UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

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 ANSWERING BRIEF TO RESPONDENTS' EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

Submitted by:
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Pursuant to Section 102.46 of the Board's Rules and Regulations, Series 8 as amended, Counsel for the Acting General Counsel submits this Answering Brief in opposition to Respondents' Exceptions to the Decision of the Administrative Law Judge William G. Kocol in the captioned matter. Counsel for the Acting General Counsel hereby respectfully requests that the National Labor Relations Board deny all of Respondents' exceptions.

I. BACKGROUND

A. Procedural History Before the Administrative Law Judge

The Honorable William G. Kocol (hereafter, the "ALJ") opened the record in this matter on December 10, 2012, for the parties to finalize a joint stipulation of facts, and solely for the purpose of postponement. No party called a witness. The Consolidated Complaint alleges, in essence, that Respondent Bank of America ("BAC"), Respondent Countrywide Financial Corporation ("CFC"), and Respondent Countrywide Home Loans, Inc. ("CHL") (collectively "Respondents") violated Section 8(a)(1) of the National Labor Relations Act ("the Act") by maintaining and enforcing an arbitration agreement as a term and condition of employment that infringes upon the Section 7 rights of employees.

On December 18, 2012, the parties filed a Joint Motion and Joint Stipulation of Facts and Joint Exhibits; the Exhibits of Counsel for the Acting General Counsel ("General Counsel") were also submitted on this date.[1]

On February 13, 2012, the ALJ issued his Decision and Recommended Order ("ALJD") finding that Respondent CHL violated Section 8(a)(1) of the Act by maintaining an unlawfully broad policy that interferes with employees' right to file charges with the Board. The ALJ dismissed all other allegations of the Consolidated Complaint.

On March 26, 2013, the General Counsel filed exceptions to the ALJD. On March 27, 2013, Respondents filed exceptions.

II. INTRODUCTION

A. Respondents' Exception No. 1

The ALJ properly found that Respondent CHL maintained an Arbitration Agreement that interferes with employees' right to file charges with the Board. Based thereon, the ALJ properly found that Respondent CHL violated Section 8(a)(1). (ALJD 6:9-31). The relevant facts and the General Counsel's legal argument in support are set forth below.

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[1] The Joint Motion to Accept Parties' Joint Stipulation of Facts and to Close the Record (the "Joint Stipulation") is referred to hereafter 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.

B. Respondents' Exceptions No. 2 and No. 3

In Exception No. 2, Respondents except to the remedy of the ALJ, and in Exception No. 3, Respondents except to the ALJ's Recommended Order. Both the remedy and the Recommended Order flow from the ALJ's proper finding that Respondent CHL violated Section 8(a)(1) of the Act. As the General Counsel is in accord with the ALJ's finding of the Section 8(a)(1) violation, the General Counsel does not separately address Respondents' Exception No. 2 or No. 3. However, the General Counsel excepts to the ALJ's recommended remedy, as discussed below in footnote 4, because it does not remedy the violation as found by the ALJ.

III. The ALJ properly found that Respondent CHL maintained an Arbitration Agreement that interferes with the employees' right to file charges with the Board and violates Section 8(a)(1).

A. In their assertion that it is "facially apparent" that the Arbitration Agreement applies only to litigation filed in a "court of law" and not to claims filed before administrative agencies, Respondents selectively and misleadingly quoted from the Arbitration Agreement. (R. Ex. Brief: pg. 2, 11).

The Board has made clear that mandatory arbitration policies that interfere with an employee's right to file an unfair labor practice charge are unlawful. *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, 377-378 (2006), enf'd mem. 255 F. Appx. 527 (D.C. Cir. 2007). Here, employees would reasonably conclude that the Arbitration Agreement precludes them from filing

unfair labor practice charges because the Arbitration Agreement itself states that it covers "claims for violation of any federal, state or other governmental constitution, statute, ordinance, regulation, or public policy." Thus, on its face, the Arbitration Agreement asserts that it covers unfair labor practice charges filed pursuant to the National Labor Relations Act.

Moreover, the Arbitration Agreement states that its 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 its express terms, the Arbitration Agreement requires arbitration for unfair labor practice claims, and forecloses filing charges with the Board. *U-Haul Co. of California,* 347 NLRB at 377-378 (arbitration agreement unlawfully interferes with employees' right of access to the Board, even where agreement states that it covers claims that would otherwise go to courts). As employees would reasonably read the Arbitration Agreement to prohibit the filing of charges with the Board, Respondents' maintenance of such Agreement therefore violates Section 8(a)(1) of the Act.

In *U-Haul Co. of California*, the Board also addressed Respondents' assertion that the phrase "court of law" applies only to civil litigation matters. The Board stated that "[t]he reference to a 'court of law'...does not by its terms specifically exclude an action governed by an administrative proceeding such as conducted by the National Labor Relations Board." 347 NLRB at 377-378. The

Board went on to state, "[I]nasmuch 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." Id.

B. Respondents conflate the fact that Whitaker's and White's counsel filed unfair labor practice claims with the Board on their behalf with the Board's "reasonable person" standard and in doing so, urge the Board to apply the wrong standard for determining a violation of Section 8(a)(1) of the Act. (R. Ex. Brief: pp, 3, 5, 10)

It is well-established that the Board uses a "reasonable person" standard in determining if an employer's rules unlawfully interfere with employees' Section 7 rights. *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 647 (2004). The Board recently reaffirmed this standard in *Supply Technologies, LLC,* 359 NLRB No. 38 (2012), where *Lutheran Heritage Village* is cited for the proposition that an employer's rule that does not explicitly restrict Section 7 may nevertheless be found to violate Section 8(a)(1) on a showing that employees would reasonably construe the language to prohibit Section 7 activity. *Supply Technologies, LLC,* slip op. at 2. In *Radisson Plaza Minneapolis*, 307 NLRB 94, 94 (1992), the Board unequivocally stated, "[T]he finding of a violation is not premised on mandatory phrasing, subjective impact, or even evidence of enforcement, but rather on the reasonable tendency of such a prohibition to coerce employees in the exercise of

fundamental rights protected by the Act." Id. See also *Heck's Inc.,* 293 NLRB, 1119 (1989).

Here, the Arbitration Agreement itself states it covers "claims for violation of any federal, state or other governmental constitution, statute, ordinance, regulation, or public policy." This statement encompasses the Act. In fact, the only claims not covered by the Arbitration Agreement are those "prohibited by law." (Jt. Exh. 1, paragraph numbered 3; Jt. Exh. 2, paragraph numbered 3). The reasonable employee would act, or be restrained from acting, based on the plain meaning of the Arbitration Agreement.[2] Moreover, this exclusion of claims "prohibited by law," is ambiguous and in large part unknowable to an employee at the time he/she may seek to file a charge with the Board. Board precedent is that ambiguity is construed against the drafter. *Lafayette Park Hotel,* 326 NLRB 824, 828 (1998).

Respondents assert that the General Counsel failed to meet the "requisite burden of proof." (R Ex. Brief: p. 3). Respondents assert the General Counsel's error in this respect is shown by the failure to demonstrate that Respondents have used the Arbitration Agreement to preclude an individual from submitting an administrative charge. But this assertion is inapposite, because this is not the

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[2] The fact that the unfair labor practice charges were filed by legal counsel is potentially instructive, as the involvement of a legal representative demonstrates this very precept, i.e., that an employee would reasonably conclude the Arbitration Agreement prevents him or her from filing an unfair labor practice charge, but counsel, based on his or her legal education and experience -- thus not within the class of a reasonable employee -- would not be so deterred.

standard. Likewise, Respondents' assertion that the filing of the unfair labor practice charges at issue in this matter "demonstrates that [Whitaker and White] themselves did not reasonably believe that they were precluded from filing such claims with the NLRB" is also unavailing. (R. Ex Brief, p. 3). The objective standard, quoted more fully above, "is not premised on...evidence of enforcement..." 307 NLRB 94. Moreover, Respondents' position is incongruous in light of Respondents' persistent and substantial efforts not only to compel individual arbitration but also to block the Board's processes by moving for summary judgment.

C. Respondents deceptively assert that Whitaker and White "voluntarily" entered into the Arbitration Agreement, and the ALJ properly did not find they had voluntarily signed the Arbitration Agreements. (R. Ex. Brief: p. 6)

In his decision, the ALJ properly acknowledged that Whitaker's and White's acceptance of the Arbitration Agreement was far from voluntary. The ALJ states, "The arbitration agreement indicates that each party entered the agreement 'voluntarily'; however, if the employee did not agree to the arbitration agreement, then the employee 'will not be able to move forward in the application process at this time.'" (ALJD 4:30.)

The terms of the mandatory Arbitration Agreement are imposed upon the applicant during the application process, and, if the applicant is offered a position, the terms immediately and automatically become a term and condition of

employment. (Jt. Exh. 1, Jt. Stip. 5(a) through (c), Jt. Stip. 6(a)-(c)). The ALJD notes, "[T]he Supreme Court has indicated that Congress intended to ensure that employees be 'completely free from coercion' with respect to access to the Board." *NLRB v. Scrivener,* 405 U.S. 117, 123 (1972). (ALJD 6:21-23). Here, Respondents ignored and misrepresented the coercive nature of how the employees came to affix their signatures to the Arbitration Agreement. Thus, the ALJ's finding that the employees did not voluntarily accept the Arbitration Agreement is well-supported by the record.

III. CONCLUSION

Based on the foregoing, the ALJ properly found that Respondent CHL violated the Act by maintaining the Arbitration Agreement that interferes with employees' right to file charges with the Board, and his Order is appropriate. However, the ALJ's remedy is inadequate, and the General Counsel excepted to this in Exception No. 17.[3]

In conclusion, the General Counsel submits that Respondents' Exceptions to the decision and order of the Administrative Law Judge should be denied.

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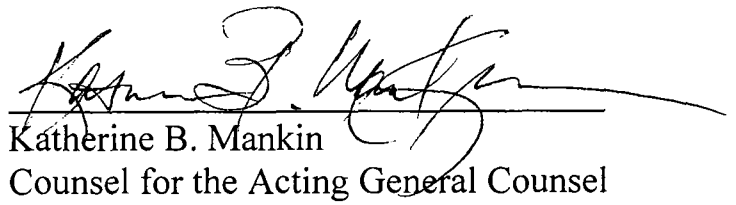
[3] Respondent CHL ceased operations on or about March 31, 2009. (Joint Motion 4 (a) through (m)). Consequently, the ALJ's remedy that Respondent CHL mail a notice to all current and former employees employed since August 22, 2011, would not remedy the violations. Rather, Respondents should be required to mail a copy of the Notice in this matter to all current employees and former employees who have been employed at any time since the Mutual Agreement to Arbitrate Claims has been in effect.

DATED AT Los Angeles, California, this 10th day of April 2013.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I served the attached **COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPODENTS' EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** on the parties listed below on the 10th day of April, 2013:

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