

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

VXI GLOBAL SOLUTIONS, LLC

and

Case 08-CA-133514

ANZEL MILINI

ANSWERING BRIEF OF CHARGING PARTY ANZEL MILINI

Charging Party Anzel Milini submits this Answering Brief in further support of her position that the Board should conclude, as to Issue II of the parties' Joint Motion and Stipulation of Facts, that Respondent VXI Global Solutions has violated Section 8(a)(1) of the Act by seeking judicial enforcement of its Mutual Agreement to Arbitrate ("MAA") as an implicit waiver of class action arbitration and thereby as an implicit waiver of the Charging Party's substantive right under Section 7 of the Act "to engage in ... concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Respondent's Brief is for the most part a predictable plea for the Board to reverse course on its decisions in *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014) and *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012) which irrefutably dictate the outcome of this charge. In certain significant ways, however, the Respondent purposefully misconstrues the issues here, and does so in ways that reveal additional reasons why the Board should not depart from its decisions that control this case. This Brief is not intended to address all of the Respondent's points and authorities, but only to highlight some that, from the Charging Party's perspective, merit

emphasis. In all respects, the Charging Party joins in and endorses the General Counsel's positions in this proceeding.

1. The Issue For The Charging Party Is Not Whether She Must Arbitrate Her Claims, But Whether She Must Be Forced To Forgo Any Opportunity To Pursue Arbitration On A Class-Action Basis

In Respondent's Brief in Support of Its Motion for Judgment On Stipulated Facts at 5-6 ("Respondent's Brief"), the Respondent's citation of *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987), and other cases, implies that the issue here is whether the Charging Party's underlying wage claims must be arbitrated. To the contrary, the Charging Party is not opposed to arbitration, and filed for arbitration before the American Arbitration Association ("AAA") immediately upon learning of the existence of the MAA. In fact, the only issue is whether, in arbitration, she should be permitted to seek possible certification of a class.¹

In similar "straw man" fashion, the Respondent implies that the Charging Party's position requires the Board to conclude that vindication of Section 7 rights is somehow inherently incompatible with arbitration. The result sought here is arbitration-neutral. As the Charging Party explained in her opening Brief, if forbidding an employee from participating in a class or collective action violates the Act, then it makes no difference whether the prohibition is contained in an arbitration clause. All the Charging Party wants is the opportunity to assert her claims in arbitration on a class-wide basis, without regard to the MAA being set up as a waiver of such a right.

¹ Class action arbitration is an accepted procedure at the AAA, and the AAA even has special rules for such proceedings. Of course, as in any federal or state court, the right to seek class certification in arbitration does not guarantee the right to proceed on a class-wide basis. See, AAA Supplementary Rules for Class Arbitration, https://www.adr.org/aaa/ShowPDF?url=/cs/groups/commercial/documents/document/dgdf/mda0/~edisp/adrstg_004129.pdf.

In this regard, it is most telling that Respondent has “not sought to enforce the [MAA as a class action or collective action waiver] against plaintiffs in at least six purported class or collective actions filed against it by current or former employees since 2008.” Respondent’s Brief at 2. This troubling concession begs the question why, in the case of Charging Party Milini and her co-plaintiff Lashonna Shakoor, has the Respondent chosen to do so at all, much less with such exhaustive vehemence? One plausible answer is that Respondent sees merit and risk in the Charging Party’s wage claims that were absent in those other actions where it did not oppose class or collective arbitration. If so, the Section 7 rights here have substantive importance to potentially hundreds of hourly-wage employees, and are therefore particularly deserving of protection.²

2. The Respondent Has Demonstrated Animus Towards The Charging Party, And To Her Efforts To Vindicate Her Section 7 Rights, Whether It Be In Arbitration Or In This Proceeding Before The Board

Respondent’ animosity toward the Charging Party and her co-plaintiff – not to mention the true esteem in which Respondent holds Section 7 rights – is apparent not only from its seemingly arbitrary choice to enforce the implied class action waiver in the MAA as to them when it did not do so as to others, but in its assertion that the Charging Party “abuses the Board’s unfair labor practice machinery for tactical gain in unrelated litigation.” *Id.* at 4. This unfounded accusation shows the Respondent’s true contempt for employees’ rights.

The Charging Party has in fact gained no litigation advantage of any kind from the pendency of this proceeding before the Board, nor is it possible to comprehend how she could have, since the Board is exclusively charged with enforcement of the Act. But Respondent’s

² Another plausible explanation, as noted in Charging Party’s prior Brief, is that Respondent never originally intended the MAA to serve as a class action waiver, but recent Supreme Court jurisprudence presented an opportunity to pretend that it did.

belief that an employee who seeks relief from an (implied) class action waiver by grieving to the Board is “abusing” the unfair labor practice machinery, even in light of *Murphy Oil* and *D.H. Horton*, is further evidence of Respondent’s animus toward the Charging Party and reveals a particular motive and intent to preclude employees from the exercise of Section 7 rights. Under the circumstances, no other conclusion is justified.

3. The MAA Is Not A Clear And Unmistakable Waiver Of Section 7 Rights

Respondent claims that the MAA, which contains only an implied class action waiver, is a “clear and unmistakable” waiver of Section 7 rights. *Id.* at 1; 12-14. This is a leap that the law and facts do not justify and that the Board should reject. Respondent fails to explain how an agreement that makes no reference to class actions, to collective actions, or to the Act, can satisfy the “clear and unmistakable” standard of *Lockheed Space Operations Company, Inc.*, 302 NLRB 322 (1991), and the other authorities on which it relies. By definition, such an implicit waiver can only rarely be “clear and unmistakable,” and this is not such a case. At a minimum, the MAA was purely adhesive, there was no equality of bargaining power between the parties, and the agreement contains ambiguities that suggest bilateral arbitration was not the Respondent’s fixed and original intent and expectation.³

An examination of *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009) and one of its antecedent cases, *Wright v. Universal Mar. Serv. Corp.*, 525 U.S. 70 (1998), fully supports the

³ For example, Section 1 of the MAA does not restrict the scope of arbitration solely to claims involving the signing employee. Section 1 states “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”).” (emphasis added) A perfectly reasonable interpretation of this clause is that the scope of arbitration includes claims that arise out of the employment of employees other than the signator, such as when a co-employee sues in a representative capacity on a class or collective basis.

Charging Party's position in this regard. In *Wright*, the Court held that the waiver of an employee's statutory right to a judicial forum for claims of employment discrimination "must be clear and unmistakable." *Id.* at 80. Justice Scalia himself, who authored the majority opinion, stated that even if it is not a "substantive right ... the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit" waiver. *Id.* In that case, the agreement at issue contained "no explicit incorporation of statutory antidiscrimination standards." *Id.* Accordingly, the Court refused to find a clear and unmistakable waiver. By the same token, the Board here should find that the MAA, which bears no mention of the Act, or any generic language ensuring that the employee is free from interference in efforts "to engage in ... concerted activities for the purpose of collective bargaining or other mutual aid or protection," is not a waiver of Section 7 rights.

In *14 Penn Plaza*, the Court encountered the same question as in *Wright*, but justifiably found that the waiver at issue was "clear and unmistakable." The agreement there explicitly invoked "the Age Discrimination in Employment Act ... and similar laws" and required that "[a]ll such claims shall be subject to the grievance and arbitration procedure ... as the sole and exclusive remedy for violations." *Id.* at 252. That easily qualifies as a clear and unmistakable waiver of a federal forum.

The Respondent's MAA contains no such "clear and unmistakable" waiver of the Charging Party's Section 7 rights to "to engage in ... concerted activities for the purpose of collective bargaining or other mutual aid or protection." Under the circumstances, the conclusion is clear. The Respondent is taking the position that the Charging Party has no right to join her wage claims with any other employee's, in any forum – arbitral or judicial – but the

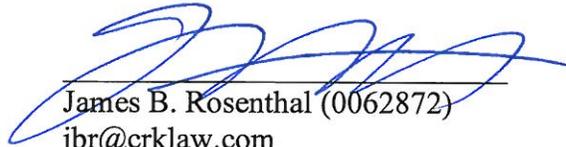
Respondent can establish no clear and unmistakable waiver of such a right. That is a violation of the Act.

Conclusion

For all of the foregoing reasons, and those set forth in the prior submission of the Charging Party and the General Counsel, the Board should rule in favor of the Charging Party and find that Respondent's MAA, and its conduct in enforcing it as a class action waiver, constitute an unfair practice in violation of the Act.

Respectfully submitted,

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