

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

AMERISAVE MORTGAGE CORPORATION

and

AMANDA A. FARAHANY

CASE 10-CA-82519

COUNSEL FOR THE ACTING GENERAL COUNSEL'S
BRIEF TO THE BOARD

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On May 22, 2013, the Board issued an Order Approving Stipulation, Granting Motion and Transferring Proceeding to the Board pursuant to a joint motion filed by Respondent Amerisave Mortgage Corporation (Respondent), Charging Party Amanda A. Farahany (Charging Party)¹, and Counsel for the Acting General Counsel to waive a hearing and transfer the proceedings to the Board for a decision based on the stipulated record. Pursuant to that Order, Counsel for the Acting General Counsel hereby submits this brief.

I. PROCEDURAL STATEMENT

The Regional Director for the Tenth Region issued and served a Complaint and Notice of Hearing in Case 10-CA-82519, on January 23, 2013. (Jt. Ex. 5)² The Complaint alleges that Respondent violated the Act by maintaining and enforcing a mandatory arbitration agreement

¹ Charging Party is an attorney representing the interest of current and former employees of the Respondent, and is the attorney of record in the Zulauf litigation discussed herein.

² References to page numbers in the stipulated record shall appear as SR __, and to paragraph numbers therein as ¶__ or ¶¶s __ - __. References to joint exhibits shall be referred to as Jt.Ex. __, p. __. Reference to specific pages within joint exhibits, when necessary, shall be made to the joint exhibit bates numbering. References to the Respondent's Brief shall appear as R. Br. _____.

that prohibits employees from pursuing class or collective claims in any forum. Further, the Complaint alleges that Respondent independently violated the National Labor Relations Act (“Act”) by enforcing its mandatory arbitration agreement through a motion to compel individual arbitration in the U.S. District Court, Northern District of Georgia.

II. STATEMENT OF ISSUES

1. Whether the Respondent maintained and enforced an unlawful policy requiring employees to refrain from engaging in concerted employment litigation and arbitration of employment disputes in violation of Section 8(a)(1) of the Act?
2. Whether Respondent’s Revised Policy violates Section 8(a)(1) of the Act?³
3. Whether Respondent’s filing on April 16, 2012, of a Motion to Compel Arbitration and Dismiss Collective Action, independently violates Section 8(a)(1) of the Act?
4. Whether the Complaint is barred, in whole or in part, because, on May 22, 2012, thirty-two (32) opt-in Plaintiffs and three (3) named Plaintiffs in Zulauf withdrew their consents to join the Zulauf litigation?
5. Whether the Complaint is barred, in whole or in part, because the Board lacked a quorum at the time it issued its decision in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012)?
6. Whether the Board has the authority to order Respondent to reimburse employees for all reasonable litigation expenses directly related to opposing Respondent’s Motion to Compel or any other legal action taken to enforce the unlawful agreement?

III. STATEMENT OF FACTS

A. The Charges

The original charge in this matter was filed and served on June 6, 2012, and alleged, *inter alia*, that in response to its employees filing of a complaint alleging violation of the Fair Labor Standards Act (“FLSA”) in the United States District Court, Northern District of Georgia, Respondent adopted and maintained an unlawful mandatory arbitration agreement. (Jt. Ex. 1 and

³ In the parties’ stipulated record, the parties’ presented the issues above. It is noted that the first and second legal questions are substantially the same, as only one Arbitration Agreement is alleged to have violated the Act. As such, these issues are addressed in Counsel for the Acting General Counsel’s brief as a single legal issue.

2) On August 29, 2012, an amended charge was filed and served on August 30, 2012. (Jt. Ex. 3 & 4) The amended charge includes a new allegation that Respondent violated the Act by its enforcement of its Arbitration Agreement based on Respondent's prosecution of an April 16, 2012, Motion to Compel Arbitration filed in the United States District Court, Northern District of Georgia, discussed at III.C, below.

B. Respondent's Mandatory Arbitration Agreements

Respondent is a retail residential mortgage company, providing mortgages and related products directly to consumers located throughout the United States.⁴ (SR 3, ¶ 2) Respondent's employees are not represented by a labor organization. (SR 3, ¶ 5) Respondent employs senior mortgage processors ("SMPs") who work mainly from their homes to provide various services related to loan application and processing to Respondent's customers. (SR 4, ¶ 4)

Before June 8, 2011, the Respondent required some of the individuals employed as SMPs to complete its "Amerisave Business Partner Employment Agreement" ("Employment Agreement"). (SR 3, ¶ 6; Jt. Ex. 9) Respondent's Employment Agreement required that all disputes between Respondent and its employees be arbitrated, but did not require employees to waive their right to pursue class or collective actions. (Id.) The Respondent's maintenance and enforcement of this Employment Agreement is not alleged to violate the Act.

On May 31, 2011, a complaint was filed by former SMP's in the United States District Court, Northern District of Georgia, Case No. 1:11-cv-01784-WSD, seeking compensation for alleged violations of the Fair Labor Standards Act ("Zulauf litigation"), discussed in detail at III.C., below. (SR 4, ¶ 7; Jt. Ex. 10) The Complaint sought certification of a collective class of all current and former SMP's who were allegedly not paid overtime to which they were entitled.

⁴ Respondent stipulated to the Board's jurisdiction and its status as an employer within the meaning of the Act. (SR 4, ¶¶ 2 and 3)

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⁴ Respondent stipulated to the Board's jurisdiction and its status as an employer within the meaning of the Act. (SR 4, ¶¶ 2 and 3)

On June 8, 2011, shortly after the Zulauf complaint was filed, Respondent notified all current employees via e-mail that it was adopting a “Revised Arbitration Policy” (“Arbitration Agreement”) to be effective June 22, 2011.⁵ (SR 4, ¶ 8, Jt. Ex. 11) Since June 22, 2011, all employees have been required to agree to the Arbitration Agreement; an agreement that by its terms mandates arbitration of most employment claims and effectively requires employees to waive their right to pursue class or collective actions before an arbitrator. (SR 4, ¶ 8, Jt. Ex. 11).

The Arbitration Agreement provides, in relevant part:⁶

2. Covered claims include, but are not limited to, claims prior and/or subsequent to this policy, regardless of when the claims have occurred or accrued arising under the Age Discrimination in Employment Act (ADEA), Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), the Fair Labor Standards Act (FLSA), 42 U.S.C. § 1981, including amendments to all the foregoing statutes, the Employee Polygraph Protection Act, state discrimination statutes, state wage statutes, and/or common law regulating employment termination, misappropriation, breach of the duty of loyalty, the law of contract or the law of tort, including, but not limited to, claims for malicious prosecution, wrongful discharge, wrongful arrest/wrongful imprisonment, intentional/negligent infliction of emotional distress or defamation.

Conversely, claims for state employment insurance (e.g., unemployment compensation, workers’ compensation, worker disability compensation) or under the National Labor Relations Act are a [sic] not covered, and thus not subject to arbitration. If applicable, statutory or common law claims made outside of the state employment insurance system alleging that Amerisave retaliated or discriminated against an employee for filing a state employment insurance claim, however, are covered claims, and shall be subject to arbitration.

3. ...

⁵ Inadvertently, the Arbitration Agreement that was attached as Attachment 1 to the Acting General Counsel’s Complaint, Jt. Ex. 5, was not filed with the parties’ joint exhibits. The Arbitration Agreement is, however, included as Jt. Ex. 11.

⁶ Around April 2012, Respondent implemented a revised employee manual that incorporates the Arbitration Agreement without material change. (SR. 6, ¶ 14; Jt. Ex. 15)

The arbitrator has no authority to and shall not consolidate claims of different employees into one proceeding, nor shall the arbitrator have the power to hear an arbitration as a class or collective action (a class or collective action involves an arbitration or lawsuit where representative members of a group who claim to share a common interest seek class or collective relief), and you shall not be allowed to submit your claim(s) against Amerisave to arbitration as a representative of or participant to a class or collective action or a claim seeking class or collective relief.

(Jt. Ex. 11)

C. Civil Litigation

On May 22, 2011, in Case No. 1:11-cv-01784-WSD, Charging Party, as counsel, filed a collective action Complaint (Complaint) in the United States District Court, Northern District of Georgia, on behalf of three named plaintiffs, Jeffrey Zulauf, Kal Waymon, and Jason Zulauf (Zulauf litigation). The three named plaintiffs were former SMP's and alleged that Respondent had violated the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq., (FLSA) by failing to pay employees' overtime wages for hours worked. (Jt. Ex. 10) The Complaint further requested certification of a collective action and notice to similarly situated current and former employees. (Jt. Ex. 10) As discussed above, subsequent to the filing of the Complaint, Respondent adopted its revised Arbitration Agreement.

On July 14, 2011, Respondent filed a Motion to Compel Arbitration on an Individual Basis, a Motion to Stay Action and a Motion to Strike Class Allegations ("Motion to Compel"). In its Motion to Compel, Respondent asserted that the original Employment Agreement required arbitration of employment related claims arising under the Fair Labor Standards Act. (Jt. Ex. 12) Respondent further argued in its Motion to Compel that while the Employment Agreement does not specifically prohibit collective actions, it requires arbitration of the parties' FLSA claims and, under extant federal law, the parties to an arbitration agreement cannot be required to arbitrate class or collective actions absent specific agreement to do so. On July 29, 2011, the

Zulauf Plaintiffs filed Motion for Conditional Certification seeking an Order certifying a collective class of current and former SMPs. (SR 6, ¶ 12; Jt. Ex. 13) As the Respondent sought only to enforce the Employment Agreement in this Motion to Compel, an Agreement that Counsel for the General Counsel has not alleged to violate the Act, the Respondent's enforcement thereof likewise is not alleged to violate the Act.

On November 23, 2011, the Honorable Judge William S. Duffey, Jr., issued an Opinion and Order ("Order") on the Respondent's Motion to Compel and on the Plaintiffs' Motion for Conditional Certification. (Jt. Ex. 14) At the time of the Order, in addition to the three named plaintiffs, another 27 plaintiffs had joined the suit through the opt-in procedures, for a total of 30 plaintiffs in the Zulauf litigation. (Jt. Ex. 14, P. 2, bates no. 71) Of those 30 plaintiffs, the judge found that 14 plaintiffs were parties to the Respondent's Employment Agreement that required arbitration of the alleged employment claims.⁷ (Id. at P. 9, bates no. 78) The judge granted Respondent's Motion to Compel arbitration as to the 14 plaintiffs who had signed the Employment Agreement. (Id. at P. 41-42, bates no. 110-111). In addition, Judge Duffey granted in part, Plaintiffs' Motion and conditionally certified a class of former and current SMP's "who did not agree to arbitrate their claims," and further authorized notice to be sent to these potential plaintiffs. However, Judge Duffey specifically denied the Plaintiff's Motion to Conditionally Certify a class with regard to any SMPs who agreed to arbitrate their claims through Respondent's Employment Agreement and/or Arbitration Agreement. (Id. at P. 60, bates no. 129)

⁷ Another four plaintiffs, according to the Order, were also bound to arbitrate their claims based on an arbitration provision in the employee handbook that had terms similar to that set forth in the Employment Agreement. The judge similarly granted the Respondent's Motion to Compel with regard to those four employees bound by the handbook terms.

After the court's conditional certification, additional SMP's opted into the Zulauf litigation. On April 16, 2012, Respondent filed a Second Motion to Compel Arbitration and Dismiss Collective Action ("Second Motion to Compel"), seeking an order compelling arbitration as to five opt-in SMP plaintiffs who signed the June 2012 Arbitration Agreement and the twenty-seven opt-in SMP plaintiffs who had signed the earlier Employment Agreement. (SR 7, ¶ 15; Jt. Ex. 16) On May 22, 2012, an additional 32 opt-in plaintiffs, including the five opt-in plaintiffs who had signed the Arbitration Agreement, filed a Notice of Withdrawal of Consent to Join the Civil Action. (SR 7, ¶ 16, Jt. Ex. 17) Plaintiffs withdrew their Consent in anticipation of the District Court's Order compelling arbitration consistent with the court's November 23, 2011, Order. (SR 7, ¶ 16)

On June 22, 2012, Respondent filed a Motion to Decertify Collective Action ("Motion to Decertify"). (SR 7, ¶ 17, Jt. Ex. 18) Plaintiffs filed no opposition to this Motion to Decertify. On November 29, 2012, Judge Duffey granted Respondent's Motion to Decertify, reasoning that Plaintiffs had failed to establish sufficient evidence to establish that class certification was appropriate. (Jt. Ex. 19) Judge Duffey further dismissed, without prejudice, the claims of all opt-in claimants and granted the Plaintiffs' withdrawal of consent to join the class-wide litigation.

In sum, during the material time period, Respondent petitioned the District Court to compel employees to arbitrate their employment-related legal claims on an individual basis. (SR 8, ¶ 13) Respondent's Second Motion to Compel was, in part, based on the five opt-in Plaintiffs' acquiescence to the Respondent's Arbitration Agreement, and the purported waiver of the right to pursue class and collective claims contained therein.

IV. ARGUMENT AND CITATION TO AUTHORITY

1. Respondent's Arbitration Agreement Violates Section 8(a)(1) of the Act

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in” Section 7 of the Act. 29 U.S.C. §158(a)(1). In *D.R. Horton*, the Board affirmed that “employees who join together to bring employment-related claims on a classwide or collective basis in court or before an arbitrator are exercising rights protected by Section 7 of the NLRA.” *Id.*, slip. op. at 3. The Board found that the appropriate standard to determine whether a workplace policy, including a mandatory arbitration agreement, is unlawful “is that set forth in *Lutheran Heritage Village*, and under that test, a policy such as Respondent’s violates Section 8(a)(1) because it expressly restricts Section 7 activity or, alternatively, because employees would reasonably read it as restricting such activity.” *D.R. Horton*, 357 NLRB No. 184, slip op. at 7, citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). In sum, the Board definitively held in *D.R. Horton* that an employer violates Section 8(a)(1) “by requiring employees to waive their right to collectively pursue employment-related claims in all forums, arbitral and judicial.”

First, Respondent’s Arbitration Agreement explicitly prohibits employees from pursuing employment-related claims as a class or collective action in any forum, arbitral or judicial. An arbitration policy such as Respondent’s is an unequivocal ban on any group legal activity. Respondent’s Arbitration Agreement mandates that employment-related disputes be resolved in arbitration and then forbids the arbitrator from consolidating any claims of different employees, or hearing an arbitration as a class or collective action. (Jt. Ex. 11, P. 1, ¶ 3, bates no. 46) A policy which only leaves one avenue for the resolution of employment-related disputes, and then further restricts that avenue so that disputes may only be heard individually, is clearly a ban on concerted activity. The maintenance of such an agreement foreclosing employees’ protected-concerted activity is a clear violation of Section 8(a)(1) of the Act. Thus, the Respondent’s Arbitration Agreement explicitly restricts Section 7 activity under *Lutheran Heritage Village-*

Livonia and like the agreement in *D.R. Horton*, Respondent's Arbitration Agreement plainly limits Section 7 activity and, as a term or condition of employment, violates Section 8(a)(1).

Second, under the *Lutheran Heritage Village-Livonia* test, even if the Arbitration Agreement does not expressly interfere with Section 7 activity, in *D.R. Horton* the Board expressed a second basis for finding a mandatory arbitration agreement to violate the Act. 357 NLRB No. 184, slip op. at 7. Even absent an express intent to impinge employees' free exercise of their rights under the Act, a policy may still be found unlawful if it is applied to restrict employees' exercise of Section 7 rights. There is no question that Respondent's policy was unlawfully applied.

On May 31, 2011, Respondents' employees filed a Complaint seeking the certification of a collective action pursuant to the Fair Labor Standards Act. (Jt. Ex. 10) On June 8, 2011, absent any other legitimate explanation as to the motivation for adopting its policy, Respondent announced the promulgation of its new Arbitration Agreement that became effective June 22, 2011. In the immediate aftermath of a potential collective action regarding terms and conditions of employment, Respondent required all current and future employees to assent to a mandatory Arbitration Agreement that specifically prohibits employees from pursuing class and collective actions. (Jt. Ex. 11) Based on the timing alone, it is clear that Respondent intended its Arbitration Agreement to insure that its current employees were barred from participating in the pending Zulauf litigation as opt-in Plaintiffs. As evidence of such intent, on April 16, 2012, Respondent filed its Second Motion to Compel arbitration, and asserted that those opt-in plaintiffs who had acknowledged receipt of the Arbitration Agreement were contractually bound to forego their Section 7 right to pursue class or collective claims.

The record clearly demonstrates that Respondent used the Arbitration Agreement to compel individual arbitration when employees have attempted to bring employment-related

collective actions against Respondent. (See Jt. Ex. 16) Under these circumstances, the Arbitration Agreement violates the Act because it “has been applied to restrict the exercise of Section 7 rights.” See, *Lutheran Heritage Village-Livonia*, 343 NLRB at 647.

Thus, because Respondent’s Arbitration Agreement expressly restricted employees’ pursuit of concerted legal claims, and because the Arbitration Agreement was applied to specifically restrict employees’ Section 7 rights, the policy violates the Act under either prong of the test set forth in *Lutheran Heritage Village*. Therefore, the Arbitration Agreement as promulgated and maintained violates Section 8(a)(1) of the Act.

A. Just as in *D.R. Horton*, Respondent’s Class Action Waiver is Imposed as a Mandatory Condition of Employment and Thus Violates the Act

The Board in *D.R. Horton* found that “employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in *all* forums, arbitral and judicial.” 357 NLRB No. 184, slip op. at 12 (2012) (emphasis in original). In *D.R. Horton*, the employer required each new and current employee to execute a mandatory arbitration agreement (MAA) as a condition of employment. *Id.*, slip op. at 1. The MAA required employees to agree, as a condition of employment, that they would not pursue class or collective litigation in arbitration or court. *Id.* The Board reasoned that the MAA clearly and expressly barred employees “from exercising substantive rights that have long been held protected by Section 7 of the Act,” and “implicate[d] prohibitions that predate the NLRA,” on which modern Federal labor policy is based. *Id.*, slip op. at 4, 6.

Just as in *D.R. Horton*, Respondent has violated the Act by imposing a class action waiver as a mandatory condition of employment. Respondent’s Arbitration Agreement is a mandatory condition of employment because employees were informed that “continued employment constituted acceptance” of Respondent’s Arbitration Agreement. (SR 5, ¶ 10) A

Hobson’s choice of “agreeing” to waive their Section 7 rights or foregoing employment is not a choice, but is the imposition of a mandatory term of employment. Based on the foregoing, it is indisputable that for those employees employed on or after June 22, 2011, the Respondent’s Arbitration Agreement was imposed upon them as a condition of employment.

Moreover, Respondent’s Arbitration Agreement impacts not only employees’ rights at the onset, but any future rights. Respondent’s Arbitration Agreement unlawfully interferes with employees’ Section 7 right to engage in collective legal activity by establishing an irrevocable waiver of their *future* Section 7 rights. In analogous circumstances, the Board has found unlawful and unenforceable agreements that condition employment on the employee’s waiver of prospective Section 7 rights, concluding that “future rights of employees as well as the rights of the public may not be traded away in this manner.” *Ishikawa Gasket American, Inc.*, 337 NLRB 175, 175 (2001), *enfd.* 354 F.3d 534 (6th Cir. 2004) (finding unlawful a separation agreement prohibiting the departing employee from engaging in union and other protected activities for a 1-year period); *Mandel Security Bureau, Inc.*, 202 NLRB 117, 119 (1973) (finding unlawful an employer’s conditioning reinstatement on the employee’s refraining from future concerted activities and unfair labor charges, in addition to requesting withdrawal of pending charges).

Inasmuch as the Arbitration Agreement remains in effect, thus continuing to preclude employees from engaging in rights protected by Section 7 of the Act, the violation is complete. In this regard, Respondent’s maintenance of the Agreement as applicable to these employees has violated—and continues currently to violate—Section 8(a)(1) of the Act as alleged, under the rationale of *D.R. Horton*.

B. Board Precedent Dictates Finding Respondent’s Arbitration Agreement Unlawful

In its position statement submitted with the Joint Stipulation, Respondent argues that “employees do not have the right under the NLRA to adjudicate their claims collectively and such procedures may be waived.” Essentially, Respondent asserts that the right to participate in class or collective action is not protected under Section 7 of the Act, and even if such a substantive Section 7 right exists, it can be waived. However, the Board in *D.R. Horton* specifically proclaimed that the right to engage in a class or collective action is protected concerted activity under Section 7 of the NLRA. 357 NLRB No. 184.

Even if *D.R. Horton* were not the controlling case law, the determination that Section 7 of the Act includes employees’ rights to pursue joint, class and collective actions regarding terms and conditions of employment is grounded in seven decades of Board statutory interpretation and case precedent.⁸ Agreements such as Respondent’s Arbitration Agreement are essentially “yellow dog” contracts as they require employees to “promise” not to engage in protected activity. *Barrow Utilities & Electric*, 308 NLRB 4, fn. 5 (1992). The Board has long found that an employer violates Section 8(a)(1) by soliciting such agreements,⁹ as this conduct “has an

⁸ See *Spandsco Oil & Royalty Co.*, 42 NLRB 942 (1942), in which three employees filing a complaint with the FLSA was deemed protected activity; See also *Salt River Valley Water Users Ass’n*, 99 NLRB 849, 853-854 (1952), *enfd.* 206 F.2d 325 (9th Cir. 1953), circulation of employee petition to represent others for FLSA claim found deemed protected-concerted activity.

⁹ *Hecks, Inc.*, 293 NLRB 1111, 1121 (1989) (“[b]y requesting . . . employees to promise to be bound by the Respondent’s written policy that it does not want its employees to be represented by a union and that there is no need for a union or other paid intermediary to stand between the employees and the Company, the Respondent . . . has interfered with, restrained, and coerced [its] employees in the exercise of their rights under Section 7 of the Act, in violation of Section 8(a)(1) of the Act”); *Western Cartridge Co.*, 44 NLRB at 6-8, fn.5, 19 (invalidating individual employment contract that purportedly gave employer right to fire any employee who “participated in a strike or any other concerted activity regarded as interfering with his ‘faithfully’ fulfilling ‘all his obligations,’” because it effectively restricted employees’ right to engage in concerted activity); *Superior Tanning Co.*, 14 NLRB 942, 951 (1939), *enfd.* 117 F.2d 881, 888-91 (7th Cir. 1941) (compulsory individual contracts covering employees’ terms and

inherent and direct tendency to interfere with, restrain, and coerce employees in the exercise of their rights under Section 7 of the Act . . .” *Hecks, Inc.* 293 NLRB 1111, 1121 (1989). In contrast to Respondent’s assertions, the Board has long interpreted the Act to prohibit employers from forcing employees to waive their Section 7 rights by individual employment contract, and this legal conclusion is deeply entrenched in Board law.

C. This Case Does Not Present a Conflict Between the FAA and the NLRA

The instant case, like *D.R. Horton*, does not present a conflict between the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1, et seq., and the NLRA. As the Board in *D.R. Horton* explained: “holding that an employer violates the NLRA by requiring employees, as a condition of employment, to waive their right to pursue collective legal redress in both judicial and arbitral forums accommodates the policies underlying both the NLRA and the FAA to the greatest extent possible.” 357 NLRB No. 184, slip. op. at 12. This is because Section 2 of the FAA “provides that arbitration agreements may be invalidated in whole or in part” for the same reasons any contract may be invalid, including that it is unlawful or contrary to public policy. *Id.*, slip. op. at 11. Inasmuch as the Arbitration Agreement is inconsistent with the NLRA, it is not enforceable under the FAA.

The Board also emphasized that finding an arbitration policy, such as the one presented herein, unlawful does not conflict with the FAA because “the intent of the FAA was to leave substantive rights undisturbed.” *Id.* Although Respondent asserts that the waiver is not of substantive rights but, rather, of procedural rights, the Arbitration Agreement clearly requires employees to forego substantive rights under the NLRA—namely, employees’ right to pursue employment-related claims in a collective or class action—and the Board has so held. *D.R.*

conditions of employment promulgated by the employer to discourage unionization, were unlawful).

Horton, 357 NLRN No. 184, slip op. at 7. Thus, the Arbitration Agreement is unlawful not because it involves arbitration or specifies particular litigation procedures, but instead because it prohibits employees from exercising their Section 7 right to engage in concerted collective legal activity in any forum.

D. The Rules Enabling Act (REA) Deals With Procedural Rights and not With Substantive Rights

Respondent argues that the REA states that the Federal Rules "shall not abridge, enlarge or modify any substantive right," and that class and collective action rules are permissible under the REA because they regulate procedures and do not impact substantive rights. 28 U.S.C. § 2072(b); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 130 S.Ct. 1431, 1443 (2010) (plurality). (R. Br. P. 20) According to Respondent, the Act does not create a substantive right to pursue class and collective actions in federal court. (R. Br. P. 20)

Respondent's arguments fail to acknowledge the fact that the right to participate in collective action is founded in Section 7 of the NLRA, not through the REA. Respondent has purposefully ignored the Board's central holding in *D.R. Horton* that the right of employees under the NLRA to bring class and collective claims is itself a *substantive* right. This being the case, the REA cannot be interpreted to forbid the Section 7 right to engage in protected-concerted activity manifested by way of a class action. Further, Respondent's arguments erroneously presume that only federal courts will be hearing cases absent arbitration. However, workplace disputes are also brought under state law. e.g. *Gentry v. Superior Court*, 42 Cal.4th 443 (2007); *Iskanian v. CLS Transportation*, 142 Cal.Rptr.3d 372 (2012); *Franco v. Arakelian Enterprises, Inc.*, 211 Cal.App.4th 314 (2012). In such circumstances, the REA would more emphatically not apply. In any case, Respondent's reliance on the REA is misguided.

**E. The Supreme Court’s Post-D.R. Horton Decisions Regarding
Enforcement of Arbitration Agreements do not Override Substantive
Rights Guaranteed by the NLRA**

Respondent argues that post-*D.R. Horton* Supreme Court authority renders the Arbitration Agreement enforceable under the FAA, citing *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011).¹⁰ According to Respondent, in *Concepcion* the Court held that “class waiver provisions should not be stricken or be grounds to render entire agreement unenforceable.” (SR 15) On the contrary, in *Concepcion*, the Court did not address substantive rights conferred on employees by an act of Congress. The issue posed by *Concepcion* was whether California state law, deeming unconscionable (and therefore void) any waiver of class arbitration of common-law claims under a consumer contract, was preempted by the FAA. 132 S.Ct. at 1745. The Court held that the state law was preempted by the FAA because the basis on which California found unconscionability was one that is available only to agreements to arbitrate, as opposed to

¹⁰ Respondent makes only passing reference to *Compucredit Corp. v. Greenwood*, ___ U.S. ___, 132 S.Ct. 665, (January 10, 2012) referring only to *Concepcion*’s progeny in its Brief. In *CompuCredit*, the issue presented was whether the Credit Repair Organization Act’s (CROA) civil liability and non-waiver provisions together constitute a “congressional command” sufficient to override the FAA’s mandate that courts enforce arbitration agreements. 132 S. Ct. at 669. The Court held that because Congress, in drafting CROA, did not prohibit or restrict the use of arbitration, the FAA required the Court to enforce the arbitration agreement at issue on its terms. As Justices Sotomayor and Kagan point out in their concurrence, however, Congress need not explicitly state within a statute that arbitration of statutory claims are disallowed in order to find that a statute trumps the FAA. “We have never said as much, and on numerous occasions have held that proof of Congress’ intent may also be discovered in the history or purpose of the statute in question . . . (‘If such an intention exists, it will be discoverable in the text of the [statute], its legislative history, or an ‘inherent conflict’ between arbitration and the [statute’s] underlying purposes’); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987) (“If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent ‘will be deducible from [the statute’s] text or legislative history,’ **or from an inherent conflict between arbitration and the statute’s underlying purposes.**” (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985).” (emphasis added) The *CompuCredit* Court did not narrow the basis on which a statutory conflict would be assessed. In the instant case, Respondent’s mandatory class action waiver creates an inherent conflict between arbitration and Section 7 of the Act -- not because the Respondent’s Arbitration Agreement compels arbitration, but because it compels *individual* arbitration and prohibits collective actions.

contracts generally. *Id.* at 1746. Thus, Supreme Court precedent does not purport to decide the question whether employees can be required, *as a condition of employment*, to waive their substantive right under the NLRA to engage in collective workplace dispute resolution. Nor is the Court likely to make such a leap, given that Section 2 of the FAA recognizes the possibility that arbitration agreements may be invalidated “upon such grounds as exist in law.” 9 U.S.C. § 2. Indeed, as the Board discussed in *D.R. Horton*, the Supreme Court has made clear that arbitration may substitute for a judicial forum only so long as the litigant can effectively vindicate his or her statutory rights through arbitration. 357 NLRB No. 184, slip op. at 9, citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 28 (1991); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 628, 637.

The Acting General Counsel does not take the position that employees cannot be required to commit to arbitration of their employment-related disputes. Indeed, such a proposition would be contrary to longstanding policy under the NLRA to *encourage* arbitration of labor disputes. Here, in contrast, Respondent’s Arbitration Agreement prevents employees from exercising the core NLRA right to engage in *collective* remedial acts in all forums, both arbitral and judicial. The illegality of the provision rests on the prohibition of *collective* action, not the requirement that claims be heard in an arbitral forum. The cases upon which Respondent relies have nothing to do with whether the Section 7 right to act collectively may be waived by committing to an arbitration policy that requires individual arbitration.¹¹

F. The Federal Court’s Failure to Apply *D.R. Horton* in Other Employment Related Litigation is not Persuasive Authority

¹¹ Respondent also cites various federal court case decisions that have upheld class action waivers in mandatory arbitration policies. However, the interpretation and enforcement of the substantive rights protected by the NLRA is, in the first instance, accorded to the Board—not to the federal courts.

Respondent asserts as a defense to these charges that "virtually every court to consider *D.R. Horton* has rejected it. However, the interpretation and enforcement of the substantive rights protected by the Act is, in the first instance, accorded to the Board—not to the federal courts—and it is the Board law that controls herein. *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616-617 (1963)). Further, the Board's Petition for Enforcement in *DR Horton* is pending before the Fifth Circuit, and the employer has filed a cross-petition. See, Court of Appeals, 5th Cir., Case 12-60031, filed May 31, 2012. It is well-established that the Board is entitled to rely on its own decisions even while they are pending on review before a court of appeals. *Horizons Hotel Corp.*, 323 NLRB 591 (1997).

G. Respondents Arbitration Agreement Does not Fall Within the Exception Articulated by the Board in *D.R. Horton*

Respondent asserts that because its Arbitration Agreement is drafted to specifically preserve employees' rights to file charges with the Board, and other agencies, it falls within an exception to the Board's *D.R. Horton* decision. Such logic misapprehends Board law.

Even before *D.R. Horton*, it was well established that an arbitration agreement that implicitly leads employees to reasonably believe that they are prohibited from filing charges with the Board violates Section 8(a)(1) of the Act. *Id.* at fn. 2; see also, *2 Sisters Food Group, Inc.* 357 NLRB No. 168 (2011); *U-Haul*, 347 NLRB 375 (2006), *enfd.* 255 Fed Appx. 527 (D.C. Cir. 2007); *Bill's Electric*, 350 NLRB 292, 296 (2007). In contrast to Respondent's argument, the Board has held that language that leads employees to believe Board charges are subject to arbitration agreement will independently violate the Act, even absent a restriction on a class and collection action waiver. See, *U-Haul*, 347 NLRB 375. While Respondent's Arbitration Agreement was drafted so as to avoid this type of violation, language excluding Board charges from an arbitration agreement hardly remedies the separate violation of the Act alleged herein.

Simply because the Board, or another administrative agency, might be able to pursue employee claims on a classwide basis does not guarantee employees' the unfettered exercise of their rights guaranteed by Section 7 of the Act, nor does this language cause the agreement to fall within any exception to *D.R. Horton*. Moreover, under Respondent's logic, the Board, and other administrative agencies, would be preempted from pursuing claims on behalf of employees absent exclusionary language. As the Supreme Court has made clear, an arbitration agreement cannot bind non-parties and cannot be asserted to prohibit a federal agency from vindicating public rights. *EEOC v. Waffle House*, 534 U.S. 279 (2002). Thus, Respondent's assertion that its Arbitration Agreement falls within an exception to *D.R. Horton* is pure flight of the imagination.

2. Respondent's Enforcement of its Arbitration Agreement Through its Motion to Compel Arbitration Independently Violates Section 8(a)(1) of the Act.

Since the underlying Arbitration Agreement is unlawful, Respondent's Motions to Compel are also unlawful as further interference with the employees' Section 7 right to engage in collective legal activity. It is axiomatic that the enforcement of an unlawful rule violates the Act. The Board has held that if the objective of the lawsuit in question is "unlawful under traditional NLRA principles, it can be condemned as an unfair labor practice." *Teamsters Local 776 (Rite-Aid)*, 305 NLRB 832, 834 (1991). As the sole objective of the Respondent's Motion is enforcement of a contractual provision prohibiting employees from engaging in Section 7 activity, it is unnecessary to determine whether the Motion was retaliatory or baseless.

Bill Johnson's Restaurants v. NLRB, 461 U.S. 731 (1983), supports proceeding against Respondent's motions. In footnote 5 of *Bill Johnson's Restaurants*, the Court stated that it did not intend to preclude the enjoining of suits that have "an objective that is illegal under federal

law.” *Id.* In such circumstances, “the legality of the lawsuit enjoys no special protection under *Bill Johnson’s*.” *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 834 (1991), *enfd.* 973 F.2d 230 (3d Cir. 1992), *cert. denied* 507 U.S. 959 (1993).

The Board has made clear that it will apply footnote 5 to particular litigation tactics, as well as to entire lawsuits. Thus, for example, in *Wright Electric, Inc.*, the Board found that an employer’s discovery request had an illegal objective and violated the Act, even though the lawsuit itself could not be enjoined. 327 NLRB 1194, 1195 (1999), *enfd.* 200 F.3d 1162 (8th Cir. 2000); see also, *Dilling Mechanical Contractors*, 357 NLRB No. 56, slip op. at 2-3 (2011) (finding that employer’s discovery requests had an illegal objective, although the lawsuit itself did not). Accordingly, a footnote 5 analysis is properly applied to the Respondent’s motion here, despite it constituting a defense in the course of a lawful employee lawsuit and arbitration claims.¹²

A lawsuit has a footnote 5 illegal objective “if it is aimed at achieving a result incompatible with the objectives of the Act.” *Manno Electric*, 321 NLRB at 297. In particular, an illegal objective may be found for two reasons relevant here. The first reason is where “the underlying acts constitute unfair labor practices and the lawsuit is simply an attempt to enforce the underlying act.” *Regional Construction Corp.*, 333 NLRB 313, 319 (2001). This category includes the illegal union fine cases cited by the Court in footnote 5 itself. *Granite State Joint Board, Textile Workers Union*, 187 NLRB 636, 637 (1970), *enforcement denied*, 446 F.2d 369 (1st Cir. 1971), *rev’d*, 409 U.S. 213 (1972); *Booster Lodge No. 405, Machinists & Aerospace*

¹² Counsel for the Acting General Counsel notes that legal actions that have an illegal objective may be found to be unlawful *ab initio*, in contrast to legal actions against “arguably protected” conduct, which are only unlawful to the extent they are continued after the General Counsel issues complaint, pursuant to *Loehmann’s Plaza*, 305 NLRB 663 (1991), *rev. denied*, 74 F.3d 292 (D.C. Cir. 1996). See, e.g., *Manno Electric*, 321 NLRB 278, 298 (1996), *enfd. per curiam mem.*, 127 F.3d 34 (5th Cir. 1997).

Workers, 185 NLRB 380, 383 (1970), enf'd. in rel. pt., 459 F.2d 1143 (D.C. Cir. 1972), aff'd, 412 U.S. 84 (1973). In those cases, the unions violated Section 8(b)(1)(A) by fining employee/members, and the lawsuits were the mechanism to enforce and collect the unlawful fines.

The second reason a lawsuit or legal pleadings will be found unlawful is where a grievance or lawsuit is itself aimed at preventing employees' protected conduct. In such cases, the lawsuit is not merely retaliatory for employees' protected conduct, but also seeks to use the arbitrator or the court to directly interfere with the Section 7 activity. *Long Elevator*, 289 NLRB 1095 (1988). Thus, for example, in *Manno Electric, Inc.*, the Board found that an employer's judicial cause of action attacking employee statements made to the Board was not only preempted, but also had an illegal objective. 321 NLRB at 297.

Here, both reasons apply. First, the Respondent's Motion to Compel in the instant case seeks to enforce an arbitration agreement that is itself unlawful as it expressly prohibits employees' collective legal activity, as discussed above. Thus, as in union fine cases, the underlying acts constitute unfair labor practices and the motion is simply an attempt to enforce the underlying act. Second, the Respondent's Second Motion to Compel also has an illegal objective because it is directly aimed at preventing employees' protected conduct. Indeed, the *only* objective of the Respondent's motion is to prohibit employees from engaging in Section 7 activity. The Respondent's Second Motion to Compel would impose individual arbitration, which specifically attempts to prevent employees' protected concerted legal activity. Therefore, the Respondent's motion has a footnote 5 illegal objective and is unlawful under Section 8(a)(1) of the Act.

The Board has made it clear that, contrary to Respondent's suggestion, *BE&K Construction* did not affect the fn. 5 exemption in *Bill Johnson's* for lawsuits with an illegal

objective. See *Plasterers Local 200 (Standard Drywall, Inc.)* (“SDI-IV”), 357 NLRB No. 179, fn. 7 (2011) Citing its earlier decision in *Plasterers Local 200 (Standard Drywall, Inc.)*, 357 NLRB No. 160, fn. 7 (2011) (“SDI-III”), “[t]he Board noted that the Supreme Court’s decision in *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002), did not undermine the Court’s earlier statement that legal proceedings that have an objective that is illegal may be enjoined without infringing on the First Amendment.” *SDI-IV*, 357 NLRB No. 179, fn. 7; *Bill Johnson’s Restaurants v. NLRB*, 461 U.S. 731, 737, fn. 5 (1983); citing, *SDI-III*, 357 NLRB No. 160, slip op. at 3, relying on *E. P. Donnelly*, 357 NLRB No. 131, slip op. at 2 fn. 4 (2011). The Board has held that the Supreme Court’s decision in *BE&K Construction* did not affect the fn. 5 exemption in *Bill Johnson’s* for lawsuits with an illegal objective. *E.P. Donnelly*, supra, slip op. at 2 fn. 4; *Allied Trades Council (Duane Reade, Inc.)*, 342 NLRB 1010, 1013 fn. 4 (2004). Moreover, as discussed *infra* at Section IV.1.B., the Board’s determination that such mandatory arbitration agreement infringe upon Section 7 substantive rights is hardly novel. Based on the foregoing, Respondent’s defense that footnote 5 does not apply because the Board’s decision is novel is contrary to *Bill Johnson’s* and its progeny, and utterly ignores the Board’s long history of legal precedent proclaiming this type of restriction of Section 7 activity to be illegal.

3. No Allegations of the Complaint are Barred as a Result of Plaintiffs’ Withdrawal of Consent to Join the Zulauf litigation.

Respondent asserts that the complaint is barred because the Plaintiff’s have withdrawn their consent to proceed on a collective basis. While Respondent correctly asserts that the Plaintiffs subject to the unlawful Arbitration Agreement withdrew their consent to participate in the collective action, and that Plaintiffs’ counsel never opposed said motion, this does not render the allegation moot. The Respondent committed a violation of the Act by filing the Motion to Compel and enforcing its unlawful Arbitration Agreement. Merely because Respondent’s

unlawful conduct was effective in this instance does not erase the ongoing effect of the misconduct. While the Respondent may be unable to rescind its Motion to Compel, as Judge Duffey has ruled it moot because the Plaintiff's withdrew consent to litigate collectively, by its filing of the Motion to Compel alone Respondent violated the Act by enforcing an unlawful rule. Moreover, such motions have the ongoing effect of prospectively discouraging future collective actions. As to whether there are any legal costs associated with defending the Motion, Plaintiffs may have direct costs related to the Motion despite their failure to oppose the Motion. The issue of whether there exists any direct costs goes to the appropriate remedy, and can be determined in compliance—it does not however affect whether the unlawful act is cognizable by the Board.

The Respondent, in effect, argues that because its unlawful conduct—filing a Second Motion to Compel Arbitration enforcing its unlawful agreement—was effective it is therefore immune from prosecution. This argument is analogous to an employer who effectively combats a nascent union campaign through unlawful threats arguing that since the union lost support, the question of whether the threats violate the Act is purely academic and purportedly “moot.” While the Board cannot “order” employees to reinstate their support for the Union, the Board fashions a remedy to insure that such misconduct does not occur in the future and attempts to place employees in the position they were in before the unlawful actions occurred. In this case, the Board can fashion a prospective remedy after a compliance proceeding.

Black's Law Dictionary defines legal mootness as “a matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights.” Black's Law Dictionary (9th Ed., 2009). This is not an abstract question of law; it is a question of whether Respondent's enforcement of the Arbitration Agreement in court interferes with employees' Section 7 rights. As discussed above, not only did the Respondent's Motion foreclose the named Plaintiffs from exercising their Section 7 rights, it sent a message to other

employees that they, too, would be prevented from engaging in any concerted legal actions. Furthermore, while the Respondent was successful in forcing the Plaintiffs' to individually arbitrate, it was the act of prosecuting this motion that violates Section 8(a)(1). Nothing prevents the Respondent from using the same legal tactic in the future absent the Board's remedial Order. Thus, the Respondent's Second Motion to Compel has the continuing effect of interfering with employees' Section 7 rights, and Respondent is not, at present, prohibited from future misconduct. Moreover, the Board can still, consistent with the Act, fashion a remedial Order that would reinstate the *status quo* and prevent future violations. Therefore, the Respondent's assertion that the issue is "moot" is not legally or factually viable.

4. The Complaint is Not Barred Because the Board Lacked a Quorum at the Time the D.R. Horton, Inc., 357 NLRB No 184 (2012) Issued.

Respondent initially challenges the Board's decision in *D.R. Horton*, 357 NLRB No. 184 (2012) (pending review, 5th Circuit Court of Appeals, Case No. 12-60031), claiming that the Board lacked the required quorum to issue that decision. It is correct that contrary to *Noel Canning v. NLRB*, __ F.3d ___, 2013 WL 276024 (D.C. Cir. Jan. 25, 2013) (petition for certiorari filed April 25, 2013), Member Becker was not appointed during an intersession recess of the Senate. And *Noel Canning* held that Members Griffin and Block, current Board Members serving alongside Chairman Pearce, were not validly appointed because they were appointed during an intrasession recess. However, Respondent's reliance on *Noel Canning* is misplaced. The Board has filed a petition for certiorari with the United States Supreme Court seeking review of the D.C. Circuit's decision. Furthermore, in *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. 1, fn.1 (Mar. 13, 2013), the Board took note that in *Noel Canning*, the D.C. Circuit Court itself recognized that its conclusions concerning the Presidential appointments had been rejected by the other circuit courts to address the issues. Compare *Noel Canning v. NLRB*,

2013 WL 276024, at *14-15, 19 (D.C. Cir. Jan. 25, 2013) with *Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004) (en banc); *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (en banc); *United States v. Allocco*, 305 F.2d 704, 709-15 (2d Cir. 1962). Thus, in *Belgrove*, the Board concluded that because the “question [of the validity of the recess appointments] remains in litigation,” until such time as it is ultimately resolved, “the Board is charged to fulfill its responsibilities under the Act.”¹³ The Board’s conclusion in *Belgrove* is equally applicable here, to both the Board’s continued actions and the actions taken by its appointees, agents, and delegates. See *Bloomingtondale’s*, 359 NLRB No. 113 (2013).¹⁴

In any event, regardless of the issue of the Board’s composition, and contrary to Respondent’s assertions, in *Bloomingtondale’s*, 359 NLRB No. 113 (2013), the Board found that the Acting General Counsel has the independent authority to issue and prosecute complaints. *Bloomingtondale’s* at *1 (“[u]nder the NLRA, the General Counsel is an independent officer appointed by the President and confirmed by the Senate, and staff engaged in the investigation and prosecution of unfair labor practices are directly accountable to the General Counsel.”) (citing 29 U.S.C. § 153(d); *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 127-28 (1987) (“*UFCW*”); *NLRB v. FLRA*, 613 F.3d 275, 278 (D.C. Cir. 2010)). Thus, “[t]he authority of the General Counsel to investigate unfair labor practice charges and prosecute complaints derives not from any ‘power delegated’ by the Board, but rather directly from the language of the NLRA.” *Id.* Accordingly, the authority of the Acting General Counsel and

¹³ The Third Circuit’s decision in *NLRB v. New Vista Nursing and Rehabilitation*, -- F.3d --, 2013 WL 2099742 (3d Cir. May 16, 2013), should not change this result. As noted above, there still remains a split in the circuits regarding the validity of intrasession recess appointments.

¹⁴ Respondent also separately challenges the composition of the Board in *D.R. Horton*, including an argument that even if Member Becker’s appointment was valid, it expired before *D.R. Horton* issued. These challenges are currently pending before the Fifth Circuit in the petition for review of *D.R. Horton*.

Regional Director to issue complaints is unaffected by any issue concerning the composition of the Board.

5. The Board has Authority to Order Respondent to Reimburse Employees for All Reasonable Litigation Expenses Directly Related to Opposing Respondent’s Motion to Compel and Other Legal Action Taken to Enforce the Unlawful Agreement.

Respondent argues that the remedy sought by the Acting General Counsel “– that Respondent reimburse employees for all reasonable litigation expenses directly related to opposing the Employer’s unlawful Motion or any other legal action taken to enforce the unlawful agreement – lacks any basis in law.” However, this argument fails under Board case law and as a matter of fact. Respondent’s sole basis for this assertion is that *D.R. Horton* was incorrectly decided, however, as set forth above Respondent’s assertion is fallacious, and the remedy requested is entirely consistent with Board case law.

As part of the remedy sought in this matter, the Acting General Counsel seeks an order precluding Respondent from enforcing that portion of its Arbitration Agreement found to be unlawful. This would include not only cease-and-desist relief, but also an order requiring Respondent to notify all judicial and arbitral forums wherein the Arbitration Agreement has been enforced that it no longer opposes the seeking of collective or class action type relief. (Jt. Ex. 5, ¶13) In particular, to remedy the legal consequences of the employer’s unlawful motion, and return employees to the *status quo ante*, Respondent should be required to withdraw the motion for individual arbitration, if pending, or to move the appropriate court to vacate its order for individual arbitration, if Respondent’s motion has already been granted and a motion to vacate can still be timely filed.¹⁵ Any such motion to vacate should be made jointly with the affected

¹⁵ 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

employees, if they so request.¹⁶ It is noted that nothing in the requested 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 able to exercise their collective legal rights in some forum.¹⁷

Under Board law, such remedies are appropriate. Specifically, the Board has frequently sought remedies requiring a respondent to take affirmative steps in disavowing positions that are antithetical to the Act. Thus, in *Loehmann's Plaza*, 305 NLRB 663, 671 (1991), the Board ordered the respondent to seek to have the injunction granted against the union withdrawn. In *Federal Security, Inc.*, 336 NLRB 703 (2001), remanded on other grounds, 2002 WL 31234984 (D.C. Cir. 2002), the Board ordered the respondent to take affirmative steps to file a motion with the court to withdraw its lawsuit and file a motion to vacate the default orders entered and those still operative.¹⁸

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).

¹⁶ In this regard, the Board has in the past ordered such a joint motion or petition where an employer has unlawfully used the legal system to interfere with an employee’s Section 7 rights. See, e.g., *Baptist Memorial Hospital*, 229 NLRB 45, 46 (1977) (“[w]e shall also require Respondent to rectify the effects of its unlawful conduct by joining with [the employee] in petitioning the Memphis Municipal Court and Police Department to expunge any record of [the employee’s] arrest and conviction”).

¹⁷ This would be consistent with the General Counsel’s long-standing position that employers may lawfully require employees to bring their claims in arbitration, rather than in court, as long as all of their substantive rights are preserved (including their statutory right to engage in collective legal activity). See, e.g., *O’Charley’s Inc.*, Case 26-CA-19974, Advice Memorandum dated April 16, 2001, at 5-7 (“Section 7 does not provide a right to select any particular forum to concertedly engage in activities for mutual aid or protection”).

¹⁸ As those cases were based on federal-law preemption, rather than an “illegal objective” under fn. 5 of *Bill Johnson’s*, the timing of the preemption was considered in applying the remedy.

Additionally, consistent with the Board's usual practice in cases involving unlawful legal actions, Respondent should be ordered to reimburse employees for any attorney's fees and litigation expenses directly related to opposing the employer's unlawful motions to compel individual arbitration. See *Bill Johnson's Restaurants*, 461 U.S. at 747 ("If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorney's fees and other expenses" and "any other proper relief that would effectuate the policies of the Act"), on remand, 290 NLRB 29, 30 (1988); *Phoenix Newspapers*, 294 NLRB 47, 51 (1989); *Summitville Tiles, Inc.*, 300 NLRB 64, 67, 77 (1990).

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.¹⁹ The Board determined that the award of attorney's fees and costs, in the 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

Here, of course, there is no point of preemption to consider and, as noted above, Respondent's motions were unlawful *ab initio*.

¹⁹ 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.

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.²⁰

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. While the Plaintiffs may not have filed any opposition to the Second Motion to Compel, there may exist other direct costs related to the Plaintiffs' determination to withdraw their consents.

V. CONCLUSION

Based on the foregoing, Counsel for the Acting General Counsel submits that, as alleged in the Complaint and as demonstrated above, Respondent violated Section 8(a)(1) of the Act.

²⁰ See *Carey v. 24 Hour Fitness USA, Inc.*, 2012 U.S. Dist. LEXIS 143879, *4-6 (S.D. Tex. October 4, 2012); *Jasso v. Money Mart Express, Inc.*, 2012 U.S. Dist. LEXIS 52538, *26-28 (N.D. Cal. April 13, 2012); *Morvant v. P.F. Chang's China Bistro, Inc.*, 2012 U.S. Dist. LEXIS 63985, *32-34 (N.D. Cal. May 7, 2012); *Delock v. Securitas Security Services USA, Inc.*, 2012 U.S. Dist. LEXIS 107117, *12-18 (E.D. Ark. August 1, 2012); *Spears v. Waffle House*, 2012 U.S. Dist. LEXIS 90902, *5-6 (D. Kan. July 2, 2012); *De Oliveira v. Citicorp North America, Inc.*, 2012 U.S. Dist. LEXIS 69573, *6-7 (M.D. Fla. May 18, 2012); *LaVoice v. UBS Fin. Servs., Inc.*, 2012 U.S. Dist. LEXIS 5277 (S.D. N.Y. Jan. 13, 2012); *Cohen v. UBS Fin. Servs.*, 2012 U.S. Dist. LEXIS 174700 (S.D. N.Y. Dec. 4, 2012) *Palmer v. Convergys Corp.*, 2012 U.S. Dist. LEXIS 16200, *7 n. 2 (M.D. Ga. February 9, 2012); *Nelsen v. Legacy Partners Residential, Inc.*, 207 Cal. App. 4th 1115, 1134 (2012); *Iskanian v. CLS Transportation Los Angeles LLC*, 206 Cal. App. 4th 949, 962 (2012); *Truly Nolen of America v. Superior Court*, 2012 Cal. App. LEXIS 871, *50-51 (August 9, 2012).

General Counsel urges the Board to so find in every respect alleged, and order a full, comprehensive and appropriate remedy.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Kerstin I. Meyers", followed by a horizontal line extending to the right.

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