Countrywide Financial Corporation, Countrywide Home Loans, Inc., and Bank of America Corporation *and* Joshua D. Buck and Mark Thierman, Thierman Law Firm *and* Paul Cullen, The Cullen Law Firm. Cases 31–CA–072916 and 31–CA–072918

August 14, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

On February 13, 2013, Administrative Law Judge William G. Kocol issued the attached decision. The Respondents filed exceptions, a supporting brief, and a brief in support of the judge's dismissal of a complaint allegation. The General Counsel filed exceptions and a supporting brief, which the Charging Parties joined. The Respondents and General Counsel filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to adopt the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.[1]

At issue is whether Countrywide Financial Corporation (CFC), Countrywide Home Loans, Inc. (CHL), and Bank of America (BAC), collectively the Respondents, violated Section 8(a)(1) of the Act by: (1) maintaining a mandatory arbitration agreement that employees would reasonably believe restricted their right to file unfair labor practice charges with the Board, and (2) filing motions in Federal court to compel individual arbitration of employees' collective wage claims. Although the judge found that Respondent CHL unlawfully maintained the arbitration agreement, he dismissed allegation (2), above, and all allegations against CFC and BAC. For the following reasons, we adopt the judge as to the violation found but reverse his dismissals.[2]

[1] We have modified the judge's recommended Order and substituted new notices consistent with this decision, and to conform to the violations found.

[2] Although the judge found that Respondent CHL unlawfully maintained the arbitration agreement, he dismissed similar allegations against Respondents CFC and BAC. In the judge's view, because the two individuals involved in this proceeding were solely employed by CHL, and CHL alone required them to sign the arbitration agreement, he concluded that the complaint was "too attenuated to hold [CFC and BAC] liable" for the alleged violations. We disagree. The Board and courts have consistently held that "an employer under Section 2(2) of the Act may violate Section 8(a) not only with respect to its own employees but also by actions affecting employees who do not stand in such an immediate employer/employee relationship." *New York New York & Casino*, 356 NLRB No. 119, slip op. at 5 (2011), enfd. 676 F.3d 193 (D.C. Cir. 2012), quoting *International Shipping Assn*., 297 NLRB 1059, 1059 (1990). See, e.g., *Hudgens v. NLRB*, 424 U.S. 507, 510 fn. 3 (1976) (noting that the "Board has held that a statutory 'employer' may violate 8(a)(1) with respect to employees other than his own"). Here, CFC and BAC are appropriately held liable under these principles. As discussed in sec. I below, CFC is identified as the author of the arbitration agreement that the two CHL employees were required to sign, with its name and logo prominently displayed on the heading; further, CFC is defined as one of the "Compan[ies]" that maintains the agreement. BAC, as the judge found, became the parent of CFC and its subsidiaries, including CHL, and is clearly an "affiliated entit[y]," within the agreement's definition of "Company," with CFC and CHL. And as discussed in sec. II below, the three Respondents joined together and were active participants in seeking to enforce the agreement in Federal court litigation. Under these circumstances, we find that CFC and BAC, like CHL, violated Sec. 8(a)(1) by maintaining the arbitration agreement in the manner set forth in sec. I.

I. THE 8(A)(1) MAINTENANCE ALLEGATION

Respondent CFC was a holding company which, through its subsidiaries, provided banking, mortgage lending, and other real estate finance-related services. CHL was one of its subsidiaries. In June 2008, Respondent BAC purchased CFC and became the parent of CFC and CHL (CFC ultimately "merged out of existence").

The parties stipulated that Dominique Whitaker and John White applied for employment with Respondent CHL in August 2007 and September 2008, respectively. As part of the application process, both were required to execute a document bearing the heading "Countrywide Financial" and entitled "Mutual Agreement to Arbitrate Claims" (Arbitration Agreement or Agreement). The Agreement states that it is between the "Company and the Employee" and defines the Company as "Countrywide Financial Corporation and all of its subsidiary and affiliated entities . . . and all successors and assigns and any of them."

The Agreement includes 16 numbered sections. Section 1, titled, "Designated Claims," lists those claims subject to "resolution by arbitration." The list includes myriad claims relating to employment with the Company.[3] Section 3, entitled, "Claims Not Covered by This

[3] Sec. 1 provides:

> Except as otherwise provided in this Agreement, the Company and the Employee hereby consent to the resolution by arbitration of all claims or controversies arising out of, relating to or associated with the Employee's employment with the Company that the Employee may have against the Company or that the Company may have against the Employee, including any claims or controversies relating to the Employee's application for employment with the Company, the Company's actual or potential hiring of the Employee, the employment relationship itself, or its termination (hereinafter the "Covered Claims"). The Covered Claims subject to this Agreement include, but are not limited to, claims for wages or other compensation

Agreement," states that "[n]othing in this Agreement shall be construed to require arbitration of any claim if an agreement to arbitrate such claim is prohibited by law." There is no language in the Agreement addressing whether arbitration may be conducted individually or collectively as a class.

The Agreement requires applicants to select whether they agree or disagree to be bound to its terms and conditions. For those who select the "agree" option, the Agreement states that they do so "voluntarily." If the "disagree" option is selected, the Agreement states that the applicant "will not be able to move forward in the application process at this time." Whitaker and White selected the "agree" option and were hired.[4] The parties stipulated that from about 2007 through approximately March 2009, applicants for employment with CHL typically were presented with arbitration agreements substantially similar to the ones presented to Whitaker and White.

Applying *D.R. Horton, Inc*.,[5] the judge found that Respondent CHL violated Section 8(a)(1) by maintaining the Arbitration Agreement because employees would reasonably read it to prohibit their filing of unfair labor practices with the Board. We agree.

In *D.R. Horton*, supra, 357 NLRB No. 184, slip op. at 4, the Board endorsed the *Lutheran Heritage*[6] test for determining whether employer work rules interfere with employees' Section 7 rights. When, as here, the rule does not explicitly restrict Section 7 rights, an 8(a)(1) violation may be found if there is a showing that: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to Section 7 activity; or (3) the rule has been applied to restrict Section 7 activity. 343 NLRB at 646–647.

Similar to the arbitration policy found unlawful in *D.R. Horton*, the Arbitration Agreement here violates Section 8(a)(1) under prong (1) of the *Lutheran Heritage* test because employees would reasonably construe its language to prohibit filing Board charges or otherwise accessing the Board's processes–activities which are protected by Section 7. As set forth above, section 1 of the Agreement specifies in broad terms that it applies to "all claims or controversies," including those related to the employee's application for employment, hiring, employment relationship, and termination. Section 1 further states, by way of example, that "Covered Claims" include those for wages, contract breach, discrimination, harassment, and "violation of any federal . . . statute, . . . regulation, or public policy." The Agreement states in section 10 that "[a]rbitration is the parties' exclusive remedy for Covered Claims." In *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007), the Board found that a policy requiring arbitration of "all disputes relating to or arising out of an employee's employment . . . [including] claims . . . recognized by . . . federal law or regulations" violated Section 8(a)(1) because employees reasonably would construe it to prohibit the filing of Board charges, notwithstanding that the policy did not explicitly prohibit employees from resorting to the Board's procedures. See also *D.R. Horton*, slip op. at fn. 2. We reach the same conclusion here based on the breadth of the policy language encompassing claims under Federal statutes and regulations. We accordingly affirm the judge's finding that Respondents' maintenance of the Arbitration Agreement violated Section 8(a)(1).

The Respondents[7] argue, however, that employees would understand that the Arbitration Agreement does not prohibit them from filing Board charges, in light of the explanatory sentence in section 1 that the "purpose and effect of this Agreement is to substitute arbitration, instead of a federal or state court, as the exclusive forum for the resolution of Covered Claims." The Respondents argue that this language makes clear that the Arbitration Agreement applies only to claims brought in Federal or State court. We find no merit in this contention. As the Board explained in rejecting a similar defense in *U-Haul*, 347 NLRB at 377–378, "[t]he reference to a 'court of law' . . . does not by its terms specifically exclude an action governed by an administrative proceeding such as one conducted by the National Labor Relations Board . . . [and thus] does nothing to clarify that the arbitration policy does not extend to the filing of unfair labor prac-

due; claims for breach of any contract or covenant, express or implied; tort claims; claims for discrimination or harassment on bases which include but are not limited to race, sex, sexual orientation, religion, national origin, age, marital status, disability or medical condition; claims for benefits and claims for violation of any federal, state or other governmental constitution, statute, ordinance, regulation, or public policy. The purpose and effect of this Agreement is to substitute arbitration, instead of a federal or state court, as the exclusive forum for the resolution of Covered Claims. The parties' responsibilities and legal remedies available under any substantive law applicable to a Covered Claim shall be enforced in any arbitration conducted pursuant to this Agreement.

[4] We agree with the judge's implicit finding that because an applicant would not be employed if he or she selected the " disagree" option, acceptance of the Agreement was a condition of employment and not a voluntary choice as the Respondents contend.

[5] 357 NLRB No. 184 (2012), enf. denied in part on other grounds 737 F.3d 344 (5th Cir. 2013).

[6] *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004).

[7] Although the judge found the violation only as to Respondent CHL, the Respondents (CHL, CFC, and BCA) jointly filed exceptions to this finding.

tice charges." Here, as in *U-Haul*, the reference to arbitration as a substitute for filing a claim in a "federal or state court" does nothing to clarify that the Arbitration Agreement does not prohibit the filing of Board charges. Indeed, the last phrase in the sentence relied on by Respondents, i.e., that arbitration is the "exclusive forum for the resolution of Covered Claims," actually reinforces the notion that Board charges are forbidden.

We also reject the argument by the Respondents and our dissenting colleague that the right to file Board charges is made clear by the language of section 3 that "[n]othing in this Agreement shall be construed to require arbitration of any claim if an agreement to arbitrate such a claim is prohibited by law." The Board rejected this same argument in *2 Sisters Food Group*, 357 NLRB No. 168 (2011), where the arbitration agreement comparably stated that it only covered claims "that may be lawfully [ ] resolve[d] by arbitration." The Board explained that this language did not "specifically exclude NLRB proceedings, and 'most nonlawyer employees' would not be sufficiently familiar with the limitations the Act imposes on mandatory arbitration for the language to be effective." Slip op. at 2, citing *U-Haul*, 347 NLRB at 378. We reject the Respondents' argument for the same reasons.

In sum, we agree with the judge that employees would reasonably construe the Arbitration Agreement to prohibit the filing of unfair labor practice charges or otherwise accessing the Board's processes. Accordingly, in this respect we adopt his finding that maintenance of the Agreement violates Section 8(a)(1).

II. THE 8(A)(1) ENFORCEMENT ALLEGATION

On June 16, 2009, Whitaker filed a class action lawsuit against CFC and BAC in the Superior Court of California (Ventura County), alleging minimum wage and overtime pay violations of the California Labor Code and the Fair Labor Standards Act (FLSA). Thereafter, the case was removed to the United States District Court for the Central District of California, where CHL was added as a defendant and White was added as a plaintiff.[8] The Respondents filed motions with the district court pursuant to the Federal Arbitration Act (FAA) to stay the lawsuit and compel Whitaker and White to arbitrate their wage claims individually, and not on a class or collective basis. Whitaker and White filed oppositions to the motions.

The district court granted the Respondents' motions to compel in part and stayed the lawsuit, but left to the arbitrator the question of whether the wage claims should be arbitrated individually or collectively. The parties stipulated that, as of the date of the hearing, this issue has yet to be determined by an arbitrator or other authority.

The complaint alleges that by moving the district court to stay the collective lawsuit and to compel Whitaker and White to arbitrate their wage claims individually, the Respondents have maintained and enforced the Agreement in violation of Section 8(a)(1). The judge dismissed the allegation, finding that the Respondents did nothing more than argue before the appropriate forum that the claims be heard on an individual basis, and that they did not argue that the employees had waived their right to pursue classwide claims. Contrary to the judge, we agree with the General Counsel that the Respondents violated Section 8(a)(1) by enforcing the Agreement through its district court motion to compel arbitration.

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." *Lutheran Heritage*, supra, 343 NLRB at 647. See, e.g., *Hitachi Capital America Corp*., 361 NLRB No. 19, slip op. at 3 (2014); *Albertson's Inc.,* 351 NLRB 254, 259 (2007). Here we find that the Arbitration Agreement, as applied by the Respondents, violated Section 8(a)(1) under *Lutheran Heritage*'s third prong.

In *D.R. Horton*, the Board held that class or collective litigation by employees of claims relating to their terms and conditions of employment is a "core substantive right" protected by Section 7 (357 NLRB No. 184, slip op. at 10), and an employer violates Section 8(a)(1) by compelling employees, as a condition of their employment, to waive that right by prohibiting them from "filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer in any forum, arbitral or judicial." Id. at 1. The Board explained that an employer may avoid a violation "so long as [it] leaves open a judicial forum for class and collective claims" and, if this is done, the employer is "free to insist that *arbitral* proceedings be conducted on an individual basis." (Emphasis in original.) Id. at 12. In *Murphy Oil USA, Inc*., 361 NLRB No. 72 (2014), the Board reexamined and reaffirmed the holding and rationale of *D. R. Horton.* In both cases, the Board found 8(a)(1) violations based on language in arbitration agreements that were unlawful on their face in compelling employees to waive their right to proceed collectively in all forums in pursuit of their employment claims.

As noted above, the Arbitration Agreement here is silent on whether employees are prohibited from filing class or collective employment claims. Therefore, the Agreement is not facially unlawful as in *D. R. Horton* and *Murphy Oil*, and the complaint does not so allege.

[8] By this time, Whitaker and White were no longer employed by CHL.

But there is sufficient evidence, as demonstrated by the Respondents' conduct in Federal district court, to establish that they applied the Arbitration Agreement in violation of Section 8(a)(1). In defending against the collective lawsuit by Whitaker and White, the Respondents argued in their motion that the employees were "compelled to arbitrate [their] claims on an individual basis, and [were] not permitted to arbitrate on a class or collective basis" because the Agreement did not so provide. Noting that the Agreement did not expressly state whether or not the parties agreed to class or collective arbitration, the Respondents argued that the "only fair reading of the Agreement is that the parties contemplated only *individual* arbitration."

By these arguments to the court, the Respondents made clear their interpretation of the mandatory Arbitration Agreement: arbitration is the exclusive forum for resolving employees' employment claims, and it must be conducted on an individual basis, not collectively. This is precisely what the Board enjoined in *D. R. Horton* ("[E]mployers 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. (Emphasis in original.) This holding was reinforced in *Murphy Oil*, where the Board found that the respondent's motion in Federal district court in response to a FLSA collective action by employees, to compel the employees to arbitrate their claims individually as required by a binding arbitration agreement, violated Section 8(a)(1). 361 NLRB No. 72, slip op. at 19 ("It is well settled that an employer violates Section 8(a)(1) by enforcing a rule that unlawfully restricts Section 7 rights.").

We reach the same conclusion here. As in *Murphy Oil*, the Respondents enforced an arbitration agreement in violation of Section 8(a)(1) by filing their district court motion to compel employees to arbitrate their employment claims individually, thereby barring them from any other forum, arbitral or judicial, to litigate such claims on a class or collective basis.

By finding this violation, we necessarily disagree with the judge that the Respondents "did nothing more than argue" in their court motion that the employees' claims be heard on an individual basis, and that they relied solely on case law under the FAA in support of this position rather than on the basis that the employees had waived their right to pursue class-wide claims. There was much more to the Respondents' motion than a simple demand for individual arbitration. By arguing in court that the employees' claims must be resolved in binding individual arbitration, the Respondents completely denied employees their Section 7 right of access to *all* other forums where they could seek to litigate their employment claims collectively. Contrary to the judge, this clearly constituted an argument that employees had waived their right to pursue class-wide claims—a waiver that the Respondents unlawfully imposed on them—and the foundation for that argument was the Arbitration Agreement and not solely FAA case law.

We recognize, of course, the Board's holding in *D. R. Horton* that there is no Section 7 right to class certification,[9] and that the employees therefore have no right to have their lawsuit claims heard on that basis. But that was not the issue in *D. R. Horton* nor is it here.

> The issue here is whether Respondent[s] may lawfully condition employment on employees' waiving their right under the NLRA to take the collective action inherent in seeking class certification, whether or not they are ultimately successful under [Federal Rule of Civil Procedure 23]. Rule 23 may be a procedural rule, but the Section 7 right to act concertedly by invoking Rule 23, Section 216(b) [of the collective action procedures of the FLSA], or other legal procedures is not.

Id.

Thus, while the employees here have no Section 7 right to class certification, they do have a Section 7 right to act concertedly to *seek* class certification in pursuit of their employment claims "without employer coercion, restraint or interference," and to prove in district court that they meet "the requirements for certification under Rule 23" and Section 216 of the FLSA. Id. at fn. 24. The Respondents, however, by filing their court motion to compel individual arbitration, blocked the employees from concertedly pursuing their employment claims. Although, as the judge noted, the Respondents were privileged under *D. R. Horton* to thwart the judicial route taken by employees by "assert[ing] any and all arguments against certification" (other than the Arbitration Agreement)[10] they were not free to do what they did here: acting to compel employees to follow a route that foreclosed them from collectively pursuing their employment claims in all forums, arbitral and judicial. *D. R. Horton*, slip op. at 12.

In sum, as the Board made clear in *D. R. Horton* (slip op. at 12), the Respondents were "free to insist" that the employees arbitrate their employment claims and to require that the "*arbitral* proceedings be conducted on an individual basis," but only "[s]o long as [they left] open a judicial forum for class and collective claims . . . ." (Emphasis in original.) The Respondents did not do so.

[9] 357 NLRB No. 184 slip op. at 10.
[10] Id., fn. 24.

They applied the Arbitration Agreement in a manner that required employees to resolve all employment claims through individual arbitration, thereby compelling them to waive their Section 7 right to collectively pursue litigation of their employment claims in *all* forums. By taking steps to enforce the Agreement in Federal district court when the employees filed their collective claims against the Respondents under the FLSA, the Respondents maintained and enforced the Agreement in violation of Section 8(a)(1).

Contrary to the judge and our dissenting colleague, our finding does not interfere with the Respondents' First Amendment right under *Bill Johnson's Restaurants v. NLRB,* 461 U.S. 731 (1983), to petition the government for redress of grievances. As the Board explained in *Murphy Oil*, 361 NLRB No. 72, slip op. at 20–21, the Supreme Court held in footnote 5 of *Bill Johnson's* that court proceedings having an objective that is illegal under Federal law enjoy no First Amendment protection and may be condemned by the Board as an unfair labor practice.[11]

The Board so found in *Murphy Oil*, holding that because employees cannot lawfully be compelled to waive their Section 7 right to collectively pursue litigation of their employment claims in all forums, the respondent's motion filed with the district court to enforce such a waiver had an illegal objective under *Bill Johnson's*. As such, the motion was both unprotected by the First Amendment and violated Section 8(a)(1). Because, in the present case, the Respondents' motions filed with the district court had the illegal objective of enforcing the same unlawful waiver as in *Murphy Oil*, we can, and do, condemn that objective as an 8(a)(1) violation without running afoul of the First Amendment.

Our dissenting colleague contends that because the instant Arbitration Agreement, unlike in *Murphy Oil*, does not contain an unlawful waiver, and because the Board has not "previously ruled" that the enforcement of such an arbitration agreement is unlawful, the illegal objective exception of *Bill Johnson's* does not apply and the 8(a)(1) enforcement violation cannot be found. We disagree. Application of the illegal objective exception is not confined to cases where the Board has previously found a violation based on the same conduct. As the Board held in *Teamsters Local 776 (Rite Aid Corp.*), if a lawsuit "is aimed at achieving a result that is incompatible with the Board's [prior] ruling, the lawsuit falls within the 'illegal objective' exception to *Bill Johnson's*." 305 NLRB 832, 835 (1991), enfd. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993); see id. at 835 fn. 7; see, e.g., *Regional Construction Corp*., 333 NLRB 313, 318–319 (2001) (discussing several different categories of cases in which the exception has been applied).[12] In fact, the Board has previously applied the illegal objective exception in an analogous case, *Elevator Constructors (Long Elevator*), 289 NLRB 1095, 1095 (1988), enfd. 902 F.2d 1297 (8th Cir. 1990). There, the respondent union filed a grievance on behalf of an employee, relying on a clause in a collective-bargaining agreement that the "General Counsel [did] not contend . . . [was] unlawful on its face . . . ." Id. at fn. 2. However, the union sought a "construction of the clause" that, if successful, would have resulted in a de facto hot cargo clause. The Board concluded that because the "contract clause as construed by the Respondent would violate Section 8 (e)," the union sought an illegal objective in violation of Section 8(b)(4)(ii)(A) by attempting to enforce the unlawful construction of the clause through the grievance procedure.

The same reasoning applies here. Notwithstanding the facial validity of the arbitration agreement, the Respondents sought a construction of the agreement that was plainly unlawful under the Board's decisions in *D.R. Horton* and *Murphy Oil*. Accordingly, their court actions to enforce their construction of the agreement constituted an illegal objective under *Bill Johnson's* and violated Section 8(a)(1).[13]

[11] See, e.g., *Manno Electric*, 321 NLRB 278, 297 (1996), affd. mem. 127 F.3d 34 (5th Cir. 1997) (a lawsuit has an illegal objective "if it is aimed at achieving a result incompatible with the objectives of the Act."

[12] See also *Booster Lodge 405 (Boeing Co.)*, 185 NLRB 380 (1970) (interpreting the Act in light of recent Supreme Court decisions, the Board deemed illegal the respondent union's imposition of fines on individuals who resigned from the union, and thus found unlawful the union's lawsuits seeking to enforce the fines), enfd. in relevant part 459 F.2d 1143 (D.C. Cir. 1972), affd. 412 U.S. 84 (1973). In *Bill Johnson's*, the Court cited with approval *Booster Lodge 405* in setting forth the illegal objective exception. 461 U.S. at 737 fn. 5.

[13] Accordingly, consistent with *Murphy Oil* and *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, slip op. at 2 fn. 6 (2015), we amend the judge's remedy and shall order the Respondents to reimburse Whitaker and White for all reasonable expenses and legal fees, with interest, incurred in opposing the Respondents' unlawful motion to compel individual arbitration in the collective FLSA action. 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 attorneys' fees and other expenses" as well as "any other proper relief that would effectuate the policies of the Act."). Interest shall be computed in the manner prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). See *Teamsters Local 776 (Rite Aid)*, 305 NLRB at 835 fn. 10 ("[I]n make-whole orders for suits maintained in violation of the Act, it is appropriate and necessary to award interest on litigation expenses.").

We shall also amend the judge's remedy to order the Respondents to notify the district court that they have rescinded or revised the mandatory Arbitration Agreement and to inform the court that they no longer oppose the plaintiffs' claims on the basis of the Arbitration Agreement.

ORDER

A. The National Labor Relations Board orders that the Respondent, Countrywide Home Loans, Calabasas, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration agreement that employees would reasonably believe bars or restricts employees' rights to file charges with the National Labor Relations Board or to access the Board's processes.

(b) Maintaining or enforcing/applying a mandatory arbitration agreement in a manner that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind or revise the mandatory arbitration agreement to make clear to employees that it does not restrict employees' right to file charges with the National Labor Relations Board or to access the Board's processes, and that the agreement does not constitute a waiver of employees' right to maintain employment-related joint, class or collective actions in all forums.

(b) Notify all applicants and current and former employees who were required to sign the arbitration agreement that it has been rescinded or revised as set forth in paragraph 2 (a) and, if revised, provide them a copy of the revised agreement, and further notify them that the agreement will not be enforced in a manner that compels them to waive their right to maintain employment-related joint, class or collective actions in all forums.

(c) Notify the United States District Court for the Central District of California that it will no longer enforce the arbitration agreement upon which it based its motion to stay the collective FLSA lawsuit of Dominique Whitaker and John White and to compel individual arbitration of their employment claims, and inform the court that it no longer opposes their lawsuit on the basis of the arbitration agreement.

(d) In the manner set forth in this decision, reimburse Dominique Whitaker and John White for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing the Respondents' motion to stay their collective lawsuit and compel individual arbitration.

(e) Within 14 days after service by the Region, post at its Calabasas, California facility copies of the attached notice marked "Appendix A."[14] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix A" to all current employees and former employees employed by the Respondent at any time since July 19, 2011, and any employees against whom the Respondent has enforced its mandatory arbitration agreement since August 22, 2011.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 31, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

B. The National Labor Relations Board orders that the Respondent, Countrywide Financial Corporation, Calabasas, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration agreement that employees reasonably would believe bars or restricts employees' rights to file charges with the National Labor Relations Board or to access the Board's processes.

(b) Maintaining or enforcing/applying a mandatory arbitration agreement in a manner that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notices reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(a) Rescind or revise the mandatory arbitration agreement to make clear to employees that it does not restrict employees' right to file charges with the National Labor Relations Board or to access the Board's processes, and that the agreement does not constitute a waiver of employees' right to maintain employment-related joint, class or collective actions in all forums, whether arbitral or judicial.

(b) Notify all applicants and current and former employees who were required to sign the arbitration agreement that it has been rescinded or revised as set forth in paragraph 2 (a) and, if revised, provide them a copy of the revised agreement, and further notify them that the agreement will not be enforced in a manner that compels them to waive their right to maintain employment-related joint, class or collective actions in all forums.

(c) Notify the United States District Court for the Central District of California that it will no longer enforce the arbitration agreement upon which it based its motion to stay the collective FLSA lawsuit of Dominique Whitaker and John White and to compel individual arbitration of their employment claims, and inform the court that it no longer opposes their lawsuit on the basis of the arbitration agreement.

(d) In the manner set forth in this decision, reimburse Dominique Whitaker and John White for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing the Respondents' motion to stay their collective lawsuit and compel individual arbitration.

(e) Within 14 days after service by the Region, post at its Calabasas, California facility copies of the attached notice marked "Appendix B."[15] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix B" to all current employees and former employees employed by the Respondent at any time since July 19, 2011, and any employees against whom the Respondent has enforced its mandatory arbitration agreement since August 22, 2011.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 31, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

C. The National Labor Relations Board orders that the Respondent, Bank of America Corporation, Lancaster, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration agreement that employees reasonably would believe bars or restricts employees' rights to file charges with the National Labor Relations Board or to access the Board's processes.

(b) Maintaining or enforcing/applying a mandatory arbitration agreement in a manner that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind or revise the mandatory and binding arbitration agreement to make clear to employees that it does not restrict employees' right to file charges with the National Labor Relations Board or to access the Board's processes, and that the agreement does not constitute a waiver of employees' right to maintain employment-related joint, class or collective actions in all forums, whether arbitral or judicial.

(b) Notify all applicants and current and former employees who were required to sign the arbitration agreement that it has been rescinded or revised as set forth in paragraph 2 (a) and, if revised, provide them a copy of the revised agreement, and further notify them that the agreement will not be enforced in a manner that compels them to waive their right to maintain employment-related joint, class or collective actions in all forums.

(c) Notify the United States District Court for the Central District of California that it will no longer enforce the arbitration agreement upon which it based its motion to stay the collective FLSA lawsuit of Dominique Whitaker and John White and to compel individual arbitration of their employment claims, and inform the court that it no longer opposes their lawsuit on the basis of the arbitration agreement.

[15] See fn. 14.

(d) In the manner set forth in this decision, reimburse Dominique Whitaker and John White for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing the Respondents' motion to stay their collective lawsuit and compel individual arbitration.

(e) Within 14 days after service by the Region, post at its Lancaster, California facility copies of the attached notice marked "Appendix C."[16] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix C" to all current employees and former employees employed by the Respondent at any time since July 19, 2011 and any employees against whom the Respondent has enforced its mandatory arbitration agreement since August 22, 2011.

(f) Within 21 days after service by the Region, file with the Regional Director for Region 31, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 14, 2015

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Mark Gaston Pearce, Chairman

_____

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER JOHNSON, dissenting.

[16] See fn. 14.

Today the Board takes one more step down the primrose path of administrative hostility toward valid arbitration agreements. The Board previously (and wrongly) found separate violations of Section 8(a)(1) where an employer both maintained a mandatory arbitration agreement expressly foreclosing class or collective claims and attempted to enforce that agreement in court. See *Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. at 19 (2014) ("It is well settled that an employer violates Section 8(a)(1) by enforcing a rule that unlawfully restricts Section 7 rights."). Now, for the first time, the Board finds a violation based on the Respondents' mere enforcement of an arbitration agreement that is silent on the arbitrability of class and collective claims, and therefore not restrictive of Section 7 rights on its face. Rather than turn from this legally problematic path, the majority places the Board in even greater conflict with the Federal Arbitration Act (FAA)[1] and Supreme Court precedent construing it. For these reasons and those that follow, I respectfully dissent.[2]

Initially, for the reasons set forth in detail in my dissent in *Murphy Oil*, supra, slip op. at 35-58, I fundamentally disagree with the Board's central holding in that case and in *D. R. Horton, Inc.*,[3] which together effectively invalidate class arbitration waivers in most mandatory arbitration agreements.[4] The courts resoundingly disagree as well.[5] Moreover, the Supreme Court has made

[1] 9 U.S.C. § 1 et seq.

[2] Additionally, I disagree with my colleagues' determination that employees would reasonably construe the Respondents' "Mutual Agreement To Arbitrate Claims" to prohibit the filing of unfair labor practice charges or otherwise accessing the Board's processes. See *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007). The language of Section 3 of the Agreement operates as a "savings clause," excluding from mandatory arbitration any claim "if an agreement to arbitrate such a claim is prohibited by law." Given this language, employees would not reasonably conclude that the Agreement restricts their access to the Board's processes. Indeed, no individual arbitration agreement purporting to impose such a restriction would be lawful under the Act in any event. And, inasmuch as extant precedent might suggest a contrary result, I agree with the dissenting position of former Member Hayes in *2 Sisters Food Group*, 357 NLRB No. 168, slip op. at 14–15 (2011). Accordingly, I would reverse the judge and dismiss this allegation.

[3] 357 NLRB No. 184 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013).

[4] For these reasons alone, I would not find that the Respondents' maintenance or enforcement of its arbitration agreement violates the Act insofar as it has been applied to prevent employees from pursuing class and other collective actions. Because I do not find these violations, I find it unnecessary to consider here whether or under what circumstances the remedies related to the maintenance or enforcement violations would be appropriate. See *Murphy Oil*, slip op. at 39 fn. 15 (Member Johnson, dissenting); see generally *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002).

[5] See *Murphy Oil*, slip op. at 36 fn. 5 (Member Johnson, dissenting) and cases cited. See also *Patterson v. Raymours Furniture Co.*, No. 14-

clear that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Stolt-Nielsen S.A. v. Animal Feeds International Corp.*, 559 U.S. 662, 684 (2010) (emphasis in original).[6] Thus, "[a]n implicit agreement to authorize class-action arbitration … is not a term that the arbitrator may infer solely from the fact of the parties' agreement to arbitrate." *Stolt-Nielsen*, supra at 685. Here, the Respondents' motions to compel individual arbitration of employees' collective wage claims are firmly grounded in the Supreme Court's FAA jurisprudence. The "Mutual Agreement To Arbitrate Claims" at issue is silent on the matter of class arbitration, providing no "contractual basis" to conclude that the Respondents "agreed" to it. Although the district court referred the class arbitrability question to the arbitrator, it appears unlikely that an arbitrator could conclude, consistent with *Stolt-Nielsen*, that class arbitration should be required here. Inasmuch as my colleagues seek to punish the Respondents for pursuing their well-founded motions to compel, they bring the Board's jurisprudence into further conflict with the FAA.

The Board compounds its error by rejecting the judge's concern that finding the violation here would interfere with the Respondents' First Amendment right to petition the government for a redress of grievances. In *Bill Johnson's Restaurants v. NLRB*,[7] the Supreme Court held 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." However, the Court clarified that a lawsuit is entitled to no First Amendment protection where the action is either preempted by Federal law or where "a suit . . . has an objective that is illegal under federal law." Where "the Board has *previously ruled on a given matter*, and where the lawsuit is aimed at achieving a result that is incompatible with the Board's ruling, the lawsuit falls within the 'illegal objective' exception to *Bill Johnson's*." *Sheet Metal Workers Local 27 (E. P. Donnelly, Inc.)*, 357 NLRB No. 131, slip op. at 2 (2011) (emphasis added) (quoting *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 835 (1991), enfd. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 959 (1993)).

Consistent with the Board's approach in *Murphy Oil*, supra, slip op. at 20, the majority here relies on the "illegal objective" theory to conclude that its cease-and-desist order pertaining to the Respondents' motions to compel would not impinge on the First Amendment.[8] Undoubtedly, the Respondents' motions have a reasonable basis in fact and law in light of *Stolt-Nielsen*, supra. The First Amendment should therefore protect these motions unless the *Bill Johnson's* "illegal objective" exception applies. However, the Board has not, in this case or any other, "previously ruled" on the question of whether an employer violates the Act by moving to enforce a facially valid arbitration agreement as requiring individual arbitration where the agreement is silent on the matter of class arbitration. Indeed, in *Murphy Oil*, supra, slip op. at 19–21, the Board found that an employer violated Section 8(a)(1)—and acted with an illegal objective under *Bill Johnson's*—by enforcing an arbitration agreement expressly waiving class arbitration "that [was] itself an unfair labor practice."[9] Even assuming, without deciding, that the Respondents' motions were "aimed at achieving a result that is incompatible with the Board's ruling" in *Murphy Oil*, the Board has not "previously ruled" on the enforcement of a facially lawful arbitration agreement like that at issue here. See *Sheet Metal Workers Local 27 (E. P. Donnelly, Inc.)*, supra, slip op. at 2. Meanwhile, setting aside the Board's definition of "illegal objective" under *Bill Johnson's*, it seems inconceivable that the Supreme Court would find an illegal objective under Federal law where, as here, an employer has sought to enforce an arbitration agreement consistent with the Court's own precedent (*Stolt-Nielsen*) construing the FAA. Accordingly, the Respondents could not have filed their motions to compel with the requisite illegal objective to forfeit the First Amendment's protection.[10]

CV-5882-VEC, —F.Supp.3d ——, ——, 2015 WL 1433219, at *7 and fn. 7 (S.D.N.Y. Mar. 27, 2015) (declining to apply *Murphy Oil*, instead following binding Second Circuit precedent rejecting *D. R. Horton* to enforce a class action waiver, and observing that "the NLRB stands alone in holding that the NLRA overrides the FAA relative to class action waivers"); *Nanavati v. Adecco USA, Inc.*, No. 14-CV-04145-BLF, 2015 WL 4035072, at *2 (N.D. Cal. Jun. 30, 2015) (observing that "every court to have considered *Horton I* and *Murphy Oil* has rejected the reasoning in those opinions…"); *Hobson v. Murphy Oil USA, Inc.*, No. CV-10-S-1486-S, 2015 WL 4111661, at *2 (N.D. Ala. Jul. 8, 2015) (citing *D. R. Horton* and observing that "the NLRB's decisions are not entitled to deference when they concern the interpretation of the Federal Arbitration Act, or any statutory provision other than the NLRA").

[6] See also *AT&T Mobility, LLC v. Concepcion*, 131 S.Ct. 1740 (2011) (holding that class action waivers are enforceable under the FAA).

[7] 461 U.S. 731, 748 (1983).

[8] The Board has previously accepted the view that First Amendment protection extends to defendants as well as plaintiffs. See *Murphy Oil*, supra, slip op. at 20 and fn. 101.

[9] Similarly, in *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, slip op. at 2 and fn. 8 (2015), the Board found an 8(a)(1) violation where an employer enforced a mandatory arbitration policy expressly waiving class arbitration, relying "solely on the principle that the enforcement of an unlawful provision is, in itself, an independent violation of Sec. 8(a)(1)."

[10] My colleagues' reliance on *Elevator Constructors (Long Elevator)*, 289 NLRB 1095, 1095 (1988), enfd. 902 F.2d 1297 (8th Cir.

Finally, even assuming that my colleagues' conclusion that the Respondents acted with an illegal objective under *Bill Johnson's* is reasonable, the Board should, in my view, avoid ruling on matters outside of its core expertise. The Board's foray into the *Bill Johnson's* analysis necessarily involves evaluating the merits of lawsuits under other Federal (and State) statutes. This evaluation is the proper province of courts and the administrative agencies authorized to implement and enforce particular statutes. Thus, the Board should principally concern itself with enforcing the Act and leave the enforcement of other statutes to those whom Congress has appointed for that purpose.

Dated, Washington, D.C. August 14, 2015

Harry I. Johnson, III, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration agreement that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board or to access the Board's processes.

WE WILL NOT maintain or enforce/apply the mandatory arbitration agreement in a manner that requires our employees, as a condition of employment, to waive their right to maintain employment-related joint, class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind or revise the mandatory arbitration agreement to make clear that it does not restrict your right to file charges with the National Labor Relations Board or to access the Board's processes, and that the arbitration agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, whether arbitral or judicial.

WE WILL notify all applicants and current and former employees who were required to sign the mandatory arbitration agreement that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement, and WE WILL further notify them that the agreement will not be enforced in a manner that compels them to waive their right to maintain employment-related joint, class or collective actions in all forums.

WE WILL notify the court in which Dominique Whitaker and John White filed their collective lawsuit that we will no longer enforce/apply the mandatory arbitration agreement upon which we based our motion to stay their collective lawsuit and compel individual arbitration of their employment claims, and WE WILL inform the court that we no longer oppose their collective lawsuit on the basis of that agreement.

WE WILL reimburse Dominique Whitaker and John White for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing our motion to stay their collective lawsuit and compel individual arbitration.

COUNTRYWIDE HOME LOANS

The Board's decision can be found at www.nlrb.gov/case/31–CA–072916 or by using the QR code below. Alternatively, you can obtain a copy of the

1990), is misplaced. There, the Board found an illegal objective under *Bill Johnson's* where a union filed a grievance seeking to construe a facially lawful contract clause in a manner that would have created a de facto hot cargo agreement in violation of Sec. 8(e). Id. That hot cargo agreements violate the Act was not in dispute. However, in this case, the underlying legal predicate for finding a violation of the Act is vigorously disputed. Indeed, as noted above, the courts have categorically rejected the Board's legal theory in *Murphy Oil* and *D. R. Horton* that mandatory arbitration agreements expressly foreclosing class or collective claims in all forums violate Sec. 8(a)(1). Further, in *Stolt-Nielsen*, 559 U.S. at 684–685, the Supreme Court made clear that a party cannot be forced into class arbitration absent its contractual agreement to do so, and no such class arbitration agreement may be inferred from the mere existence of a general arbitration agreement. Thus, even assuming, arguendo, that the Board's decisions in *Murphy Oil* and *D. R. Horton* were valid, and that the arbitration agreement at issue here could not preclude class arbitration under Board law, the Respondents could not be compelled to engage in class arbitration under Supreme Court precedent in any event. The Respondents therefore cannot be charged with having an illegal objective under Federal law in attempting to enforce their arbitration agreement consistent with *Stolt-Nielsen*.

decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

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Choose not to engage in any of these protected activities.

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WE WILL NOT maintain or enforce/apply the mandatory arbitration agreement in a manner that requires our employees, as a condition of employment, to waive the right to maintain employment-related joint, class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind or revise the mandatory arbitration agreement to make clear that it does not restrict your right to file charges with the National Labor Relations Board or to access the Board's processes, and that the arbitration agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, whether arbitral or judicial.

WE WILL notify all applicants and current and former employees who were required to sign the mandatory arbitration agreement that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement, and WE WILL further notify them that the agreement will not be enforced in a manner that compels them to waive their right to maintain employment-related joint, class or collective actions in all forums.

WE WILL notify the court in which Dominique Whitaker and John White filed their collective lawsuit that will no longer enforce/apply the mandatory arbitration agreement upon which we based our motion to stay their collective lawsuit and compel individual arbitration of their employment claims, and WE WILL inform the court that we no longer oppose their collective lawsuit on that basis.

WE WILL reimburse Dominique Whitaker and John White for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing our motion to stay their collective lawsuit and compel individual arbitration.

COUNTRYWIDE FINANCIAL CORPORATION

The Board's decision can be found at www.nlrb.gov/case/31–CA–072916 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

APPENDIX C

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

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WE WILL NOT maintain or enforce/apply the mandatory arbitration agreement in a manner that requires our employees, as a condition of employment, to waive the right to maintain employment-related joint, class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind or revise the mandatory and binding arbitration agreement to make clear that it does not restrict your right to file charges with the National Labor Relations Board or to access the Board's processes, and that the arbitration agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, whether arbitral or judicial.

WE WILL notify all applicants and current and former employees who were required to sign the mandatory arbitration agreement that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement, and WE WILL further notify them that the agreement will not be enforced in a manner that compels them to waive their right to maintain employment-related joint, class or collective actions in all forums.

WE WILL notify the court in which Dominique Whitaker and John White filed their collective lawsuit that we will no longer enforce/apply the mandatory arbitration agreement upon which we based our motion to stay their collective lawsuit and compel individual arbitration of their employment claims, and WE WILL inform the court that we no longer oppose their collective lawsuit on the basis of that agreement.

WE WILL reimburse Dominique Whitaker and John White for any reasonable attorneys' fees and litigation expenses that they may have incurred in opposing our motion to stay their collective lawsuit and compel individual arbitration.

BANK OF AMERICA CORPORATION

The Board's decision can be found at www.nlrb.gov/case/31–CA–072916 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Katherine Mankin, Esq., for the General Counsel.
Paul Berkowitz, Gregg A. Fisch, and *Richard W. Kopenhefer, Esqs. (Sheppard Mullin Richter & Hampton LLP),* of Los Angeles, California, for the Respondent.
Joshua D. Buck, Esq. (Thierman Law Firm P.C.), of Reno, Nevada, for Charging Party Theirman.
Paul T. Cullen, Esq. (The Cullen Law Firm), of Agoura Hills, California, for John White.
Shaun Setareh, Esq. (The Law Offices of Shaun Setareh), of Los Angeles, California, for Dominique Whitaker.

DECISION

STATEMENT OF THE CASE

WILLIAM G. KOCOL, Administrative Law Judge. This trial in this case opened in Los Angeles, California, on December 10, 2012. At that time I postponed the case indefinitely to allow the parties time to complete a stipulated record. On December 18, 2012, all parties filed a joint motion to accept parties' joint stipulation of facts and to close the record. Upon consideration, that motion is granted, Joint Exhibits 1–20 are received into evidence, and the record is closed.

Joshua D. Buck and Mark Thierman, Thierman Law Firm filed the charge in Case 31–CA–072918 on January 19, 2012, and Paul Cullen, The Cullen Law Firm filed the charge in Case 31–CA–072918 against Countrywide Financial Corporation (CFC), Countrywide Home Loans, Inc. (CHL) and Bank of America Corporation (BAC), collectively called Respondents and the General Counsel issued the order consolidating cases, consolidated complaint, and notice of hearing on October 23, 2012. The complaint as amended at trial, alleges that Respondents violated Section 8(a)(1) by maintaining and enforcing an arbitration agreement that requires employees to arbitrate all employment-related claims, including any claims arising under a Federal statute or regulation, and by asserting it against employees Dominique Whitaker (Whitaker) and John White (White) in a lawsuit brought by those employees against the Respondent.

Respondents filed a timely answer that denied "each and every" allegation in the complaint except that it admitted the Board's jurisdiction over BAC and that "on or about September 19, 2011, the United States District Court for the Central District of California, Honorable Christine A. Snyder presiding, in

Whitaker, et al, *v. Countrywide Financial Corp.,* et al, Case No. VC 09–5898 (PJWx), granted, in part, Respondents' motion to compel arbitration and also stayed litigation. Respondents further admit that, in the Order, the District Court specifically found that the 'question of whether plaintiffs are subject to individual or class arbitration depends on the parties' intent and is a question for the arbitrator to decide.'" Respondent asserted a number of affirmative defenses.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Charging Parties, and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Effective July 1, 2008, through a complex and involved transaction, BAC became the ultimate parent company of the entity that was previously named "Countrywide Financial Corporation" but has since merged out of existence (the Merged CFC) and its subsidiaries (the Merged CFC's Subsidiaries), including CHL. Prior to the July 1, 2008 transaction, the Merged CFC was a holding company, incorporated under the laws of the State of Delaware, with its corporate headquarters in Calabasas, California. At that same time, CHL was a separate company and a wholly-owned subsidiary of the Merged CFC. CHL was, and continues to be, incorporated in New York, with its corporate headquarters in Calabasas, California.

At all material times, BAC has been a separate company from CFC (and the Merged CFC as well) and CHL, and is incorporated under the laws of the State of Delaware, and its corporate headquarters are in Charlotte, North Carolina, with an office and place of business in Lancaster, California, and has been engaged in the operation of a financial institution providing financial services. In conducting its operations during the 12-month period ending March 23, 2012, BAC, on its own or through its subsidiaries, in the course and conduct of its business operations described above had gross revenue valued at in excess of $500,000. During the same 12-month period, BAC, on its own or through its subsidiaries, in the course and conduct of its business operations, purchased and caused to be transferred and delivered to its facilities within the State of California, goods and materials valued at in excess of $50,000 directly from sources outside of the State of California, or from suppliers within the state which, in turn, obtained such goods and materials directly from sources outside the state.

At all material times through at least March 31, 2009, CFC was a corporation with an office and place of business in Calabasas, California, and a holding company which, through its subsidiaries, engaged in mortgage lending and other real estate finance-related businesses, including mortgage banking, banking and mortgage warehouse lending, and dealing in securities and insurance underwriting. In conducting its operations during the 12-month period ending March 31, 2009, CFC, on its own or through its subsidiaries, in the course and conduct of its business operations described above, had gross revenue valued at in excess of $500,000. During the same 12-month period, CFC, on its own or through its subsidiaries, in the course and conduct of its business operations, purchased and caused to be transferred and delivered to its facilities within the State of California, goods and materials valued at in excess of $50,000 directly from sources outside of the State of California, or from suppliers within the state which, in turn, obtained such goods and materials directly from sources outside the state.

At all material times through at least March 31, 2009, CHL was a corporation with an office and place of business in Calabasas, California, and engaged in mortgage lending and other real estate finance-related businesses, including mortgage banking, banking and mortgage warehouse lending, and dealing in securities and insurance underwriting. In conducting its operations during the 12-month period ending March 31, 2009, CHL, in the course and conduct of its business operations described above had gross revenue from its operations valued at in excess of $500,000. During the same 12-month period, CHL, in the course and conduct of its business operations, purchased and caused to be transferred and delivered to its facilities within the State of California, goods and materials valued at in excess of $50,000 directly from sources outside of the State of California, or from suppliers within the state which, in turn, obtained such goods and materials directly from sources outside the State of California. At all material times, CHL, BAC, and CFC, each has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The foregoing facts are taken from the parties' joint stipulation.

However, Respondents do not admit or stipulate that either BAC or CFC was an employer of Whitaker or White. And it is important to note that the complaint does not allege any relationship between the Respondents such as a single- integrated enterprise, joint employer, successorship, or agency.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Arbitration Agreement

On or about August 30, 2007, Whitaker applied for employment at CHL. On or about August 30, 2007, as part of the application process, CHL presented Whitaker with a mutual agreement to arbitrate claims (the arbitration agreement) and Whitaker electronically checked "I agree." Whitaker began working for CHL on or about November 19, 2007, as a customer service telephone representative. She went out on a leave of absence on or about May 5, 2008, and did not return to work at CHL after that date. Her last day of employment at CHL was on or about August 20, 2008. On or about September 26, 2008, White applied for employment at CHL. On or about September 26, 2008, CHL, as part of the application process, presented White with the arbitration agreement, and White electronically checked "I Agree." White worked for CHL as an account manager from in or about November 2008 until approximately November 2009. Neither Whitaker nor White is still employed by CHL and neither ever worked for BAC or CFC.

The arbitration agreement bears the heading "Countrywide Financial" and explains that reference in that agreement to the "Company" means "Countrywide Financial Corporation and all of its subsidiary and affiliated entities, . . . and all successors and assigns from any of them." The arbitration agreement contains the following provision:

> Except as otherwise provided in this agreement, the Company and the Employee hereby consent to the resolution by arbitration of all claims or controversies arising out of, relating to or associated with the Employee's employment with the Company that the Employee may have against the Company or that the Company may have against the Employee, including any claims or controversies relating to the Employee's application for employment with the Company, the Company's actual or potential hiring of the Employee, the employment relationship itself, or its termination (hereinafter the "Covered Claims"). The Covered Claims subject to this Agreement include, but are not limited to, claims for wages or other compensation due . . . and claims for violation of any federal, state or other governmental constitution, statute, ordinance, regulation, or public policy. The purpose and effect of this Agreement is to substitute arbitration, instead of a federal or state court, as the exclusive forum for the resolution of Covered Claims. The parties' responsibilities and legal remedies available under any substantive law applicable to a Covered Claim shall be enforced in any arbitration conducted pursuant to this agreement.

The arbitration agreement also provides that "Nothing in this Agreement shall be construed to require any claim if an agreement to arbitrate such a claim is prohibited by law." The arbitration agreement indicates that each party entered the agreement "voluntarily"; however, if the employee did not agree to the arbitration agreement, then the employee "will not be able to move forward in the application process at this time." The arbitration agreement is silent concerning whether arbitration may be compelled on an individual or collective basis.

During the period of in or about 2007 through approximately March 31, 2009, applicants for employment at CHL typically were presented with an arbitration agreement, similar to those described above, or with language substantially similar to the arbitration agreement.

B. Lawsuit

On or about June 16, 2009, Whitaker filed lawsuit against CFC and BAC in Ventura County Superior Court. On or about August 12, 2009, the case was removed to the United States District Court for the Central District of California. As amended, the lawsuit, a putative class action, alleges seven claims of failure to pay overtime and other wages in violation of California and Federal law. The putative class of employees includes employees of "Countrywide" and *not* any employees of BAC. Rather, the claims against BAC were brought as a "successor in liability." On June 27, 2011, White was added to the lawsuit. On or about August 22, 2011, CFC, BAC, and CHL filed motions to compel individual arbitration for Whitaker's and White's claims.

Whitaker and White filed an opposition to the motions to compel, and CFC, BAC, and CHL then filed a reply. In both the motion to compel and the reply, Respondents unequivocally expressed its intent to compel individual, and not class, arbitration. Respondents' arguments, however, were not based on any purported waiver of class-based arbitration contained within the arbitration agreement. Rather, Respondents argued that case law, as described below, compelled individual arbitration. On September 19, 2011, United States District Court Judge Christine A. Snyder granted, in part, the motions to compel, and also stayed the litigation of the lawsuit. In doing so Judge Snyder rejected the assertion that Section 7 rendered the arbitration agreement unenforceable; the court pointed to case authority that described that argument as "nonsensical." Judge Snyder held that "the question of whether plaintiffs are subject to individual or class arbitration depends on the parties' intent and is a question for the arbitrator to decide."

On or about June 11, 2012, CFC, BAC, and CHL filed a motion for partial reconsideration of Judge Snyder's order. On or about June 25, 2011, Whitaker and White filed an opposition to the motion for partial reconsideration and on or about July 16, 2012, CFC, BAC, and CHL filed a reply. On or about August 20, 2012, Judge Snyder denied the motion for partial reconsideration. To date, the parties have not selected an arbitrator. There has been no determination by an arbitrator (or any other authority) as to whether Whitaker and White can assert their employment-related claims on a class-wide or collective basis in arbitration. On or about October 19, 2011, Whitaker and White filed with the Ninth Circuit a petition for writ of mandamus; on or about October 30, 2012, CFC, BAC, and CHL also filed a petition for writ of mandamus with the Ninth Circuit.

To summarize, Respondents have sought to compel litigation of Whitaker's and White's claims made in the lawsuit on an individual basis before an arbitrator and White and Whitaker have collectively resisted Respondents' efforts. Importantly, Respondents' have *not* contended that White and Whitaker have waived their right under the arbitration agreement to act collectively in seeking class-wide arbitration; rather, Respondents' have only argued that case law favors their position and they did not otherwise agree to class-wide arbitration.

III. ANALYSIS

A. Arbitration Agreement

The complaint alleges that Respondents have maintained and enforced the arbitration agreement that includes provisions that require employees to arbitrate all employment-related claims, including any claims arising under Federal statute or regulation. I have described above how that arbitration agreement does so. Respondents argue that BAC and CFC should be dismissed as parties in the complaint. I have noted above that Whitaker and White were employed by CHL and not BAC or CFC. I have also described how CHL but not BAC or CFC required employees to sign the arbitration agreement. In his brief the General Counsel correctly points White and Whitaker are statutory employees in a general sense and the facts show that BAC and CFC are employers engaged in commerce. But so is General Motors. Importantly, the General Counsel has not pled in complaint or even explained at the hearing any legal theory under which BAC and CFC should be held liable for the conduct of CHL. This lack of due process has caused Respondents to guess that the General Counsel is proceeding under a "successorship" theory, given that this was the theory used by

the charging parties to join BAC in the lawsuit at issue in this case. But the facts do not support such a theory. Under these circumstances I conclude that relationship of BAC and CFC to this allegation of the complaint is too attenuated to hold them liable. I dismiss BAC and CFC from this allegation.

Although the arbitration agreement was signed well outside the 10(b) period, CHL sought to maintain it within that period. The arbitration agreement, as reasonably read by employees, prohibits employees from filing charges with the Board, an activity protected by Section 7 and Section 8(a)(4). An employer cannot condition employment on a waiver of employees' right to file charges with the Board and thereby lose the advantages provided to them by the Act. *Supply Technologies, LLC,* 359 NLRB No. 38 (2013); *D. R. Horton,* 357 NLRB No. 184, slip op. at 2 (2012); *U-Haul Co. of California,* 347 NLRB 375, 377 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007). For example, by compelling arbitration as a substitute for Board proceedings, the employee must forego having a Board agent conduct an investigation of the charge, thereby acquiring evidence and then making a legal analysis of that evidence. The employee gives up the benefit of an NLRB-prepared complaint as well as having an NLRB attorney prosecute the complaint. Nor will the employee have the resources of the General Counsel to prepare any meritorious case against the Respondents. Indeed, the Supreme Court has indicated that Congress intended to ensure that employees be "completely free from coercion" with respect to access to the Board. *NLRB v. Scrivener,* 405 U.S. 117, 123 (1972). In its brief Respondents do not address the merits of this allegation of the complaint. I conclude that by maintaining an arbitration agreement that interferes with employees' right to file charges with the Board, CHL violated Section 8(a)(1). Nothing in this conclusion should properly be understood to touch upon Respondents' First Amendment right to petition the government for a redress of grievances, described more fully in the following section of this decision. Respondents' remain free to assert their claims concerning the meaning of the arbitration agreement in the lawsuit. Rather, it is only the maintenance of an unlawfully broad policy that I find unlawful; this finding does not require Respondents to alter their litigation position.

B. Lawsuit

The complaint alleges that Respondents violated Section 8(a)(1) "by moving the district court to compel plaintiffs Whitaker and White to individually arbitrate their class-wide wage and hour claims against Respondent." I have described above how, in its motion to compel, Respondents unequivocally expressed its intent to compel individual, and not class, arbitration. I have also described above how the arbitration agreement is silent concerning this matter and at no time have Respondents argued that the arbitration agreement, by its terms, compelled only individual arbitrations. I have also described above how Whitaker and White have continued to maintain that their claims should be heard collectively and there is no evidence that Respondents have sought to interfere with, as opposed to disagree with, that contention. The General Counsel argues that *D. R. Horton,* supra, requires the conclusion that Respondents here violated the Act. I disagree. First, I identify the Section 7 rights implicated in *D. R. Horton.* In that case the employer required, as a condition of employment, that employees sign an agreement that precluded them *filing* joint collective, or class action claims concerning their working conditions. The Board held that "Collective *pursuit* of a workplace grievance in arbitration is . . . protected by the NLRA." Id., slip op. at 2 (emphasis added). The Board concluded:

> We need not and do not mandate class arbitration in order to protect employees' rights under the NLRA. Rather, we hold only that employers may not compel employees to *waive* their NLRA right to collectively *pursue* litigation of employment claims in all forums, arbitral and judicial. So long as the employer leaves open a judicial forum for class and collective claims, employees' rights are preserved without requiring the availability of classwide arbitration. Employers remain free to *insist* that arbitral proceedings be conducted on an individual basis.

Id., slip op. at 12 (emphasis added). The Board gave, as an example, Rule 23 of the Federal Rules of Civil Procedure. The Board stated that there is no Section 7 right to class certification. It continued:

> Nothing in our holding guarantees class certification; it guarantees only employees' opportunity to pursue without employer coercion, restraint or interference such claims of a class or collective nature *as may be available to them under Federal, State or local law. . [T]heir employer remains free to assert any and all arguments against certification (other than the MAA).*

Id., slip op. 10 fn. 24 (emphasis added). So the Section 7 that could not be waived in *D. R. Horton* was the right of employees to collectively pursue class or collective work-related complaints against their employer. This is different from any right that the claims be heard and decided on a class-wide basis; that issue is for the appropriate forum, and not the Board, to decide. Here, Respondent did nothing more than argue before the appropriate forum that the claims be heard on an individual basis, and it did so not on the basis that the employees had waived their right to pursue class-wide claims. Rather, it relied solely on case law that it felt support that position.

The General Counsel argues:

> This is a hollow sanctuary. While employees may be able to argue to an arbitrator that they are entitled to bring their claims as a class, *Stolt-Nielsen*[1] and *AT&T Mobility v. Concepcion*[2] make clear that the arbitrator has no authority to grant such status in the absence of some authorization for class arbitration in the arbitration agreements themselves or where, as here, the agreements are silent as to whether the mandatory arbitration may be heard on a collective or class basis. See *Stolt-Nielsen,* 130 S. Ct. at 1775("a party may not be compelled under the FAA to submit to class arbitration unless there is a basis for concluding that the party *agreed* to do

[1] *Stolt-Nielsen SA v. Animal Feeds International Corp*., 130 S.Ct. 1758 (2010).

[2] 131 S.Ct. 1740 (2011).

so") (emphasis in original); *AT&T Mobility v. Concepcion,* 131 S. Ct. at 1750 ("the agreement at issue, which was silent on the question of class procedures, could not be interpreted to allow them").

But by making this argument the General Counsel conflates the Section 7 right to collectively seek class wise arbitration with the non Section 7 right to actually have their claims addressed in a class wide fashion; as described above this was something the Board was careful to differentiate in *D. R. Horton.*

What the General Counsel is seeking in this case is to have the Respondents stop presenting their legal arguments to the court concerning why class-wide arbitration is not appropriate. If the Board were to do so, it would likely trench upon Respondents' rights under the First Amendment "to petition the Government for a redress of grievances." *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983)[3]; *BE & K Construction v. NLRB*, 536 U.S. 516 (2002). The General Counsel cites *Elevator Constructors (Long Elevator),* 289 NLRB 1095 (1988), enfd. 902 F.2d 1297 (8th Cir. 1990). In that case the Board concluded that a grievance filed by a union concerning the meaning of a contract clause, if successful, would result in the clause being read in a manner that violated Section 8(e); the grievance thereby violated Section 8(b)(4)(ii)(A). The Board concluded that *Bill Johnson's* did not preclude it from reaching that result. But that case is clearly inapposite here. Respondents have not sought to have the court interpret the arbitration agreement in a manner that would violate the Act. And while, as the Charging Parties point out in their brief, Respondents have argued that the arbitration agreement does not provide for class-wide arbitration but only individual arbitration, these assertions must be seen in context. That context shows that Respondents are arguing that under existing law, class-wide arbitrations can arise only by agreement of the parties and the arbitration agreement does not so provide. In other words, Respondents are *not* arguing that under the terms of the arbitration Agreement the employees waived whatever right they may have to make class-wide claims. I dismiss this allegation of the complaint.[4]

CONCLUSION OF LAW

By maintaining an arbitration agreement that interferes with employees' right to file charges with the Board, CHL has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, Countrywide Home Loans, Calabasas, California, its officers, agents, successors, and assigns, shall

1. Cease and desist

(a) Maintaining an arbitration agreement that interferes with employees' right to file charges with the Board.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its facility in Calabasas, California, copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 22, 2011.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. February 13, 2013

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[3] Fn. 5 of that decision offers no way out for the General Counsel because the motions to compel individual arbitration at issue in this case do not have an objective that is illegal under Federal law. To the contrary, those motions simply assert existing Federal case law as viewed by Respondents.

[4] The complaint also alleges that Respondent independently violated Sec. 8(a)(1) by "About August 30, 2007, Respondent required employee Dominique Whitaker to agree to the arbitration agreement" and "About September 26, 2008, Respondent required employee John White to agree to the arbitration agreement." Of course, those allegations are facially invalid under Sec. 10(b) and I dismiss them.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain an arbitration agreement that interferes with employees' right to file charges with the Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

COUNTRYWIDE HOME LOANS