

**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 ANSWERING BRIEF TO THE BRIEFS OF THE GENERAL  
COUNSEL AND CHARGING PARTY**

On March 21, 2016, the General Counsel and Charging Party Anzel Milini (“Milini”) filed their Briefs to the National Labor Relations Board. This Answering Brief addresses the arguments made in those Briefs.

## **I. INTRODUCTION**

Under the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1, *et seq.*, the Supreme Court has made clear that arbitration agreements must be enforced according to their terms and that other federal and state statutes will not override the FAA on this point absent an express “contrary Congressional command.” In an attempt to avoid the FAA’s broad reach, the General Counsel and Milini ignore this controlling precedent while advocating for an outcome clearly at odds with the FAA’s objectives.<sup>1</sup> For the reasons set forth in Respondent’s Brief in Support of Motion for Judgment on Stipulated Facts (“Respondent’s Brief”) and herein, the Board should dismiss the Complaint.

## **II. ARGUMENTS AND AUTHORITIES**

### **A. The Opening Briefs Ignore the Unique Procedural History of this Case**

The General Counsel and Milini overlook or minimize an important procedural fact in this case: Milini voluntarily filed for arbitration pursuant to the parties’ Mutual Arbitration Agreement (“MAA”). *See* JS at 8, ¶21(C), Ex. R. Although Milini now complains about the FAA and its robust jurisprudence (Charging Party’s Brief (“CPB”) at 6-7), it was her tactical litigation decision that brought that precedent to bear. The procedural posture here undercuts the arguments advanced by the General Counsel and Milini in at least two key ways. First, their focus on an alleged general Section 7 right to pursue class or collective litigation is misplaced.

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<sup>1</sup> Notably, while the General Counsel gives a faithful summary of the procedural history here—including that Milini actively sought to arbitrate her claims—there is no discussion of the FAA in its brief. Additionally, neither party argues that the FAA’s saving clause is a basis to invalidate the MAA.

General Counsel’s Brief (“GCB”) at 10 (“Respondent’s actions directly conflict with well-established federal law protecting employees’ Section 7 rights to collectively pursue work-related legal claims.”); CPB at 2 fn. 2. Putting aside for the moment that none of the cases cited by Milini or the General Counsel actually hold that employees have such an inherent right, there is no reason for the Board to opine here on this larger issue.<sup>2</sup> Instead, the Board’s proper focus in this case should be on the consequences of Milini’s decision to invoke arbitration pursuant to an agreement that she voluntarily signed at the start of employment. The Supreme Court has made clear that such agreements are to be enforced according to their terms, which necessarily results in individual arbitration of Milini’s claims here, *See, e.g., American Express Co. v. Italian Colors Restaurant* 133 S.Ct. 2304, 2309, 186 L. Ed. 2d 417 (2013) (under the FAA, “courts must rigorously enforce arbitration agreements according to their terms, including terms that specify with whom the parties choose to arbitrate their disputes, and the rules under which that arbitration will be conducted.”) (internal quotation marks, brackets, and citations omitted); *Stolt-Nielsen S.A. v. Animal Feeds Int’l Corp.*, 559 U.S. 662, 683-84 (2010) (parties “may specify *with whom* they choose to arbitrate their disputes” and “a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding

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<sup>2</sup> General Counsel and Milini both rely upon *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978) for the proposition that Section 7 protects legal concerted activity, including class and collective action. GCB at 10; CPB at 5. However, *Eastex* only stood for the broad proposition that Section 7 “protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums.” 437 U.S. at 565-566. It did not hold that employees have an absolute right to pursue class or collective procedures in arbitration or otherwise. Nor did any of the other cases that the Board and Milini cite in support of this point. GCB at 10: *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). CPB at 4-6: *Novotel New York*, 321 NLRB 624, 633 (1996); *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Murphy Oil*, 361 NLRB No. 72 (2014) (Member Johnson, Dissenting); *Nat’l Licorice Co. v. N.L.R.B.*, 309 U.S. 350 (1940); *United Transp. Union v. State Bar of Mich.*, 401 U.S. 576 (1971); *Convergys Corp.*, 363 NLRB 51 (2015).

that the party *agreed* to do so.”) (emphases in original).<sup>3</sup>

Second, Milini gets the cart before the horse in discussing the theoretical interaction between the FAA and the NLRA. CPB at 6 (“[I]t should be unthinkable that even an ‘overriding federal policy favoring arbitration’ could **implicitly** do away with substantive rights guaranteed by the Act and by the First Amendment.”) (emphasis in original).<sup>4</sup> But the correct test is not whether the FAA overrides a (non-existent) right in the NLRA. Rather, the General Counsel and Milini must show that the Act is expressly exempted from the FAA’s coverage; otherwise, the MAA must be enforced according to its terms. *See American Express*, 133 S.Ct. at 2308; *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 669, 181 L. Ed. 2d 586 (2012). Similarly, Milini’s argument that no agreement “expressly precludes” her from filing a joint proceeding (CPB at 4) ignores that the correct analysis is whether the MAA explicitly allows such proceedings. *Stolt-Nielsen*, 599 U.S. at 684 (assuming that class arbitration is permitted when an agreement is silent on the issue is “fundamentally at war with the foundational FAA principle that arbitration is a matter of consent.”); *Oxford Health Plans LLC v. Sutter*, 133 S.Ct. 2064, 2066, 186 L. Ed. 2d 113 (2013) (“Class arbitration is a matter of consent: An arbitrator may

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<sup>3</sup> Milini emphasizes that the parties in *Stolt-Nielsen* stipulated that their arbitration agreement was “silent” as to the availability of class arbitration (CPB at 2), but no stipulation is required to see that the MAA is similarly “silent” here, where the MAA does not mention class actions or collective arbitration, the entire arbitration agreement is phrased as an agreement between VXI and the individual employee, the MAA uses the terms “I,” “me” and “my” to refer to the employee 37 times, and the agreement’s language does not provide that anyone other than the individual signatory can be bound by the arbitrator’s decision. *See JS, Exs. L and M*. While Milini’s alleged subjective intent in signing the MAA (CPB at 3) is irrelevant in interpreting its express terms, Respondent notes that it contains no citation to the Joint Motion and Stipulation of Facts and should therefore be disregarded.

<sup>4</sup> For her novel First Amendment argument, Milini relies on *Novotel*, 321 NLRB 624 (1996), in which the Board found that that a union’s provision of legal services to employees was protected by the First Amendment. CPB at 4-6. *Novotel* says nothing about arbitration or even employees having a constitutional right to class procedures. Nor has the Board found a constitutional claim in this context. *See, e.g., Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014); *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012).

employ class procedures only if the parties have authorized them.”); *Reed Elsevier, Inc. v. Crockett*, 734 F.3d 594, 599 (6th Cir. 2013) *cert. denied* 2014 WL 469583 (2014); *Thomas v. Right Choice Staffing Grp., LLC*, 2015 WL 4078173, at \*7 (E.D.Mich. 2015) (“The arbitration clause in the [agreement] does not mention classwide arbitration [and] [a]s such, the Court makes the determination that Plaintiffs may not seek classwide relief ...”); *Bird v. Turner*, 2015 WL 5168575, \*9 (N.D.W.V. 2015) (“[T]he arbitration agreement does not mention class arbitration ... [t]herefore, this Court finds that the parties did not consent to class arbitration but only to bilateral arbitration.”); *Taylor v. American Income Life Ins. Co.*, 2013 WL 2087359, \*4 (N.D.Ohio 2013) (“Silence on the right to collective arbitration means there is no right to collective arbitration.”).

**B. The Opening Briefs Advocate for an Outcome that Frustrates the FAA**

Milini and the General Counsel argue that an employee’s waiver of the option to bring class actions would amount to a *per se* violation of the federal right to undertake concerted action. *See* CPB at 5-6; GCB at 10-11. But their approach would effectively eliminate individual arbitration and ultimately disfavor arbitration agreements in a way that the FAA forbids. As noted above, while parties may agree to class arbitration if they desire, that is no basis for concluding that the FAA permits them to be forced into class arbitration. On the contrary, “[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” *AT&T Mobility v. Concepcion*, 563 U.S. 333, 344 (2011).

As the Supreme Court recognized in *Concepcion* and *Stolt-Nielsen*, arbitration is inherently individualized and deferring to collective or class procedures would result in the sacrifice of cost savings, informality, and expedition of individual arbitration. As a result, no rational employer would agree to collective or class arbitration. *See Concepcion*, 563 U.S. at

351 (“We find it hard to believe that defendants would” enter into agreements permitting class arbitration); *Stolt-Nielsen*, 559 U.S. at 685 (“class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator”). Put simply, a forced abandonment of individualized arbitration would result in a rejection of arbitration altogether, which would ultimately also be to the detriment of employees<sup>5</sup> and conflict with the FAA’s objectives.

**C. VXI Lawfully and Properly Defended Itself in Ohio State Court**

Contrary to the General Counsel’s arguments, VXI’s decision to seek individual arbitration of Milini’s claims according to the terms of the MAA was not unlawful nor based upon an “illegal objective.” See GCB at 10-12. Instead, VXI relied on binding Supreme Court, federal Circuit Court, and Ohio precedent to argue before the appropriate forums that her employment-related claims should be arbitrated on an individual basis. See, e.g., *Stolt-Nielsen*, 559 U.S. 662; *Bachrach v. Cornwell Quality Tool Co.*, 2011-Ohio-2498, ¶17 (9th Dist.).

In addition to the Supreme Court and other federal precedent cited in Respondent’s Brief (Respondent’s Brief at 6-10), VXI also relied upon controlling Sixth Circuit and Ohio precedent that parties that do not agree to class arbitration unless an arbitration agreement expressly authorizes it. See, e.g., *Reed Elsevier*, 734 F.3d at 598. The Sixth Circuit has held that “it cannot be presumed the parties consented to [classwide arbitration] by simply agreeing to submit

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<sup>5</sup> The Supreme Court has repeatedly observed that “arbitration’s advantages often would seem helpful to individuals who need a less expensive alternative to litigation.” *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 280 (1995). See also, e.g., *Concepcion*, 563 U.S. at 345 (“the informality of arbitral proceedings reduc[es] the cost and increas[es] the speed of dispute resolution”); *Stolt-Nielsen*, 559 U.S. at 685 (observing that “the benefits of private dispute resolution” include “lower costs” and “greater efficiency and speed”); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 257 (2009) (“Parties generally favor arbitration precisely because of the economics of dispute resolution.”); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 123 (2001) (“Arbitration agreements allow parties to avoid the costs of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts.”).

their disputes to an arbitrator” and that “[t]he principal reason to conclude [an] arbitration clause does not authorize classwide arbitration is that the clause nowhere mentions it.” *Id.* at 599 (quoting *Stolt-Nielsen*, 559 U.S. at 685).<sup>6</sup> Ohio state courts have similarly held that “[t]he holding in *Stolt-Nielsen* was that parties could not be forced to arbitrate, in a class format, claims pleaded as a class action, as opposed to arbitrating each claim individually, absent some contractual evidence of an agreement to arbitrate claims in a class format.” *Bachrach*, 2011-Ohio-2498 at ¶17. Finally, and perhaps most importantly, VXI’s position was ultimately vindicated by an Ohio appellate and trial court against Milini in the litigation that spawned this NLRB charge.<sup>7</sup>

The General Counsel argues that VXI’s defensive efforts to enforce the MAA as written nevertheless amount to an “unlawful construction of a facially valid provision of an arbitration agreement” under federal law. GCB at 11. But VXI’s actions cannot be deemed unlawful or based upon an illegal objective when it simply—and successfully—sought to vindicate lawful rights based upon federal and state law. *See Countrywide Financial*, 362 NLRB No. 165, slip op. at 9 (Aug. 14, 2015) (Member Johnson, Dissenting) (“it seems inconceivable that the Supreme Court would find an illegal objective under Federal law where, as here, an employer

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<sup>6</sup> *See also Huffman v. Hilltop Companies, LLC*, 747 F.3d 391, 398-99 (6th Cir. 2014) (“here the parties’ arbitration clause nowhere mentions classwide arbitration . . . [w]e therefore conclude that the arbitration clause does not authorize classwide arbitration, and hold that the plaintiffs must proceed individually.”). The Board need look no further than this Sixth Circuit precedent to decide the instant dispute. *Kitchen Fresh, Inc. v. N.L.R.B.*, 716 F.2d 351, 357 (6th Cir. 1983) (the Board cannot “choose to ignore the decision of this court as if it had no force or effect.”) (quoting *Ithaca Coll. v. N.L.R.B.*, 623 F.2d 224, 228 (2d Cir. 1980).

<sup>7</sup> *See Shakoor v. VXI Global Solutions*, 2015-Ohio-2587, 35 N.E.3d 539, ¶20 (7th Dist.) (“The Ohio Supreme Court has consistently held that, ‘arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which [it] has not agreed so to submit.’”) (quoting *Taylor v. Ernst & Young, L.L.P.*, 130 Ohio St.3d 411, 2011-Ohio-5262, 958 N.E.2d 1203, ¶ 20); Exhibit A to the March 16, 2016 Declaration of Mark Filipini, ¶2 (March 3, 2016 Order by the Court of Common Pleas, Mahoning County, Ohio, mandating individual arbitration).

has sought to enforce an arbitration agreement consistent with the Court’s own precedent (*Stolt-Nielsen*) construing the FAA.”). Similarly, VXI’s enforcement of the MAA is not analogous to a lawsuit filed with an “illegal objective” under *Bill Johnson’s Restaurants v. NLRB*, 461 U.S. 731 (1983). In that case, a former employee filed a charge with the Board claiming her employer’s libel lawsuit was in retaliation for alleged protected activities. *Id.* at 734. The Supreme Court held that, to be enjoined, the lawsuit prosecuted by the employer must have “an objective that is illegal under federal law.”<sup>8</sup> *Id.* at 737 fn. 5. However, *Bill Johnson’s* did not consider an employer’s defense of an employee-initiated suit, which would invariably require a higher degree of constitutional protection. It would indeed be incredible if the Board were to apply *Bill Johnson’s* in a case where VXI did not initiate suit, Milini first sought enforcement of the MAA, and VXI’s interpretation of the terms of the MAA was supported by controlling authority.

**D. The MAA Cannot be Reasonably Interpreted to Prevent Employees from Seeking Redress with the Board**

The General Counsel argues that reasonable employees would construe the MAA as prohibiting “the filing of charges or otherwise seeking remedial relief before the Board.” GCB at 9. However, in order for an employee to reasonably construe a workplace rule as prohibiting Section 7 activities, is not enough that the rule could possibly be read in such a manner. *NLRB v. Arkema, Inc.*, 710 F.3d 308, 318 (5th Cir. 2013) (citing *Lutheran Heritage*, 343 NLRB 646, 647 (2004). Additionally, employees’ actual interpretation of the rule in question is at least “instructive” as to how employees would reasonably construe the rule. *Cintas Corp. v. NLRB*, 482 F.3d 463, 467 (D.C. Cir. 2007). Finally, it is improper to rely on “particular phrases in

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<sup>8</sup> Alternatively, a suit may be enjoined if it is “baseless,” “lacks a reasonable basis in fact or law,” and was filed “with the intent of retaliating against an employee for the exercise of rights protected by” Section 7. *Bill Johnson’s*, 461 U.S. at 744, 748. The General Counsel does not argue that VXI’s enforcement of the MAA was baseless or retaliatory.

isolation” and to “presume improper interference with employee rights.” *Lutheran Heritage*, 343 NLRB at 646.

It is indeed instructive that VXI’s current and former employees—including Milini here—did not interpret the MAA as prohibiting them from seeking redress with the Board. VXI has never enforced the Agreement with respect to any claim filed with the Board or any other administrative agency, despite 66 administrative charges having been filed against VXI since 2009. JS, Ex. N §1, Ex. Z ¶7. Additionally, as the General Counsel notes, “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.” GCB at 9. Assuming that it was “possible” employees could construe the MAA as prohibiting filing charges with the Board is insufficient to warrant liability.<sup>9</sup>

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<sup>9</sup> Alternatively, the Board should revisit its current standard regarding alleged overly broad rules and policies, set forth as the first prong of the *Lutheran Heritage* test, under which rules and policies are deemed unlawful even if they do not explicitly restrict protected activity and are not applied against or promulgated in response to such activity. *See, e.g., Lily Transportation Corp.*, 362 NLRB No. 54, slip op. at 1 fn. 3 (2015) (Member Miscimarra, Dissenting); *Conagra Foods, Inc.*, 361 NLRB No. 113, slip op. at 8 fn. 2 (2014) (Member Miscimarra, Dissenting); *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 10 fn. 3 (2014) (Member Miscimarra, Dissenting), *affd. sub nom. Three D, LLC v. NLRB*, 2015 WL 6161477 (2d Cir. 2015).

### **III. CONCLUSION**

While Milini argues that the Supreme Court may rule in her favor following Justice Scalia's death (CPB at 7), current precedent controls over such speculation. Indeed, given that VXi would appeal any adverse ruling to the Fifth Circuit, it appears the current Supreme Court would do no worse than split and uphold the Fifth Circuit. See *Friedrichs v. California Teacher's Assn.*, 578 U.S. \_\_\_ (2016). In any event, the Board need not predict the future here, but instead should simply hold Milini to the decision she made to pursue arbitration pursuant to the MAA's actual terms.

Dated: April 4, 2016.

Respectfully submitted,

*/s/ Mark S. Filipini*

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**CERTIFICATE OF SERVICE**

The undersigned counsel for Respondent certifies that a copy of the foregoing Respondent's Answering Brief was served by email on April 4, 2016:

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