

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 14**

In the Matter of:	:	
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	:	
CONVERGYS CORPORATION,	:	Cases 14-CA-075249 and
	:	14-CA-083936
	:	
and	:	
	:	
HOPE GRANT, An Individual.	:	

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**CONVERGYS CORPORATION'S ANSWERING BRIEF TO  
COUNSEL FOR THE GENERAL COUNSEL'S CROSS-EXCEPTIONS**

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Pursuant to § 102.46(f)(1) of the Board's Rules and Regulations, Respondent Convergys Corporation ("Respondent" or the "Company" or "Convergys") files this Answering Brief to Counsel for the Acting General Counsel's ("General Counsel") Cross-Exceptions to the decision of the Administrative Law Judge ("ALJ").

**I. INTRODUCTION**

Even assuming that the ALJ's decision is correct on the merits (which, as the Company has argued extensively in briefing, it is not), the General Counsel's Cross-Exceptions (the "Cross-Exceptions") seek remedies that go far beyond what is necessary to effectuate that decision or the purposes of the Act. First, the General Counsel asks that the Company be ordered to reimburse Charging Party Hope Grant for attorney fees allegedly expended in opposing the Company's Motion to Strike Class and Collective Allegations (the "Motion to Strike"). The General Counsel has offered no

legal support for this request, however, as his Brief in Support of Cross-Exceptions (the “Cross-Exceptions Brief”) only cites cases ordering reimbursement of legal fees in situations where—unlike in this case—the employer brought suit against its employees in retaliation for their filing an unfair labor practice charge. What is more, the General Counsel broadly requests that the Company be ordered to notify courts and employees that it will not oppose the seeking of collective or class type relief, despite the law’s clarity that the Company remains free to oppose such relief on *any and all* lawful bases, even if the Waiver is found to violate the Act. Finally, the General Counsel curiously asks that the Company withdraw a non-existent motion for individual arbitration, despite the fact that all Parties have repeatedly acknowledged that there is no arbitration agreement—let alone a motion to compel arbitration—at issue in this matter. Thus, for the reasons articulated in this Answering Brief, the Board should deny in part the General Counsel’s Cross-Exceptions.

## **II. ARGUMENT**

### **A. The Charging Party Is Not Entitled to Attorney Fees.**

The General Counsel is incorrect on a number of fronts with respect to his contention that the ALJ should have ordered “Respondent to reimburse Charging Party Hope Grant for any attorney’s fees and litigation expenses directly related to responding to Respondent’s Motion to Strike Class and Collective Allegations.” (Cross-Exceptions Brief, p. 2.) First and foremost, the line of cases upon which the General Counsel relies in requesting attorney fees is entirely inapplicable to the facts of this case. Each of the three opinions cited by the General Counsel in his request for attorney fees involved a state court lawsuit filed *by the employer* in *retaliation* for the employees’ (or Union’s) filing an unfair labor practice charge. *Bill Johnson’s Restaurants, Inc. v. NLRB*, 461

U.S. 731 (1983); *Phoenix Newspapers*, 294 NLRB 47, 50–51 (1989); *Summitville Tiles, Inc.*, 300 NLRB 64, 67 (1990). Indeed, the Supreme Court in *Bill Johnson's* did not, as the General Counsel suggests, hold that an employee is entitled to legal fees whenever any violation of the Act is found; rather, it held that legal fees may be awarded if it is determined that “*the suit had been filed in retaliation for the exercise of the employees' § 7 rights.*” 461 U.S. at 747 (emphasis added).

In stark contrast, this matter involves a federal suit brought *by the Charging Party* in which the Company has defended itself, in part, based on the class and collective action waiver (“Waiver”). Unlike in the *Bill Johnson's* line of cases, the Company did not initiate the lawsuit *at all*, let alone in order to retaliate against the Charging Party for engaging in protected concerted activity. Rather, the Company has simply sought to defend itself based on the Waiver, to which its employees freely and voluntarily agreed.

Moreover, in the *Bill Johnson's* line of cases, the analysis is a two-step process. The legal action that the Board seeks to enjoin must lack a reasonable basis in law or fact as well as being filed in retaliation for the exercise of Section 7 rights. In this connection, it is important to recognize, as is discussed in detail in the Company's briefs in support of its exceptions, that the Company and many other employers have successfully relied upon identical or similar waivers in defending class and collective actions. Clearly, the General Counsel cannot meet the lacks a reasonable basis requirement. Thus, it would be anomalous for the Board to award attorney fees to the Charging Party simply because the Company raised a defense that has been deemed meritorious by nearly every court to consider it. See, e.g., *Owen v. Bristol Care, Inc.*, --- F.3d ----, 2013 WL 57874 (8th Cir. 2013). This case is further distinguished from the *Bill*

*Johnson's* line of cases because there has been no allegation or finding that the Company had a retaliatory motive in defending itself by seeking to enforce its Waiver.<sup>1</sup>

Thus, *Bill Johnson's* and its progeny are clearly inapplicable, and there is no legal basis for the General Counsel's request that Convergys be ordered to pay the Charging Party's attorney fees for opposing the Motion to Strike.

Since reliance on the *Bill Johnson's* line of cases is unavailing, that leaves only the line of cases in which the Board awards attorney fees where an employer has committed serious unfair labor practices to which it has raised frivolous defenses.<sup>2</sup> See *Frontier Hotel & Casino*, 318 NLRB 857, 864 (1995) ("We fully recognize the extraordinary nature of [an award of attorney fees] and, under the policy articulated in this case, we reserve it for cases involving frivolous defenses and the most serious unfair labor practices."). Seeking to enforce the Waiver in this case is far from the kind of serious unfair labor practice for which the Board has awarded attorney fees. See e.g., *Alwin Mfg. Co.*, 326 NLRB 646 (1998) (implementing bargaining proposals without reaching impasse); *Frontier Hotel & Casino*, supra. (surface bargaining). Additionally, based on the determinations of the courts that this waiver or similar waivers are valid and enforceable, it cannot be argued that the Company has asserted anything akin to a frivolous defense.

What is more, an award of attorney fees is inappropriate in light of the procedural posture of the lawsuit in which the Motion to Strike was filed. At this time, the district

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<sup>1</sup> Based on the Board's decision in *BE & K Construction Co.*, 351 NLRB 451, 456 (2007), the filing and maintenance of a reasonably based lawsuit does not violate the Act regardless of the motive for the lawsuit.

<sup>2</sup> General Counsel apparently recognizes that this case does not fall into this category of attorney fee awards because he does not assert a basis for the reimbursement of attorney fees other than the *Bill Johnson's* line of cases.

court has yet to rule on the Company's Motion to Strike or the Charging Party's motion for conditional certification; thus, there remains the very real chance that the court will not allow the suit to proceed as a class or collective action. Similarly, the court has not yet ruled on the merits of the plaintiffs' substantive claims, leaving open the possibility that the Company will prevail on the state and federal wage claims whether litigated individually or as a collective action. To that end, if the Charging Party's suit is found to be nonmeritorious, it would be extraordinary—to say the least—for the Board to award her attorney fees for prosecuting her failed claims. If, on the other hand, the Charging Party's claims are successful, then—unlike the defendants in the *Bill Johnson's* line of cases—she would still be statutorily entitled to attorney fees under the Fair Labor Standards Act. 29 U.S.C. §216(b). In either case, an award of attorney fees by the Board is unnecessary and inappropriate.

Finally, as an evidentiary matter, there has been absolutely no showing by the Charging Party that she has incurred even a single cent of costs in responding to the Company's Motion to Strike. To that end, an award of attorney fees would represent an inappropriate windfall. For these reasons, the General Counsel's request that the Company be ordered to reimburse the Charging Party's legal fees should be denied.

**B. The Company Cannot Be Prohibited from Opposing Class and Collective Action Type Relief on Grounds Other Than the Waiver.**

The General Counsel's Cross-Exceptions Brief also inappropriately overreaches by asking that Convergys be ordered to notify courts and other tribunals in which it has raised the Waiver as a defense "that Respondent no longer opposes the seeking of collective or class action type relief." (Cross-Exceptions Brief, pp. 3–4.) This unqualified request is plainly overbroad, goes far beyond the issues raised in this case

and the ALJ's decision, and conflicts with well-established Board law. In *D.R. Horton*, 357 NLRB No. 184 (2012), the Board explained that “there is no Section 7 right to class certification” and an “*employer remains free to assert any and all arguments against certification.*” *Id.* at sl. op. 10, fn. 24 (emphasis added). In fact, the General Counsel has echoed this sentiment in both his Answering Brief to the Company's Exceptions and his Cross-Exceptions Brief. (General Counsel Answering Brief, p. 9. (“Section 7 does not guarantee class certification if the requirements for certification under Rule 23 are not met (i.e., the putative class lacks sufficient numerosity, commonality, etc.)—as the Board stated in *D.R. Horton*, “[w]hether a class is certified depends on whether the requisites for certification under Rule 23 have been met.”); Cross-Exceptions Brief, p. 7 (“The remedy sought here...does not prohibit Respondent from urging any other lawful defenses it may have that do not interfere with Section 7 rights.”). Thus, even if the Waiver is invalid, Convergys is still entitled to raise “any and all arguments against certification,” and there is no legal basis upon which the Board can broadly order the Company to notify courts that it no longer opposes the seeking of collective or class action type relief. *D.R. Horton*, *supra*.<sup>3</sup>

**C. The General Counsel's Reference to Arbitration Agreements Is Irrelevant.**

Finally, the Board should disregard the General Counsel's request that the Company “be required to withdraw its motion for individual arbitration, if pending, or move the appropriate court to vacate its order or individual arbitration, if Respondent's motion has already been granted and a motion to vacate can still be timely filed.”

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<sup>3</sup> The General Counsel also asks that Convergys be ordered to post a notice at its facilities informing employees that it will not oppose the seeking of collective or class action type relief. (E.g., Cross-Exceptions Brief, p. 5.) This posting request is overbroad and inappropriate for the same reasons articulated above.

(Cross-Exceptions Brief, p. 4.) The Waiver at issue is not included in an arbitration agreement, and the Company has therefore not moved any court for individual arbitration. (Stipulation of Facts, ¶ 8.) Indeed, the Parties have briefed extensively on the issue of whether *D.R. Horton* applies despite the fact that it involved an arbitration agreement and the instant case does not. (See, e.g., Convergys's Reply Brief, pp. 3–4.) The Board should decline to order relief that has no application to this case.

### **III. CONCLUSION**

Simply put, the General Counsel has cited no applicable authority to support its request that the Company reimburse the Charging Party's attorney fees. Indeed, an award of fees by the Board would be either entirely anomalous (if the Charging Party's underlying lawsuit fails) or unnecessary (if the underlying suit is successful). The Board should also reject the General Counsel's invitation to infringe on the Company's well-established and acknowledged right to raise any and all lawful defenses in class or collective action suits. Finally, the General Counsel's requests related to the Company's non-existent motion to compel individual arbitration should be rejected as moot and irrelevant. Thus, for the reasons articulated in this Answering Brief, the Board should deny in part the General Counsel's Cross-Exceptions.

Respectfully submitted,

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Dated: February 15, 2013

**CERTIFICATE OF SERVICE**

I hereby certify that a true and complete copy of the foregoing has been filed electronically and has been served upon the following individuals, electronically and by regular U.S. mail, this 15th day of February, 2013:

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