

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

VXI GLOBAL SOLUTIONS, LLC

and

ANZEL MILINI

CASE 08-CA-133514

**RESPONDENT'S BRIEF IN SUPPORT OF ITS MOTION FOR JUDGMENT ON
STIPULATED FACTS**

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I. INTRODUCTION AND RESPONDENT'S POSITION

Pursuant to Sections 102.35(a)(9) and 102.46 of the Rules and Regulations of the National Labor Relations Board (the “Board”), and the Board’s February 29, 2016 Order Approving Stipulation and Transferring Proceeding to the Board, Respondent VXI Global Solutions, LLC (“VXI”) files this Brief in Support of its Motion for Judgment on Stipulated Facts. As explained below, the arguments advanced by the General Counsel are flawed because (1) its position is based upon Board decisions that conflict with the Federal Arbitration Act (“FAA”) as interpreted by the Supreme Court and numerous other federal and state courts; (2) Charging Party Anzel Milini (“Milini”) waived any rights she may have had under Section 7 of the National Labor Relations Act (“NLRA” or the “Act”); (3) VXI’s mutual arbitration agreement cannot reasonably be interpreted, and has not been applied, to prevent employees from filing charges with the Board; and (4) VXI properly sought individual arbitration of wage claims Milini filed in Ohio state court and before the American Arbitration Association (“AAA”).

II. STATEMENT OF FACTS¹

VXI is a California corporation that operates customer service call centers for employer clients at six locations in California, Arizona, Ohio, and Texas. Joint Motion and Stipulation of Facts (“JS”) at 3, ¶8. VXI’s employees are not represented by a labor organization at any of its locations. *Id.* at 4, ¶9. On or about July 11, 2011, VXI hired Milini at its Canton, Ohio facility. *Id.* at 6, ¶17. The same day, Milini signed a Mutual Agreement to Arbitrate (“MAA” or the

¹ VXI relies on, and incorporates by reference, the facts set forth in the parties’ Joint Motion and Stipulation of Facts, dated September 30, 2015, in which the Parties detailed the procedural history of this matter.

“Agreement”)² as a condition of her employment with VXI. *Id.*, Ex. N. Since at least June 2011, VXI’s applicants and new hires execute the MAA as a condition of employment. *Id.* at 4, ¶10, Ex. Z ¶4.

The MAA explicitly carves out administrative charges of discrimination. *Id.* at 5, ¶14. While Milini and other VXI employees who sign the MAA agree to arbitrate all “claims or controversies,” VXI has never sought to enforce the Agreement with respect to any claim filed with the National Labor Relations Board, Equal Employment Opportunity Commission, or any other federal, state or local administrative agency with jurisdiction over the employment relationship. *Id.*, Ex. N §1, Ex. Z ¶7. Since 2009, this includes 66 administrative claims. *Id.*, Ex. Z ¶7. Further, the MAA does not mention class actions or collective arbitration and, while VXI maintains that the Agreement requires individual arbitration of disputes, it has not sought to enforce the Agreement against plaintiffs in at least six purported class or collective actions filed against it by current or former employees since 2008.³ *Id.*, Ex. Z ¶8.

VXI employed Milini until March 23, 2013. *Id.* at 6, ¶17. On or about September 12, 2011, LaShonna Shakoor (“Shakoor”) also executed the MAA and was employed by VXI until March 6, 2013 at its Youngstown, Ohio facility. *Id.* ¶18. On November 8, 2013, Shakoor and Milini filed a Class Action Complaint against VXI in the Court of Common Pleas of Mahoning County in Ohio, alleging violations of the Ohio Minimum Fair Wage Standards Act. *Id.* ¶19, Ex. P. Milini and Shakoor also filed a Demand for (Class) Arbitration before the AAA in Cleveland, Ohio, on February 5, 2014, prior to VXI’s Motion to Compel Individual Arbitration in the Ohio

² While VXI revised the MAA in May of 2012, the pertinent language of both versions of the agreements remained identical. JS at 4, ¶11, Exs. L and M. Therefore, VXI collectively refers herein to both versions as the “MAA” or the “Agreement.”

³ VXI has also not sought to enforce the Agreement in 20 lawsuits filed in state or federal court by individual current or former employees since 2008. JS, Ex. Z ¶6.

lawsuit. *Id.* at 8, ¶21(C), Ex. R. In defending that action, VXI has consistently taken the position, through its pleadings, motions, arguments, and related filings, that the MAA requires the parties to individually arbitrate the dispute. *Id.* at 7-10, ¶20-23. On March 3, 2016, after remand from Ohio’s Seventh District Appellate Court,⁴ the trial court agreed with VXI that Shakoor and Milini’s claims “are to be arbitrated individually” and dismissed the lawsuit in favor of arbitration. March 21, 2016, Declaration of Mark Filipini (“Filipini Decl.”) ¶2, Ex. A.

On September 30, 2014, Milini filed the first amended charge in this proceeding, alleging the MAA “interferes with [VXI’s] employees’ exercise of their Section 7 rights under the National Labor Relations Act.” *Id.*, Ex. C at 2 (“Amended Charge”). On April 29, 2015, the Regional Director for Region 8 of the Board issued a Complaint and Notice of Hearing alleging that VXI violated the NLRA (the “Complaint”). *Id.* at 2 ¶6(C). Specifically, the Complaint alleges that VXI violated Section 8(a)(1) of the Act by maintaining and enforcing the MAA.⁵ On February 29, 2016, the Board granted the parties’ joint request to submit the proceedings directly to the Board for issuance of findings of fact, conclusions of law, and an Order.

III. ARGUMENT AND AUTHORITIES

As a preliminary matter, Respondent recognizes the numerous Board decisions issued in the past several months invalidating arbitration agreements in a variety of contexts.⁶ The

⁴ The Appellate Court previously determined that the trial court, rather than an arbitrator, was to decide whether the MAA required individual arbitration and remanded accordingly. *See* JS at 10, ¶23, Ex. Y; *Shakoor v. VXI Global Solutions*, 2015-Ohio-2587, 35 N.E.3d 539, ¶51 (7th Dist.) (“the trial court is instructed to determine what the contract allows; specifically, did the parties agree that arbitration would include class arbitration?”).

⁵ On July 31, 2015, the Regional Director for Region 8 approved a bilateral informal Board settlement agreement which resolved all of the Complaint’s allegations except for those pertaining to the MAA. JS at 3, ¶7.

⁶ *E.g.*, *Labor Ready*, 363 NLRB No. 138 (2016); *Ralphs Grocery Co.*, 363 NLRB No. 128 (2016); *Alternative Entertainment, Inc.*, 363 NLRB No. 131 (2016); *Apple Am. Grp. LLC*, 363 NLRB No. 111 (2016); *Flyte Tyme Worldwide*, 363 NLRB No. 107 (2016); *Waffle House, Inc.*,

General Counsel will no doubt argue these cases support its position that VXI's maintenance and enforcement of the MAA violates Section 8(a)(1) of the NLRA. However, the Board's decisions are based upon the same flawed premise underlying *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), both of which have been directly overruled by the Fifth Circuit.⁷ The Board's analysis in those cases is also contrary to Supreme Court precedent and has been flatly rejected by federal Circuit Courts of Appeal, District Courts and numerous state courts. *See infra*, section A.2 and footnote 11 (collecting cases). Regardless, this case presents the Board with a compelling opportunity to bring its jurisprudence into line with controlling authority when a party abuses the Board's unfair labor practice machinery for tactical gain in unrelated litigation.

A. Applicable Statutory Standards

Section 7 of the Act establishes employees' right to "self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection" and to "refrain from any or all of such activities." 29 U.S.C. § 157. Section 8(a)(1) of the Act forbids employers to "interfere with, restrain or coerce" employees in the exercise of their Section 7 rights. 29 U.S.C. § 158(a)(1). The Board's well-settled test for determining a Section 8(a)(1) violation is an objective one:

[I]nterference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is

363 NLRB No. 104 (2016); *Century Fast Foods, Inc.*, 363 NLRB No. 97 (2016); *Gamestop*, 363 NLRB No. 89 (2015); *Logisticare Solutions, Inc.*, 363 NLRB No. 85 (2015); *24 Hour Fitness USA, Inc.*, 363 NLRB No. 84 (2015).

⁷ *D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344 (5th Cir. 2013); *Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013 (5th Cir. 2015).

whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act.

American Freightways Co., 124 NLRB 146, 147 (1959). It is the General Counsel’s ultimate burden to show, by a preponderance of the evidence, that for each element under the Act the respondent acted unlawfully. See *Western Tug & Barge Corp.*, 207 NLRB 163, 163 fn. 1 (1973) (“[t]he burden of establishing every element of a violation under the Act is on the General Counsel.”); 9 U.S.C. § 160(c) (violations of the Act can be adjudicated only “upon the preponderance of the testimony”); *NLRB v. Fluor Daniel*, 161 F.3d 953, 965 (6th Cir. 1998).

With respect to arbitration agreements, the FAA provides:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. While application of the FAA may be precluded by another federal statute, the party opposing arbitration has a heavy burden to show that Congress intended to preclude arbitration for the statutory rights at issue. *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226-227 (1987). Such preclusion must be “deducible from the [statute’s] text or legislative history, or from an inherent conflict between arbitration and the statute’s underlying purposes.” *Id.* at 227 (internal quotations omitted). This principle extends to employment-related arbitration agreements. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (ADEA claims held arbitrable under FAA because plaintiff could not prove statute prohibited waiver of either judicial forum or class treatment).⁸

⁸ The Supreme Court has repeatedly held that employment claims are subject to mandatory arbitration agreements. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 130-131 (2001); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 274 (2009). This is true even when the employee consents to arbitration as a condition of employment. *Gilmer*, 500 U.S. at 33 (“Mere inequality in

B. Recent Board Decisions Conflict with the FAA

1. Arbitration agreements must be enforced according to their terms.

Unless there is a “contrary Congressional command,” the FAA and Supreme Court precedent mandate that arbitration agreements be enforced as written. *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 669, 181 L. Ed. 2d 586 (2012). In *CompuCredit*, consumers sued a credit card marketer alleging that excessive fees violated the Credit Repair Organization Act (“CROA”). 132 S.Ct. at 668. Defendants sought to compel arbitration, arguing that the consumers agreed to binding arbitration in their credit repair applications. *Id.* The Supreme Court held that, pursuant to the FAA, courts must enforce arbitration agreements according to their terms “even when the claims at issue are federal statutory claims, unless the FAA’s mandate has been ‘overridden by a contrary congressional command.’” 132 S.Ct. at 669 (quoting *McMahon*, 482 U.S. at 226). Specifically, it is the burden of the party opposing enforcement of the arbitration agreement to identify and establish a clear “Congressional command” based on unambiguous statutory language. *Id.* at 670-73. If the statute is “silent on whether claims under [it] can proceed in an arbitral form, the FAA requires the arbitration agreement to be enforced according to its terms.” *Id.* at 673. Because the CROA was silent on whether claims under the Act could proceed to an arbitral forum, the Court remanded the case to the Ninth Circuit to enforce the agreement according to its terms. *See id.*

Similarly, in *American Express Co. v. Italian Colors Restaurant* the Supreme Court considered whether the FAA “permits courts . . . to invalidate arbitration agreements on the ground that they do not permit class arbitration of a federal-law claim.” 133 S.Ct. 2304, 2308, 186 L. Ed. 2d 417 (2013). In *American Express*, merchants who accepted American Express

bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.”).

cards brought a class action against American Express for violations of federal antitrust laws (the Sherman and Clayton Acts). *Id.* at 2308. American Express moved to compel individual, bilateral arbitration pursuant to a standardized agreement with an express class action waiver. *Id.* at 2312. While plaintiffs argued that individual arbitration would be prohibitively costly, the Supreme Court rejected the argument, upheld the arbitration agreement, and reiterated that arbitration agreements shall be enforced according to their terms “unless the FAA’s mandate has been overridden by a contrary Congressional command.” *Id.* at 2309. The Court further held that no such command existed in the federal antitrust statutes because (like the NLRA) they did not discuss class actions. *Id.* The holdings in *CompuCredit* and *American Express* are consistent with a long line of Supreme Court precedent enforcing arbitration agreements according to their terms in the face of numerous federal statutes.⁹

2. The NLRA does not contain a “contrary Congressional command.”

In order to avoid enforcement of agreements requiring individual arbitration, such as the MAA here, the General Counsel would thus need to demonstrate that the NLRA establishes a substantive right for employees to initiate class or collective actions. However, nothing in the NLRA’s statutory text, legislative history, or Board decisions prior to *D.R. Horton* does so. *See D.R. Horton, Inc. v. NLRB*, 737 F.3d 344, 361 (5th Cir. 2013) (“Neither the NLRA’s statutory text nor its legislative history contains a congressional command against application of the FAA.”). To the contrary, Congress gave no indication that it sought to guarantee individual employees a statutory right to file putative class or collective civil actions in the NLRA. *See*,

⁹ *E.g.*, *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477 (1989) (Securities Act of 1933); *Gilmer*, 500 U.S. 20, (ADEA); *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.*, 473 U.S. 614 (1985) (Sherman Act).

e.g., *NLRB v. City Disposal*, 465 U.S. 822, 830 (1984) (recognizing that “the term ‘concerted activity’ is not [even] defined in the Act.”).

Given these realities, the NLRA does not contain a clear “contrary congressional command” necessary to permit the Board to invalidate otherwise lawful arbitration agreements like VXI’s. While we expect the General Counsel will rely on Section 7 of the Act, the right to engage in concerted activity does not contemplate, let alone clearly protect, a substantive right to class or collective actions. *See CompuCredit*, 132 S.Ct. at 670 (generic statutory language is insufficient to override the FAA); *Labor Ready*, 363 NLRB No. 138, at *2 (2016) (Member Miscimarra, dissenting) (“[T]he NLRA creates no substantive right for employees to insist on class-type treatment of non-NLRA claims.”). Indeed, class or collective actions have historically been viewed as procedural devices rather than substantive rights. *See Shady Grove Orthopedic Assocs. P.A. v. Allstate Ins., Co.*, 559 U.S. 393, 407 (2010) (upholding the validity of Rule 23 under the Rules Enabling Act, 28 U.S.C. § 2072(b), because “[i]t governs only ‘the manner and means’ by which the litigants’ rights are ‘enforced’”); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-613 (1997) (“the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims”); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980) (“We view the denial of class certification as an example of a procedural ruling, collateral to the merits of a litigation, that is appealable after the entry of final judgment.”); *D.R. Horton*, 737 F.3d at 357 (“The use of class action procedures, though, is not a substantive right.”); *Blaz v. Belfer*, 368 F.3d 501, 505 (5th Cir. 2004) (recognizing there is “no substantive right to a class remedy; a class action is a procedural device.”).¹⁰

¹⁰ In her wage lawsuit, Milini requested class certification pursuant to Ohio Rule of Civil Procedure 23, which mirrors Federal Rule of Civil Procedure 23 in all relevant respects. JS, Ex. P ¶¶ 1, 25-31.

While the Board has significant discretion in applying and enforcing the NLRA, it must defer to Congressional objectives in other statutes with regard to matters outside the labor context. *See, e.g., NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527-534, 529 fn. 9 (1984) (refusing to defer to Board's interpretation of the U.S. Bankruptcy Code; "While the Board's interpretation of the NLRA should be given some deference, the proposition that the Board's interpretation of statutes outside its expertise is likewise to be deferred to is novel."). More importantly, the Board is prohibited from inventing Congressional commands that do not exist in the NLRA and which would infringe on other Congressional objectives. *See Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942) ("[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives."); *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002) ("[W]e have accordingly never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA"); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902-904 (1984) (objectives of the Immigration and Nationality Act limited the Board's remedial authority).

Further, the Fifth Circuit has now considered this issue twice after it unanimously reversed the Board's decision in *Murphy Oil*, 361 NLRB No. 72, and ruled that "Murphy Oil committed no unfair labor practice by requiring employees to relinquish their right to pursue class or collective claims in all forums by signing the arbitration agreements at issue." *Murphy Oil*, 808 F.3d at 1018 (citing Fifth Circuit's earlier analysis and conclusion in *D.R. Horton*, 737 F.3d 344). The Court further noted that several other circuit courts have either indicated or expressly stated they would agree with its holding in *D.R. Horton* if faced with the same question. *Id.* at 1018 fn. 3, citing *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326,

1336 (11th Cir. 2014), *cert. denied*, 134 S. Ct. 2886, 189 L. Ed. 2d 836 (2014); *Richards v. Ernst & Young, LLP*, 744 F.3d 1072, 1075 fn. 3 (9th Cir. 2013), *cert. denied* 135 S. Ct. 355, 190 L. Ed. 2d 249 (2014); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053-55 (8th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 fn. 8 (2d Cir. 2013). *See also*, *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072 (9th Cir. 2014). Indeed, the number of federal and state courts following the Fifth Circuit on this issue continues to grow, with the overwhelming majority of courts finding that the NLRA does not contain a “contrary Congressional command” and enforcing mandatory arbitration agreements according to their terms.¹¹

While the U.S. Supreme Court has not yet directly addressed the issue, it has forcefully and repeatedly spoken out in favor of the FAA’s broad reach in recent years. For example, in *AT&T Mobility v. Concepcion*, the Court struck down a California judicial rule prohibiting class action waivers in arbitration agreements. 563 U.S. 333, 348 (2011). The Court explained that by requiring the availability of class arbitration, the rule frustrated most of the benefits of arbitration, such as informality, speed, efficiency and flexibility, and would have ultimately diminished the likelihood that companies would agree to arbitrate. *Id.* Because “the FAA was designed to promote arbitration,” the rule “s[tood] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” in passing the FAA. *Id.* at 345, 352. “Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” *Id.* at 344. Against the

¹¹ *See, e.g.*, JS at 17, fn. 2 (collecting cases); *Labor Ready*, 363 NLRB No. 138, at *2, *4 fn. 5 (2016) (Member Miscimarra, dissenting) (collecting cases and stating “the overwhelming majority of courts [have rejected] the Board’s position regarding class-waiver agreements”); *Tallman v. Eighth Jud. Dist. Ct.*, 131 Nev. Adv. Op. 71 (2015); *Levison v. MasTec, Inc.*, 2015 WL 5021645 (M.D.Fla.2015), *appeal dismissed* (Jan. 28, 2016); *Patterson v. Raymours Furniture Co., Inc.*, 2015 WL 1433219 (S.D.N.Y.2015); *Brown v. Citicorp Credit Servs., Inc.*, 2015 WL 1401604 (D.Idaho 2015). *But see Totten v. Kellogg Brown & Root, LLC*, 2016 WL 316019 (C.D.Cal.2016).

backdrop of FAA jurisprudence, and lacking any contrary Congressional command in the NLRA overriding the FAA, the MAA should be enforced as written here.

3. The FAA’s saving clause is inapplicable.

Section 2 of the FAA contains a saving clause, which provides that arbitration agreements are “enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. There is no evidence or allegations that such grounds for revocation are applicable in this case. Further, the saving clause “permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability, but not by defenses that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue.” *Concepcion*, 563 U.S. at 339 (internal quotation omitted).

In *D.R. Horton*, the Fifth Circuit correctly held that the Board could not rely on the FAA’s saving clause to invalidate arbitration agreements because “[r]equiring the availability of class actions ‘interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.’” *Id.* at 359-360 (quoting *Concepcion*, 563 U.S. at 344). Specifically, the Board’s position would ultimately construe the NLRA as disfavoring arbitration, and a statute that disfavors arbitration cannot fit within the saving clause because it uniquely impacts contracts to arbitrate, whereas the saving clause only permits defenses to contracts that apply equally to all contracts. *Id.* Thus, to the extent the General Counsel argues the FAA’s saving clause supports its position, this Board should reject that argument.

4. The Norris-LaGuardia Act is inapplicable

In *D.R. Horton*, the Fifth Circuit rejected the Board’s holding that the Norris-LaGuardia Act (“NLGA”), and by implication the NLRA, partially repealed the FAA. *See* 737 F.3d at 362 fn. 10 (the NLGA is “outside the Board’s interpretive ambit.”). The NLGA prohibits employers

from entering into “yellow dog” contracts with employees, which are “contracts not to join a union or to quit employment if one joins a union.” 29 U.S.C. §103; *Morvant v. P.F. Chang’s China Bistro, Inc.*, 870 F. Supp. 2d 831, 844 (N.D.Cal.2012). Significantly, the *Morvant* court also held that the NLGA “specifically defines those contracts to which it applies” and “[a]n agreement to arbitrate is not one of those contracts.” *Id.* at 844. Thus, the NLGA does not apply to arbitration agreements like the MAA.

Nor does the NLGA otherwise contain a congressional command against enforcement of arbitration agreements. The NLGA divests federal courts of the power to enjoin any person from “aiding any person participating or interested in any labor dispute . . . in any court of the United States or of any State.” 29 U.S.C. § 104. On its face, and as applied for many decades, the NLGA has nothing to do with arbitration agreements. Moreover, the NLGA was enacted in 1932, three years prior to the NLRA, nine years after passage of the Fair Labor Standards Act (“FLSA”), and 15 years prior to the FAA’s reenactment in 1947. As the Eighth Circuit explained in *Owen v. Bristol Care*, “[t]he decision to reenact the FAA suggests that Congress intended its arbitration protections to remain intact even in light of the earlier passage of three labor relations statutes [the NLGA, NLRA, and FLSA].” 702 F.3d at 1052-1053. *See also Richards v. Ernst & Young, LLP*, 744 F.3d 1072, 1075 fn. 3 (9th Cir. 2013) (“Congress did not expressly provide that it was overriding any provision in the FAA when it enacted the NLRA or the Norris–LaGuardia Act.”) (quoting *Morvant*, 870 F.Supp.2d at 845).

C. Milini Waived Any Rights by Voluntarily Executing the MAA

Even if the Board refuses to reconsider whether Section 7 of the NLRA protects collective legal activity, Milini waived any such rights by signing the MAA. *See JS* at 13-14. The Board has held that employees are fully capable of entering into individual agreements with

their employer waiving Section 7 rights so long as the waiver is clear and unmistakable.¹² *Lockheed*, 302 NLRB 322, 327 (1991). In *Lockheed*, the Board determined whether an employee who resigns union membership is nevertheless required to continue paying dues pursuant to a checkoff authorization, which the Board considered a contract between the employee and employer. *Id.* The Board ruled that it would “require clear and unmistakable language waiving the right to refrain from assisting a union, just as [it would] require such evidence of waiver with regard to other statutory rights.” *Id.* at 328. *See also In Re Boehringer Ingelheim Vetmedica*, 350 NLRB 678, 680-681 (2007) (in exchange for reinstatement, employees were permitted to waive their Section 7 right to strike).

This concept is further supported by the fact that arbitration agreements are frequently utilized in unionized workplaces, where unions may waive represented employees’ litigation rights and agree to arbitrate their statutory employment claims. *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257-258 (2009) (union agreement to arbitrate statutory claims under ADEA enforceable). Even though the ADEA has express provisions for class litigation (unlike the NLRA), the Supreme Court relied on the NLRA to support the waiver of bargaining unit employees’ rights to a litigation forum under the ADEA. *Id.* (“[T]he CBA’s arbitration provision must be honored unless the ADEA itself removes this particular class of grievances from the NLRA’s broad sweep...it does not.”). Although the MAA is an individual agreement, the concept of waiver applies equally to Milini’s Section 7 rights as she agreed voluntarily to the arbitration agreement and “[n]othing in the law suggests a distinction between the status of

¹² Additionally, the Taft-Hartley amendments of 1947 gave employees the right to choose not to engage in concerted activity. 29 U.S.C. § 157 (“and shall have the right to refrain from any or all of such activities”). If filing a class or collective action is an exercise of employees’ Section 7 rights which should be protected, the Board must also uphold an employee’s equally important right to refrain from such exercise according to his or her own choice. *See, e.g., Salt River Valley Water Users’ Assoc. v. NLRB*, 206 F.2d 325 (9th Cir. 1953).

arbitration agreements signed by an individual employee and those agreed to by a union representative.” 556 U.S. at 258. *See also Gilmer*, 500 U.S. at 32-33 (a class action is simply a procedural device which can be, like the choice of a judicial forum, waived).

Milini signed the MAA prior to commencing employment, she did not risk losing employment by refusing to sign the MAA, she agreed to arbitrate all claims and controversies in exchange for the benefit of new employment and she first filed a request for arbitration under the MAA. Her waiver of any right to collective legal action was clear and unmistakable and the Board must honor this voluntary arrangement.

D. The MAA Cannot Reasonably Be Interpreted as Preventing Employees From Filing Charges with the Board

The General Counsel’s position that VXI employees could reasonably interpret the MAA as preventing the filing of charges with the Board is contradicted by the fact that VXI has never enforced the Agreement with respect to any claim filed with the Board or any other federal, state or local administrative agency. JS, Ex. N §1, Ex. Z ¶7. Employees’ understanding of the MAA’s limits is confirmed by Milini’s filing of her original and Amended Charge in this case, as well as the 65 other administrative charges filed against VXI since 2009.¹³ *Id.* at 2, ¶6(A)-(B), Exs. C-F, Ex. Z ¶7. Further, no language in the MAA specifically addresses whether employees can file charges with the Board, it does not prevent employees from doing so, and it explicitly carves out administrative charges of discrimination. *Id.*, Ex. N. Like Milini, other employees

¹³ Even if the MAA required arbitration of alleged NLRA violations, it would be enforceable under the FAA. *See, e.g., Gilmer*, 500 U.S. at 33 (“by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”). Indeed, the NLRB has long deferred to arbitration of potential NLRA violations. *See, e.g., Collyer Insulated Wire, Gulf & W. Sys. Co.*, 192 NLRB 837, 845 (1971). Whether the arbitration agreement is found in a collective bargaining agreement or the MAA should be immaterial.

have the opportunity to file charges with the Board under the terms of the MAA, and would not reasonably interpret the agreement to prohibit them from doing so.

E. VXI Lawfully Sought Enforcement of the MAA

VXI lawfully sought to enforce the MAA by defending itself against litigation initiated by Milini and Shakoor. While the General Counsel argues that VXI acted with an “illegal objective” by seeking to enforce an “unlawful arbitration agreement” in Ohio state court (JS at 14), VXI has a First Amendment right to petition Ohio courts to enforce the MAA as long as doing so was not objectively baseless or pursued with improper motive. *See Bill Johnson’s Rests. v. NLRB*, 461 U.S. 731, 748 (1983) (“We hold that the Board may not halt the prosecution of a state-court lawsuit, regardless of the plaintiff’s motive, unless the suit lacks a reasonable basis in fact or law.”). Moreover, where the employee initiates the civil litigation, it is axiomatic that the employer may lawfully defend that action. *See Murphy Oil*, 808 F.3d at 1021 (because “Murphy Oil defended itself against the employees’ claims by seeking to enforce the Arbitration Agreement,” its actions were not retaliatory). *See also Powell v. Honda of Am. Mfg., Inc.*, 2008 WL 2872273, at *3 (S.D. Ohio 2008) (claims for retaliation when defendant employer merely opposes litigation “would be an exercise in futility”).

Here, VXI defended itself against the lawsuit filed by Milini and Shakoor by seeking enforcement of the MAA. Not only did Milini and Shakoor initiate litigation by filing a lawsuit in Ohio state court, they also filed a Demand for Arbitration prior to VXI’s Motion to Compel Individual Arbitration. JS at 7-8, ¶21(A)-(C), Ex. R. Further, Milini only went to the Board after VXI indicated it would not agree to class or collective arbitration. *Id.*, Exs. B and C. While VXI cannot have taken its litigation position in retaliation for Milini’s Board filing, VXI believes that the converse is true (i.e., Milini filed her original and Amended Charge to pressure VXI to drop its resistance to class-wide arbitration).

Additionally, as discussed in Section A.2, the overwhelming majority of federal and state courts have upheld mandatory arbitration agreements similar to VXI's. It follows that VXI's defense of Milini and Shakoor's claims is not objectively baseless nor was it pursued with an improper motive, because its position was grounded upon a valid legal argument. *See Murphy Oil*, 808 F.3d at 1021 (“[I]t is a bit bold for [the Board] to hold that an employer who followed the reasoning of our *D.R. Horton* decision had no basis in fact or law or an “illegal objective” in doing so.”). This is particularly true given that the Ohio court recently found in favor of VXI, compelled Milini and Shakoor to individually arbitrate their claims, and dismissed their action. Filipini Decl. ¶2, Ex. A. *See Ralphs Grocery Co. & Terri Brown*, 363 NLRB No. 128, at *5 (2016) (Member Miscimarra, dissenting) (“I also believe that any Board finding of a violation based on the Respondent's meritorious state court motion to compel arbitration would improperly risk infringing on the Respondent's rights under the First Amendment's Petition Clause.”).

Ordering VXI to ignore the FAA in defending itself in state court, and to pay Milini's related fees, would be an extraordinary remedy and insupportable intrusion under *Bill Johnson's* and its progeny. Such a result is especially unwarranted here, where Milini brought the Amended Charge to bolster her litigation position on an issue (individual versus class arbitration) on which VXI ultimately prevailed. *See Bill Johnson's*, 461 U.S. at 747 (where employer's lawsuit in another forum “proves meritorious and he has judgment against the employees, the employer should also prevail before the Board, for the filing of a meritorious lawsuit, even for a retaliatory motive, is not an unfair labor practice.”).

IV. CONCLUSION

Based on the Joint Stipulation and the foregoing argument and authorities, the Board should dismiss the Amended Charge and Complaint and decline to find VXI engaged in any unfair labor practice with respect to its enforcement of the MAA.

Dated: March 21, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned counsel for Respondent certifies that a copy of the foregoing Respondent's Brief in Support of Its Motion for Judgment on Stipulated Facts was served by email on March 21, 2016:

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