

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

VXI GLOBAL SOLUTIONS, LLC

and

Case 08-CA-133514

ANZEL MILINI, an Individual

**GENERAL COUNSEL'S BRIEF TO BOARD**  
**BASED ON JOINT MOTION AND STIPULATION OF FACTS**

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## TABLE OF CONTENTS

Table of Authorities .	.iii
Issues Presented .	iv
Statement of the Case.	1
Statement of the Facts.	2
<i>A. Respondent’s Business Operations.</i>	2
<i>B. Respondent’s Mutual Agreement to Arbitrate Claims.</i>	2
<i>C. Enforcement of the MAA against the Charging Party’s Class Action Lawsuit.</i>	5
Argument .	8
<i>A. Maintenance of the MAA Limits Employees’ Access to the Board (Issue I).</i>	8
<i>B. Efforts to Enforce the MAA are Prohibiting Collective Action (Issue II).</i>	10
Conclusion .	12

## TABLE OF AUTHORITIES

### Cases

<i>AWG Ambassador, LLC</i> , 365 NLRB No. 137 (2016).	8
<i>BE &amp; K Construction Co.</i> , 536 U.S. 516 (2002)	10
<i>Bill's Electric, Inc.</i> , 350 NLRB 296 (2007).	8
<i>Bill Johnson's Restaurants v. NLRB</i> , 461 U.S. 731 (1983).	10, 11
<i>Brady v. National Football League</i> , 644 F.3d 661 (8th Cir. 2011).	10
<i>Cellular Sales of Missouri, LLC</i> , 362 NLRB No. 27 (2015).	8, 9
<i>Countrywide Financial Corp.</i> , 362 NLRB No. 165 (2015).	8, 9, 11
<i>D. R. Horton</i> , 357 NLRB No. 184 (2012), enf. denied in relevant part, 737 F.3d 344 (5th Cir. 2013).	10
<i>Eastex, Inc. v. NLRB</i> , 437 U.S. 556 (1978)	10
<i>Employer Resource</i> , 363 NLRB No. 59 (2015).	11
<i>Lutheran Heritage Village-Livonia</i> , 343 NLRB 646 (2004).	9, 11, 12
<i>Mohave Elec. Coop, Inc. v. NLRB</i> , 206 F.3d 1183 (D.C. Cir. 2000).	10
<i>Murphy Oil USA</i> , 361 NLRB No. 72 (2014).	10
<i>U-Haul Co. of California</i> , 347 NLRB 375 (2006), enfd. mem. 255 F. Appx. 527 (D.C. Cir. 2007).	8, 9

## **ISSUES PRESENTED**

- I. Whether Respondent's MAA is overly broad that employees could reasonably believe that they were prohibited from filing charges, or seeking other redress, with the National Labor Relations Board in violation of Section 8(a)(1) of the Act?
  
- II. Whether Respondent, by its maintenance of its various pleadings in the Court of Common Pleas for Mahoning County, the Ohio Seventh Appellate District, and before the American Arbitration Association, is enforcing an unlawful policy requiring employees to waive the right to pursue class or collective claims in violation of Section 8(a)(1) of the Act?

## STATEMENT OF THE CASE

On September 30, 2015, the parties to this case, Respondent VXI Global Solutions, LLC, Charging Party Anzel Milini, and the General Counsel, filed a joint motion and stipulation of facts with the National Labor Relations Board (the Board). Under Section 102.35(a)(9) of the Board's Rules and Regulations, the parties waived a hearing before an administrative law judge and agreed to submit the case directly to the Board based on a stipulated record for the findings of fact, conclusions of law, and Decision and Order. On February 29, 2016, the Board granted the parties' motion, ordered the proceeding be transferred, and permitted the parties to file briefs in support of their respective positions. Counsel for the General Counsel files this brief pursuant to the Board's February 29 order.

The charge was initially filed by the Charging Party on July 25, 2014, (Stip. ¶ 6(A); Exhs. A and B), and was amended on September 30, 2014. (Stip. ¶ 6(B); Exhs. C and D.) On April 29, 2015, the Regional Director issued a Complaint and Notice of Hearing, (Exhs. E and F), and Respondent filed a timely Answer denying that it had committed any violation of the Act. (Exh. G.) Thereafter, the hearing was rescheduled, (Exhs. H and I), and subsequently postponed indefinitely. (Exhs. J and K.)

On July 31, 2015, the Regional Director for Region 8 approved a bilateral informal Board settlement agreement reached between the parties which partially resolved the amended charge in the instant Case 08-CA-133514, and fully resolved Case 08-CA-151270. (Stip. ¶ 7.) As part of the settlement agreement, the Regional Director withdrew paragraphs 4(A) through (D) of the April 29 Complaint and Respondent withdrew the portions of its Answer responsive to those paragraphs. (Stip. ¶ 7.) Paragraphs 4(A) through (D) concerned unlawful handbook rules involving derogatory behavior towards management, and confidential and proprietary

information. (Exh. E.) The remaining allegations in the Complaint are those at issue in the present proceeding before the Board. (Stip. ¶ 7.)

## **STATEMENT OF THE FACTS**

### ***A. Respondent's Business Operations***

Respondent is a California corporation and is engaged in “business process outsourcing” (BPO) by operating customer service call centers for other employers. At all relevant times, it operated call centers at the following non-unionized locations: (1) 6730 South Tucson Boulevard, Tucson, Arizona; (2) 220 West 1st Street, Los Angeles, California; (3) 401 Cleveland Avenue NW, Canton, Ohio; (4) 1661 Waycross Road, Cincinnati, Ohio; (5) 20 West Federal Street, Youngstown, Ohio; and (6) 2002 West Loop 289, Lubbock, Texas. (Stip. ¶¶ 8(A) and 9.) In conducting these business operations, Respondent annually performed services valued in excess of \$50,000 in States other than the State of Ohio. Accordingly, Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (Stip. ¶ 8(B).)

### ***B. Respondent's Mutual Agreement to Arbitrate Claims***

Since at least July 11, 2011, and continuing to the present, Respondent required employment applicants and newly hired employees at its above locations to execute a document entitled “Mutual Agreement to Arbitrate Claims” (the MAA) as a condition of their employment. (Stip. ¶ 10.) The MAA, identified as “Appendix C,” was part of Respondent’s employee handbook which was distributed to all of Respondent’s employees at its six U.S. locations. (Stip.

¶ 10.)

In approximately May 2012, Respondent revised its MAA. Both the earlier January 2009 version and the revised May 2012 version contain the same language which is at issue before the Board. (Stip. ¶ 11; Exhs. L and M, respectively.) Consequently, both versions of the MAA are herein referred to individually and collectively as “the MAA.” (Stip. ¶ 11.)

In the Joint Motion, Respondent stipulated that “no applicant for employment shall be hired and/or no newly hired employee may retain employment at any of its facilities [listed above] without executing the MAA.” (Stip. ¶ 16.) The MAA continued in effect for Respondent’s employees both during and after their employment. (Stip. ¶ 16.) Additionally, Respondent stipulated that MAAs are in effect for employees, both current and former, who were hired prior to July 11, 2011. (Stip. ¶ 16.)

The MAA required employees to agree to arbitrate all claims involving violations of federal government law and statute. (Stip. ¶ 12.) Specifically, the MAA required that the following types of claims are subject to mandatory arbitration:

1. Claims Covered by this Agreement. The Company and I agree to resolve, by arbitration, all claims or controversies, except as excluded in paragraph 2 below, involving the Company and any of its past or present partners, officers, employees or agents, whether or not those claims or controversies arise out of my employment with the Company or the termination of my employment ("Claims"). The Claims covered by this Agreement include, but are not limited to, claims for wages, bonuses, commissions or any other form of compensation; claims for breach of any contract, express or implied; tort claims; claims for discrimination or harassment, including but not limited to discrimination or harassment based on race, sex, religion, national origin, age, marital status, physical or mental disability, medical condition or sexual orientation; claims for benefits, except as excluded in the following paragraph; and all claims for violation of any federal, state or other governmental law, statute, ordinance. (sic) Executive Order or regulation; claims by the Company for injunctive and/or other equitable relief for, among other claims, unfair competition, the use or unauthorized disclosure or misappropriation of trade secrets or client information, the disclosure of any

other confidential information or the violation of any confidentiality agreement which may be in effect between me and the Company.

(Stip. ¶ 12.)

While the MAA did not contain specific language pertaining to collective or class action claims, (Stip. ¶ 15), the MAA did allow for limited exceptions to mandatory arbitration for claims involving workers' compensation, unemployment benefits, and employee pension and benefits plans. Specifically, the MAA provided:

2. Claims not Covered by the Agreement. This Agreement does not apply to or cover claims by me for workers' compensation benefits or unemployment compensation benefits; claims based upon an employee pension or benefit plan, the terms of which may contain an arbitration or other dispute resolution procedure, in which case the provisions of such plan shall control.

(Stip. ¶ 13.) The arbitration procedures section of the MAA also made reference to an exception for administrative charges alleging discrimination:

4. Arbitration Procedures.

Either the Company or I may bring an action in any court of competent jurisdiction to compel arbitration under this Agreement and to enforce an arbitration award. **Except as otherwise provided in this Agreement, the Company and I agree that neither of us shall initiate nor prosecute any lawsuit or administrative action (other than an administrative charge of discrimination) in any way related to any claim.**

(Stip. ¶ 14.)

### ***C. Enforcement of the MAA against the Charging Party's Class Action Lawsuit***

The Charging Party, Anzel Milini, filed her charge on behalf of herself and another employee, LaShonna Shakoor. (Exhs. A and C.) Milini was employed by Respondent at its Canton, Ohio facility from July 11, 2011, until March 23, 2013. (Stip. ¶ 17.) The parties stipulated that on or about July 11, 2011, Respondent required Milini to execute the MAA as a condition of her employment at the Canton facility. (Stip. ¶ 17; Exh. N.) Shakoor was employed by Respondent at its Youngstown, Ohio facility from September 12, 2011, until March 6, 2013. (Stip. ¶ 18.) The parties stipulated that on or about September 12, 2011, Respondent required Shakoor to execute the MAA as a condition of her employment at the Youngstown facility. (Stip. ¶ 15; Exh. O.)

On November 8, 2013, Charging Party Anzel Milini and employee LaShonna Shakoor filed a Plaintiff's Class Action Complaint in the Court of Common Pleas, Mahoning County, Ohio, Case No. 13-CV-03183, alleging violations of the Ohio Minimum Fair Wage Standards Act. (Stip. ¶ 19; Exh. P.) On January 28, 2014, Respondent filed an Amended Answer and Counterclaim maintaining, *inter alia*, that Plaintiff's Class Action Complaint was "not properly subject to class certification and class action" because it was barred by the MAA, and therefore, should be dismissed or stayed. (Stip. ¶ 20(A); Exh. Q, ¶¶ 13 and 19 of amended answer.)

In its counterclaim, Respondent maintained that paragraph 1 of the MAA "applies to all claims for wages and bonuses, and for all claims for violation of any state or government law;" and that paragraph 4 of the MAA dictated that neither Respondent or its employees "shall initiate nor prosecute any law suit or administrative action (other than an administrative charge of discrimination) in any way related to any claim." (Stip. ¶ 20(B); Exh. Q, ¶¶ 6 and 7 of counterclaim.) Also in its counterclaim, Respondent maintained that the MAA "does not make a

provision for arbitration as a class, and instead provides for arbitration of any claim only between the employee and [Respondent]” and that the MAA “does not specifically allow for arbitration as a class.” (Stip. ¶ 20(C); Exh. Q, ¶¶ 9 and 12 of counterclaim.)

Since the filing of its amended answer on January 28, 2014 to employees Milini and Shakoor’s class action lawsuit, Respondent has taken further affirmative actions during the course of the protracted litigation to enforce its position that the MAA limits its employees’ ability to pursue all collective legal action whether in the courts or through arbitration. (Stip. ¶ 21.)

Specifically, on March 18, 2014, Respondent filed a Response to Plaintiffs’ Motion to Stay Pending Arbitration and Cross Motion to Compel Individual Arbitration with the Mahoning County Common Pleas Court. (Stip. ¶ 21(A); Exh. R.) Respondent asserted in its response and cross motion, *inter alia*, that the employee plaintiffs had filed an improper lawsuit and demand for classwide arbitration because the MAAs “do not allow class arbitration.” (Stip. ¶ 21(A); Exh. R, p. 7.) Respondent filed its response after employees Milini and Shakoor had filed a motion to stay the state court proceedings pending arbitration. (Stip. ¶ 21(A).) On April 9, 2014, Respondent filed a Reply in Support of [its] Cross Motion to Compel Individual Arbitration. (Stip. ¶ 20(B); Exh. S.) Respondent asserted in its reply in support, *inter alia*, that “VXI’s arbitration agreements with each of the plaintiffs call[ed] for individual arbitration ” (Stip. ¶ 21(B); Exh. S, p. 1.)

On June 30, 2014, Respondent filed an Answer to Demand for Arbitration and Additional Defenses with the American Arbitration Association (AAA) in Cleveland, Ohio. (Stip. ¶ 21(C); Exh. T.) In this answer, Respondent asserted, *inter alia*, that the “separate [MAAs] to which each [employee] Claimant agreed, do not allow classwide or collective arbitration. ” (Stip.

21(C); Exh. T, ¶ 2.) Respondent filed its answer after employees Milini and Shakoor had made a demand for arbitration before the AAA on February 5, 2014. (Stip. ¶ 21(C); Exh. R.) Then on July 31, 2014, Respondent filed an Amended Answer to Demand for Arbitration, Additional Defenses, and Counterclaim with the AAA. (Stip. ¶ 21(D); Exh. U.) Again, Respondent asserted, *inter alia*, that “the [MAA] does not allow classwide arbitration proceedings.” (Stip. ¶ 21(D); Exh. U, ¶ 3 of additional defenses.)

After a Judgment Entry issued by the Mahoning County Common Pleas Court on May 1, 2014, which denied Respondent’s motion to compel individual arbitration because the MAA called for such a determination to be made by an arbitrator, Respondent filed a notice of appeal. (Stip. ¶ 21(E); Judgment Entry attached to Exh. V.) In its Appellant’s Brief filed on August 22, 2014, with the Ohio Seventh District Court of Appeals, Respondent argued, *inter alia*, that the trial court had erred by denying its motion to compel individual arbitration because the MAA does not authorize classwide arbitration. (Stip. ¶ 21(F); Exh. W, pp. i, 1, 21-25.)

On December 23, 2014, Respondent filed an Appellant’s Reply Brief with the Ohio Seventh District Court and again requested that the appellate court direct the lower court to compel individual arbitration. (Stip. ¶ 21(G); Exh. X, p. 10.) In an oral argument before the appellate court on May 13, 2015, Respondent asserted, *inter alia*, that the MAA with each of the plaintiffs required individual arbitration and prohibited classwide arbitration. (Stip. ¶ 22.)

Thereafter, on June 16, 2015, the Ohio Seventh District Court of Appeals issued an opinion, Case No. 14 MA 59, in which it remanded the issue of whether the MAA allowed class arbitration to the Court of Common Pleas for Mahoning County. (Stip. ¶ 23; Exh. Y.) The Court of Appeals held that the issue of whether the MAA allowed for class arbitration was for the judiciary to decide and not an arbitrator. (Stip. ¶ 23; Exh. Y, p. 18.) At the time of the filing

of the Joint Motion and Stipulations, the case was on remand. (Stip. ¶ 23.)

## ARGUMENT

### *A. Maintenance of the MAA Limits Employees' Access to the Board (Issue I)*

Respondent's overly broad MAA makes employees reasonably believe that they are prohibited from filing charges, or seeking other redress, with the National Labor Relations Board in violation of Section 8(a)(1) of the Act.

Respondent requires all of its employees to sign a mandatory arbitration agreement (MAA) as a condition of their employment. If one wishes to work for Respondent, then one must sign the MAA. Respondent maintains the MAA with its employees both during and after their employment.

With few exceptions, the MAA requires employees to agree to arbitrate all "claims or controversies" including those involving violations of federal law. (MAA, §1.) The exceptions not covered by the MAA involve only workers' compensation and unemployment benefits, and claims based on an employee pension or benefit plan. (MAA, §2.) Under the arbitration procedures section of the MAA, administrative charges of discrimination are referenced as not being subject to the expansive ban. (MAA, §4.)

As alleged in the complaint, Respondent's maintenance of the MAA violates Section 8(a)(1) of the Act because it interferes with employees' access to the Board. Mandatory arbitration policies that interfere with employees' rights to file a charge or otherwise participate in Board processes are unlawful. See *Countrywide Financial Corp.*, 362 NLRB No. 165, slip op. at 1-3 (2015); *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, slip op. at 1 fn. 4 (2015); *Bill's Electric, Inc.*, 350 NLRB 296 (2007); *U-Haul Co. of California*, 347 NLRB 375, 377-78

(2006), enfd. mem. 255 F. Appx. 527 (D.C. Cir. 2007. Under the test in *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004), a challenged rule that does not explicitly restrict Section 7 rights will be held unlawful where reasonable employees would construe the rule to prohibit Section 7 activity. See *Countrywide Financial*, 362 NLRB No. 165, slip op. at 2.

While the language of the MAA in the instant case does not explicitly state that employees are prohibited from pursuing NLRB claims or seeking redress before the Board, the breadth of the MAA would lead a reasonable employee to believe that the filing of charges or otherwise seeking remedial relief before the Board would be in violation of Respondent's mandatory arbitration policy. See *Countrywide Financial*, 362 NLRB No. 165, slip op. at 2 (broad terms applied to all claims and controversies including violations of federal statutes, regulations and public policy); *Cellular Sales*, 362 NLRB No. 27, slip op at 1 fn. 4; *U-Haul*, 347 NLRB at 378. The maintenance of an unlawful MAA, both during and after employees' tenure of employment, constitutes a Section 8(a)(1) violation of a continuing nature. *AWG Ambassador, LLC*, 365 NLRB No. 137, slip op. at 1 fn. 1 (2016); *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, slip op. at 2.

Accordingly, Respondent's continued maintenance of the overly broad MAA requiring arbitration for virtually all federal claims violates Section 8(a)(1) as it interferes with its employees' rights to file Board charges and otherwise seek redress before the Board.

***B. Efforts to Enforce the MAA are Prohibiting Collective Action (Issue II)***

By the maintenance of its various pleadings in the Court of Common Pleas for Mahoning County, the Ohio Seventh Appellate District, and the American Arbitration Association, Respondent is enforcing an unlawful policy requiring employees to waive the right to pursue class or collective claims in violation of Section 8(a)(1) of the Act.

Although the MAA does not expressly authorize or prohibit class or collective actions, Respondent has repeatedly asserted before the Court of Common Pleas for Mahoning County, the Seventh Appellate District of Ohio, and the American Arbitration Association that the MAA mandates arbitration of claims only on an individual basis. Respondent's actions directly conflict with well-established federal law protecting employees' Section 7 rights to collectively pursue work-related legal claims. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978); *Brady v. National Football League*, 644 F.3d 661, 673 (8th Cir. 2011); *Mohave Elec. Coop, Inc. v. NLRB*, 206 F.3d 1183, 1188 (D.C. Cir. 2000).

Emphasizing the core substantive right to engage in collective legal action under the NLRA, the Board in *Murphy Oil USA*, 361 NLRB No. 72 (2014), reaffirmed its earlier decision in *D. R. Horton*, 357 NLRB No. 184, slip op. at 1 (2012), enf. denied in relevant part, 737 F.3d 344 (5th Cir. 2013), that an employer violates Section 8(a)(1) when it requires employees to sign, as a condition of employment, an agreement that explicitly precludes them from collectively pursuing work-related claims in any forum. Moreover, an employer acts with an "illegal objective" under *BE & K Construction Co.*, 536 U.S. 516 (2002), and *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 737 fn. 5 (1983), when it seeks to enforce such an unlawful arbitration agreement. *Murphy Oil*, 361 NLRB No. 72, slip op. at 21.

The Board subsequently applied its holding of *Murphy Oil* and *D.R. Horton* to cases in

which, like here, an arbitration agreement does not specifically preclude collective or class actions. *Employer Resource*, 363 NLRB No. 59 (2015); *Countrywide Financial Corp.*, 362 NLRB No. 165 (2015). In *Countrywide Financial*, the Board found an agreement, which had no language addressing whether arbitration was to be conducted on an individual or collective basis, to be unlawful in its application. 363 NLRB No. 59, slip op. at 3. “A workplace rule that does not explicitly restrict activities protected by Section 7 will be found unlawful under the third prong of the *Lutheran Heritage* test if the rule has been applied to restrict the exercise of Section 7 rights.” *Id.*, slip op. at 5 (citing *Lutheran Heritage*, 343 NLRB at 647).

Additionally, an employer acts with an illegal objective when it seeks to prevent collective actions via court filings by asserting an unlawful construction of a facially valid provision of an arbitration agreement. *Countrywide Financial*, 362 NLRB No. 165, slip op. at 5 (2015). In finding the violation, it is not necessary for the respondent to have previously violated a Board order for the same conduct to be unlawful. *Id.* It is the conduct itself, which here is the attempt to prevent employees’ from exercising their Section 7 right to pursue collective action, which falls with the illegal objective of footnote 5 of *Bill Johnson’s*. 362 NLRB No. 165, slip op. at 5 (citing *Bill Johnson’s Restaurants v. NLRB*, 461 U.S. 731, 737 fn. 5 (1983)).

In the instant case, while the MAA does not expressly authorize or prohibit whether mandatory arbitration may be heard on a collective or class basis, Respondent has repeatedly asserted its position in the courts and before the American Arbitration Association that the MAA requires individual arbitration. Consequently, as the MAA mandates arbitration as the sole forum for resolving employment disputes, Respondent has effectively foreclosed its employees from engaging in all collective employment-related litigation. Again, under *Lutheran Heritage Village-Livonia*, a Section 8(a)(1) violation will be found when a “rule has been applied to

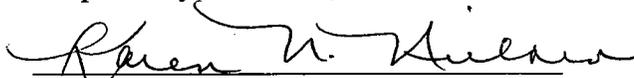
restrict the exercise of Section 7 rights.” 343 NLRB at 647. Thus, Respondent, through its various pleadings, has clearly violated Section 8(a)(1) by applying an unlawful construction of the MAA, which has an illegal objective, to preclude class action legal claims involving employees’ wages.

**CONCLUSION**

By its maintenance of the MAA, Respondent has violated Section 8(a)(1) of the Act as the MAA is overly broad in its mandate for arbitration of federal claims, thereby prohibiting employees from seeking redress before the Board. Respondent has additionally violated Section 8(a)(1) by its efforts to enforce its MAA against employees by asserting in both judicial and arbitral forums that the MAA prohibits employees from engaging in all types of class action claims.

Wherefore, Counsel for the General Counsel respectfully requests that an order be issued consistent with Board law, and as requested in the Complaint and Notice of Hearing that issued on April 29, 2015.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I certify that a copy of the foregoing General Counsel's Brief to Board Based on Joint Motion and Stipulation of Facts was served by e-mail and regular mail on the following counsel on this 21st day of March, 2016:

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