful burden on the right of employees to engage in collective litigation that may arise in the future. Board precedent establishes that employees may not be required to prospectively trade away their statutory rights. *Ishikawa Gasket American, Inc.*, 337 NLRB 175, 175-176 (2001).

Regardless of the outcome on appeal of *D.R. Horton*, as Judge William L. Schmidt noted in his opinion in *24 Hour Fitness USA, Inc*., 2012 NLRB LEXIS 761, 36-41 (N.L.R.B. Nov. 6, 2012), there is a seventy year history against agreements with employees to waive collective rights, such as the right to bring class, representative or collective actions in court. The right to engage in collective action is not a mere procedural right, it is at the heart of the nation's current labor policies, and no legislation has changed that focus. A yellow dog contract is simply an agreement between an employer and its employees not to engage in collective action. For many employees, statutory wage hour laws offer the protections once available only through union contracts. Likewise, in recent years, the mechanism of a class, representative or collective action has replaced, or supplemented, the union grievance mechanism as a method of enforcement of those statutory rights as union membership in the private sector declines. The arbitration agreement in this case is nothing more than a modern day yellow dog contract, because within an arbitration forum selection provision of the employment agreement employees give up their ability to enforce those statutory wage rights on a group basis. As Judge Schmidt states:

> Employer devised agreements that seek to restrict employees from acting in concert with each other are the raison d'etre for both the Norris-LaGuardia Act and Section 7 of the NLRA. The congressional findings giving rise to NLRA and Norris-LaGuardia plainly state that these statutes were intended to correct the massive imbalance in bargaining power between the individual worker and his employer. To correct this imbalance, Congress empowered workers to act concertedly for their mutual aid and benefit in the workplace. Thus, the public policy declaration in Section 2 of the Norris-LaGuardia Act passed in 1932 states:
>
> > Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of

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> association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . 29 USC § 102. (Emphasis added)

Similarly, Section 1 of the NLRA states in part:

> The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries. 29 USC § 151.

In the 1930's, nothing could be more destructive of the right to engage in concerted activity for mutual aid and protection as an agreement by the employees to refrain from union membership, i.e. a traditional yellow dog contract. And in the year 2013, nothing can be more destructive of the right to engage in concerted activity for mutual aid and protection as an agreement by the employees to refrain from participating in a class, representative or collective action in litigation. The mere insistence on such a provision is and has always been prohibited by the Act.

IV. CONCLUSION

For the reasons stated above, the Charging Parties, on behalf of their clients Dominique Whitaker and John White and all other similarly situated and aggrieved employees of the Respondents, submit that the Administrative Law Judge should rule that Respondents' actions have violated Plaintiffs' Section 7 rights under the Act.

DATED: January 28, 2013. THIERMAN LAW FIRM

By: /s/Mark R. Thierman
Mark R. Thierman
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PROOF OF SERVICE

CASE NAME: ***Countrywide Financial Corporation, Countrywide Home Loans, Inc., and Bank of America Corporation***
COURT: United States of America National Labor Relations Board, Region 31
CASE NOS.: 31-CA-072916 and 31-CA-072918

I, Jasmin Williams, am over the age of eighteen years and not a party to the within action; my business address is 7287 Lakeside Drive, Reno, Nevada 89511.

On January 28, 2013, I served the **CHARGING PARTIES' POST-HEARING BRIEF** on the interested parties stated below, through their attorneys of record, by facsimile transmission, by personal delivery or by placing true copies thereof in sealed envelopes addressed as shown below for service, as designated below:

XX **FIRST CLASS MAIL** - I caused each such envelope, with first-class postage thereon fully prepaid, to be deposited in a recognized place of deposit of the U.S. mail in Reno, Nevada, for collection and mailing to the office of the addressee on the date shown below following ordinary business practices.

____ **BY COURIER SERVICE** - I caused each such envelope to be deposited with the Federal Express, a courier service.

____ **BY FACSIMILE SERVICE** - I caused a true copy thereof to be transmitted on the date shown below from telecopier (775) 703-5027 to the telecopier number published for the addressee.

____ **BY PERSONAL SERVICE** - I caused each document identified herein to be delivered to a courier employed by a courier service with whom we have a direct billing account, who personally delivered the document identified herein to the addressee on the date below.

****SEE ATTACHED SERVICE LIST****

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on January 28, 2013 at Reno, Nevada.

Jasmin Williams

SERVICE LIST

(Countrywide Financial Corporation, Countrywide Home Loans, Inc., and Bank of America Corporation ~ United States of America National Labor Relations Board)

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