SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
Gregg A. Fisch (SBN 214486)
Paul Berkowitz (SBN 251077)
1901 Avenue of the Stars, Suite 1600
Los Angeles, California 90067-6017
Telephone: (310) 228-3700
Facsimile: (310) 228-3701

Attorneys for Respondents
COUNTRYWIDE FINANCIAL CORPORATION,
COUNTRYWIDE HOME LOANS, INC., and
BANK OF AMERICA CORPORATION

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 31

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	Consolidated Case Nos. 31-CA-072916 and 31-CA-072918 **RESPONDENTS' MOTION FOR SUMMARY JUDGMENT** [*Filed concurrently with Declarations of Gregg A. Fisch and Devra Lindgren*]

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

Pursuant to Section 102.24 of the National Labor Relations Board's Rules and Regulations, Respondents Countrywide Financial Corporation ("CFC"), Countrywide Home Loans, Inc. ("CHL"), and Bank of America Corporation ("BAC") (collectively, "Respondents"), file this motion seeking summary judgment. The Charging Parties allege that Respondents have improperly restricted former CHL employees, Dominique Whitaker ("Whitaker") and John White ("White") (collectively, "Claimants"), from pursuing a class or collective action lawsuit on behalf of other purportedly similarly situated employees, thereby interfering with their right to "engage in . . . concerted activities for the purposes of . . . mutual aid or protection " in violation of Section 8(a)(1) of the National Labor Relations Act (the "NLRA" or the "Act"). There is no proper basis for the alleged charges. Because no facts are disputed and the issues addressed in this Motion raise pure legal questions, a decision can be reached now. Consequently, for the multiple reasons set forth herein, the charges should be dismissed in their entirety at this time.

First and foremost, CFC and BAC are not proper parties to this proceeding and must be dismissed. Notably, the Charging Parties baselessly assert claims against BAC based solely on a successor entity theory of liability. However, based on controlling precedent of the United States Supreme Court, the facts underlying this situation, and prior court rulings on the specific subject, BAC cannot be held liable as a successor entity for any alleged unfair labor practices purportedly committed by CHL (or CFC). Moreover, CHL is the only respondent entity that ever employed Claimants (or any of the putative class members in the underlying lawsuit) and, therefore, it is the only entity that even possibly could be a proper party to this proceeding. Accordingly, both CFC and BAC must be dismissed from the proceeding.

Second, there is no substantive basis to claim that Respondents violated any employees' rights that are protected by the Act. Simply put, Respondents did not in any way (whether through entering into the voluntarily agreed-upon Arbitration Agreements or otherwise) prohibit the employees from exercising their substantive rights under the Act. Unlike the situation presented in the case that purportedly provides the sole legal support and basis for the instant alleged unfair labor practices, *D.R. Horton* – where the arbitration agreement at issue expressly stated that the arbitrator "may hear only Employee's individual claims," and "does not have authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding" – the Arbitration Agreements at issue here do not expressly waive (or even implicitly waive) Claimants' right to assert any employment-related claims on a class-wide or collective basis in court or arbitration. Rather, the Arbitration Agreements are completely silent on the issue of whether or not any class or collective action claims can be asserted by the former employees. Thus, under United States Supreme Court controlling precedent, the Arbitration Agreements must be enforced as written and cannot constitute any unfair labor practice as alleged in the Consolidated Complaint.

Lastly, in any event, these charges are premature and cannot be prosecuted at this time. First, given that *D.R. Horton* currently is under review on appeal to the Fifth Circuit Court of Appeals and very possibly will be overturned, proceeding with this matter now would constitute an inefficient use and a complete waste of everyone's scarce resources. Moreover, the Consolidated Complaint should be dismissed now because there simply has been no determination by a court, a judge, an arbitrator, or any other authority as to whether or not Claimants actually can assert their employment-related claims on a class-wide or collective basis in arbitration. Thus, even if it theoretically could be argued that the enforcement of the

Arbitration Agreements at issue potentially could at some time in the future violate these individuals' rights under the Act, the issue is not yet ripe for assertion at this time. Accordingly, the charges must be dismissed in their entirety.

II. STATEMENT OF RELEVANT FACTS

A. The Parties

The Charging Parties never worked for any of the three Respondents and otherwise have no relationship to Respondents, except that they are attorneys who have brought lawsuits against Respondents on behalf of Claimants. Claimants currently are not employees of any of the three Respondents and have not been employed by any of the entities for more than three years now. CHL is the only respondent entity that ever employed them (or any of the putative class members in the underlying lawsuit).[1] Specifically, Whitaker began working for CHL as a Customer Service Telephone Representative on or about November 19, 2007. She was granted a leave of absence on May 5, 2008, and then never returned to work, ending her employment years ago. Meanwhile, White worked for CHL as an Account Manager from on or about November 20, 2008, through on or about November 4, 2009. In addition, neither Claimant ever worked for CFC or BAC. But, they nonetheless asserted claims against BAC, based on a purported (and unfounded) successor liability claim.

At the time that Claimants were solely employed by CHL, CFC was a holding company, incorporated under the laws of the State of Delaware, that had its corporate headquarters in Calabasas, California.[2] CFC did not employ any non-exempt employees in California and, more

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[1] *See* Declaration of Devra Lindgren ("Lindgren Decl."), ¶ 4.

[2] *Id.*

specifically, never employed Claimants.[3] Meanwhile, CHL was a separate company and a wholly-owned subsidiary of CFC.[4]

BAC always has been a separate company from CFC and CHL, and is incorporated under the laws of the State of Delaware, with its corporate headquarters in Charlotte, North Carolina. The entity previously named "Countrywide Financial Corporation" that was in existence when Claimants were employed by CHL, along with its subsidiaries, has merged out of existence through a complex and involved transaction.[5] As a result of that transaction, BAC became the ultimate parent company of the merged former CFC subsidiaries, including CHL.[6] Further, unlike what CHL used to do, BAC does not require its employees to enter into arbitration agreements requiring them to submit to binding arbitration all of their employment-related disputes with BAC (or any of its subsidiaries).[7]

B. Claimants Each Voluntarily Executed Arbitration Agreements That Do Not Expressly (or Implicitly) Waive Their Rights to Bring Class or Collective Actions and Do Not Prevent Them From Filing Charges With the NLRB

Claimants each voluntarily accepted and agreed to Countrywide's Mutual Agreement to Arbitrate Claims (the "Arbitration Agreements") during his/her respective employment with CHL. Specifically, on August 30, 2007, Whitaker signed and executed the Arbitration Agreement.[8] Meanwhile, on September 26, 2008, White also entered into the Arbitration

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3 *Id.*

4 *Id.*

5 Lindgren Decl., ¶¶ 2-6.

6 *Id.*

7 Lindgren Decl., ¶ 8.

8 The arbitration agreement signed and executed by Dominique Whitaker is attached as Appendix B to the Consolidated Complaint.

Agreement.[9] The Arbitration Agreements expressly provide for the following:

> [T]he resolution by arbitration of all claims or controversies arising out of, relating to or associated with the Employee's employment with the Company [CHL] 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 . . . 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.

(Emphasis added).

Importantly, the Arbitration Agreements do not contain in any way a provision that expressly (or implicitly) prohibits Claimants' right to assert claims on behalf of other employees on a class-wide or collective basis. Rather, the Arbitration Agreements are completely silent on the issue of class arbitration. In addition, the Arbitration Agreements make clear that they do not require arbitration of every claim arising out of Claimants' employment with CHL and do not prevent them from filing claims with the NLRB:

> Nothing in this Agreement shall be construed to require arbitration of any claim if an agreement to arbitrate such a claim is prohibited by law. In addition, if either the Company or the Employee has more than one claim against the other, one or more of which is not covered by this Agreement, such claims shall be determined separately in the appropriate forum for resolution of those claims.

The Arbitration Agreements further provide that:

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[9] The arbitration agreement signed and executed by John White is attached as Appendix C to the Consolidated Complaint.

> EACH PARTY TO THIS AGREEMENT ACKNOWLEDGES CAREFULLY READING THIS AGREEMENT, UNDERSTANDING ITS TERMS, AND ***ENTERING THIS AGREEMENT VOLUNTARILY*** AND NOT IN RELIANCE ON ANY PROMISES OR REPRESENTATIONS OTHER THAN THOSE CONTAINED IN THIS AGREEMENT ITSELF.
>
> EACH PARTY FURTHER ACKNOWLEDGES HAVING THE OPPORTUNITY TO DISCUSS THE AGREEMENT WITH PERSONAL LEGAL COUNSEL AND HAS USED THAT OPPORTUNITY TO THE EXTENT DESIRED.

(Emphasis added).

C. The Underlying Lawsuit

On June 16, 2009, Claimants initiated their lawsuit against Respondents in Ventura County Superior Court, Case No. 56-2009-00347462-CU-OE-VTA. On August 12, 2009, Respondents removed the case to federal district court, Case No. VC 09-5898 CAS (PJWx). Later, on June 27, 2011, Claimants filed a Third Amended Complaint ("TAC"), in which they generally alleged that Countrywide (and only Countrywide and not BAC) required its California call center employees to work off-the-clock when booting up their computers and connecting to Countrywide's telephone system at the beginning of the day and when shutting down their computers and logging off the telephone system at the end of the day. The TAC alleged seven causes of action for: (1) failure to pay overtime in violation of California Labor Code sections 510 and 1194 and IWC Wage Order No. 4-2001; (2) waiting time penalties under Labor Code section 203; (3) failure to provide an accurate itemized wage statement in violation of California Labor Code section 226; (4) failure to pay minimum wage in violation of California Labor Code section 1194 and IWC Wage Order No. 4-2001; (5) failure to pay minimum and overtime wages in violation of the Fair Labor Standards Act (FLSA); (6) unfair competition pursuant to Business & Professions Code sections 17200, *et seq.*; and (7) failure to provide meal periods and rest

breaks.[10] Claimants sought to bring these claims against Respondents on behalf of a putative class, pursuant to Federal Rules of Civil Procedure, Rule 23, and also on a collective basis, based on federal law, under 28 U.S.C. § 216.

D. Although the District Court Granted Respondents' Motion to Compel Arbitration, the Court Did Not Decide and Left Open the Issue of Whether or Not Claimants Could Assert Their Claims On A Class-Wide Basis In Arbitration

On August 22, 2011, Respondents filed a motion to compel both Whitaker and White to arbitrate their claims pursuant to the Arbitration Agreements.[11] On September 19, 2011, the District Court, Honorable Christine A. Snyder presiding, granted Respondents' motion to compel arbitration and stayed the litigation.[12] However, in the Order, the 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***." (Emphasis added.) Accordingly, the District Court did not decide whether Claimants could assert their claims on a class-wide basis in arbitration. On September 30, 2012, Claimants initiated the arbitration process by filing their Demand for Arbitration with JAMS.[13] However, there has been no determination by an arbitrator (or any other authority) as to whether or not Claimants can assert their employment-related claims on a class-wide or collective basis in arbitration.[14] In fact, the parties have yet to even select an arbitrator or otherwise brief the issue as part of the arbitration process.

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10 Declaration of Gregg A. Fisch ("Fisch Decl."), ¶ 2, Exh. D.

11 Fisch Decl., ¶ 3.

12 Fisch Decl., ¶ 3, Exh. E.

13 Fisch Decl., ¶ 4, Ex. F.

14 Fisch Decl., ¶ 4.

III. LEGAL ARGUMENT

A. BAC and CFC Must Be Dismissed From These Matters Because Neither Ever Was "An Employer" of Claimants, As Defined By The Act, and, Therefore, They Are Not Proper Parties To This Proceeding

CFC and BAC are not proper parties to this proceeding and must be dismissed from this action. Simply put, neither CFC nor BAC ever was "an employer" of Claimants, as defined by the Act. *See* 29 U.S.C. § 158(a)(1) ("It shall be an unfair labor practice for ***an employer*** to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7") (emphasis added). Indeed, as set forth above, CFC did not employ Claimants or any California non-exempt employee. Further, in the underlying lawsuit, Claimants baselessly asserted claims against BAC based solely on a successor entity theory of liability and, in any event, they admit that BAC never employed Claimants.[15] Because CHL is the only respondent entity that ever employed Claimants (or any of the putative class members), CHL is the only entity that potentially could even be a proper party to this proceeding.

Further, not only did BAC never employ Claimants, but it has no successor liability for any actions of CHL (or CFC). The United States Supreme Court has made it clear that a successor employer is responsible for (and required to remedy) the unfair labor practices of its predecessor ***only if*** it was aware of the unfair labor practices at the time of the acquisition. *See Golden State Bottling Co., Inc. v. NLRB*, 414 U.S. 168 (1973). It cannot be disputed that BAC did not have any knowledge whatsoever of any alleged unfair labor practices committed by CHL when BAC acquired CHL. Most notably, the transaction that led to BAC becoming the ultimate parent company of CHL (in July 2008) undisputedly occurred years before the January 2011

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[15] Fisch Decl., ¶ 2, Exh. D (¶ 5) (Claimants admitting in the TAC that BAC did not employ them and they were employed only by CHL).

issuance of *D.R. Horton* and the filing of Claimants' charges with the NLRB (in January 2012) or the lawsuit underlying it (in June 2009). In addition, a United States District Court already ruled that BAC has no successor liability for any actions of CHL (or CFC).[16] Thus, under *Golden State Bottling*, and its progeny, BAC cannot be held liable for any alleged unfair labor practices purportedly committed by CHL. Accordingly, the unfair labor practice charges asserted against CFC and BAC must be dismissed in their entirety.

B. The Arbitration Agreements Do Not Expressly (Or Even Implicitly) Prohibit the Exercise of Claimants' Substantive Rights Protected by the NLRA

CHL did not violate any of Claimants' substantive rights protected by the National Labor Relations Act (the "NLRA" or the "Act"). Claimants base their instant charges on the plurality decision issued by the NLRB earlier this year in *D.R. Horton, Inc.*, 357 NLRB No. 184, 2012 WL 36274 (Jan. 3, 2012). However, as discussed below, *D.R. Horton* is currently on appeal to the Fifth Circuit Court of Appeals and should be given no weight under the circumstances.

But, even if the Board here wishes to consider this decision, *D.R. Horton* fails to support the charges. Rather, *D.R. Horton* is particularly instructive as to why Respondents' position is correct that the charges should be dismissed in their entirety. In the *D.R. Horton* decision, two members of the NLRB held narrowly that the employer's ***express*** class/collective action waiver in its arbitration agreements – which all employees were required to sign as a condition of employment – constituted an unfair labor practice under the NLRA. Specifically, the arbitration agreement at issue there expressly stated that the arbitrator "may hear only Employee's individual claims," and "does not have authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding." The

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16 Lindgren Decl., ¶ 6, Exh. C.

NLRB held that the employer violated Section 8(a)(1) of the Act because it required its employees to sign an agreement that ***expressly*** barred them from bringing class and collective claims in an arbitral or judicial forum and, therefore, constituted an unlawful restriction on the employees' Section 7 rights to engage in concerted action for mutual aid or protection.[17] *Id.*, at *17 ("We thus hold, for the reasons explained above, that the Respondent violated Section 8(a)(1) by requiring employees to waive their right to collectively pursue employment-related claims in all forums, arbitral and juridical.").

In reaching its conclusion, the NLRB addressed, among other things, the United States Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). In *Gilmer*, the Supreme Court held that an employer can require an employee, as a condition of employment, to agree to resolve his or her individual employment-related claims in private arbitration. *Gilmer*, 500 U.S. at 31. In distinguishing *Gilmer*, the NLRB in *D.R. Horton* specifically noted that the "arbitration agreement [in *Gilmer*] contained no language specifically waiving class or collective claims." *D.R. Horton.*, 2012 WL 36274, at *12.

Here, unlike the situation in *D.R. Horton*, and quite similar to the arbitration agreement in *Gilmer*, the Arbitration Agreements do ***not expressly waive*** (or even implicitly waive) Claimants' right to assert any employment-related claims on a class-wide or collective basis in court or arbitration. Indeed, the Arbitration Agreements are completely silent on the issue and make no reference whatsoever to whether or not Claimants can proceed on a class-wide or collective basis in arbitration. Because the Arbitration Agreements on their face do not contain an express (or implied) class or collective action waiver, CHL did not require Claimants, as a

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[17] Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7. 29 U.S.C. § 158(a)(1).

condition of their employment, to execute a mandatory arbitration agreement that restricted the exercise of their Section 7 rights.

Meanwhile, even if Claimants were to argue that Respondents committed an unfair labor practice by seeking to compel them to individually arbitrate their claims, Claimants' charges still must be dismissed. Respondents did not move to compel arbitration based on an agreement that expressly waived Claimants' rights to engage in concerted activities. Rather, Respondents moved to compel arbitration based solely on the parties' lawful agreement to arbitrate certain employment-related claims, as the Supreme Court specifically permitted in *Gilmer*. That Court-granted Motion was based on the specific terms of the Arbitration Agreements as written, combined with the precedential holdings from the United States Supreme Court's recent decisions in *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 130 S.Ct 1758 (2010), and *AT&T Mobility v. Concepcion*, 131 S.Ct 1740 (2011). Notably, in those controlling decisions, the Supreme Court made clear that arbitration agreements must be enforced according to their terms and specifically held that, where, as here, such an agreement is silent on the issue of class-wide arbitration, the parties must proceed with arbitration on an individualized basis. *See Concepcion*, 131 S.Ct 1740 (holding that class-action waivers are enforceable because "[t]he overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings"); *Stolt-Nielsen*, 130 S.Ct. at 1775-76 (holding 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" and rejecting that "the parties' mere silence on the issue of class action arbitration constitutes consent to resolve their disputes in class proceedings"). Here, when they moved to compel Claimants to arbitrate their claims (or at any time earlier), Respondents never entered into, invoked, or even sought to invoke, an

"unlawful" arbitration agreement, containing any express (or implied) prohibitions of employees' rights, much less one similar to the agreement at issue in *D.R. Horton*.

Lastly, when considering the terms of the Agreements in their totality, it should be clear that the Arbitration Agreements apply only to litigation matters that potentially could be filed in a court of law and not apply to any claims filed with administrative agencies such as the NLRB. For instance, the Agreements discuss how the governing state/federal law applied by the U.S. District Court sitting at the place of the hearing should apply to the disputes and the Agreements also set forth various procedures, such as discovery and motion practices, that are inherently inconsistent with proceedings conducted by the Board. Simply put, these contractual terms do not apply to administrative matters, such as the matters at issue here before the NLRB.

Moreover, the Agreements also expressly establish that their specific purpose is to avoid litigating any claims in "court." They do not address claims that are raised with any administrative agency or in any such forum, where they state that "The purpose and effect of this Agreement is to ***substitute arbitration, instead of a federal or state court*** . . ." (Emphasis added.) Lastly, the Agreements specify that, "In addition, if either the Company or the Employee has more than one claim against the other, one or more of which is not covered by this Agreement, such claims shall be ***determined separately in the appropriate forum*** for resolution of those claims." (Emphasis added.) Such explicit language, thus, makes clear that the Arbitration Agreements do not require Claimants to arbitrate any administrative claims arising out of their employment with CHL. Consequently, those claims that are not brought in any court and, instead, raised in another forum, such as the ones at issue in these NLRB matters, do not implicate the Arbitration Agreements and do not in any way trigger the terms thereunder. Indeed, Claimants filed the instant charges with the NLRB (and Respondents do not contend

that, automatically, they were procedurally precluded from doing so), which demonstrates that the Arbitration Agreements do not in any way restrict Claimants' ability to seek relief from the NLRB.[18] Accordingly, for all the reasons described above, the charges completely lack any merit and must be dismissed in their entirety.

C. Putting Aside Whether or Not Respondents Violated the Act, The Charges are Premature and Must Be Dismissed At This Time

1. The Charges Must Be Dismissed for the Separate Reason that There Has Been No Determination as to Whether Or Not Claimants Can Assert Their Employment-Related Claims On A Class-Wide Basis In Arbitration

The charges are improperly premature and must be dismissed for this separate and distinct reason as well. Most notably, in granting Respondents' motion to compel arbitration, the District Court did not decide whether Claimants could assert their employment-related claims on a class-wide basis in arbitration. Rather, the Court specifically held that "[i]t is up to the arbitrator to determine whether class or individual arbitration is appropriate." Claimants only recently initiated the arbitration process and, thus, no decision has been rendered on this critical issue. Because an arbitrator (or any other decision-maker) has not made a ruling as to whether or not Claimants can proceed on a class-wide or collective basis, the charges have no proper basis

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[18] Nonetheless, Claimants have no proper basis to assert their charges now. As former employees, Claimants have no ability to exercise any of those rights here (*i.e.*, to engage in "concerted activities" to improve their working conditions) since they had not been employees for many years and the alleged conduct on which they base their charges occurred well after their employment ended, therefore undercutting any right or ability they might have to improve the working conditions at their former employer. In fact, the United States Supreme Court previously has made clear that former employees, such as Claimants here, have no standing to seek similar injunctive relief in civil actions. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2559-60 (2011) (holding that "plaintiffs no longer employed by [defendant] lack standing to seek injunctive or declaratory relief against its employment practices"); *see also Price v. Starbucks Corp.*, 192 Cal. App. 4th 1136 n.5 (2011) ("Price does not seek injunctive relief . . . nor could he because he lacks standing as a former Starbucks employee").

and are premature. Thus, even if it theoretically could be argued that the Arbitration Agreements potentially violate Claimants' Section 7 rights, it is not yet ripe for assertion at this time. In fact, if at some point in the future the arbitrator rules that Claimants can proceed in arbitration on behalf of a putative class, Claimants would have absolutely no basis to claim an unfair labor practice in these matters or otherwise assert that they were prevented from engaging in concerted activities for the purpose of mutual aid or protection. Therefore, the charges now must be dismissed in their entirety.

2. *D.R. Horton* Currently is Being Reviewed On Appeal and, Therefore, Claimants' Charges Should Be Deferred Until the Appeal Process Is Completed and the Ruling is Final

Claimants' unfair labor practice charges also are premature for the separate and distinct reason that *D.R. Horton* – the case on which Claimants entirely base their charges – currently is under review on appeal. Indeed, on January 21, 2012, D.R. Horton filed a notice of appeal in the U.S. Court of Appeals for the Fifth Circuit, seeking to overturn the Board's decision in *D.R. Horton*. The parties have fully briefed the issues in *D.R. Horton* and it is entirely possible (if not likely) that the Fifth Circuit will reverse the *D.R. Horton* NLRB decision within the next few months. Consequently, the resulting law very possibly would comport with the controlling United States Supreme Court precedent, which holds that the Federal Arbitration Act (FAA) mandates that arbitration agreements be enforced as written and that parties need not arbitrate claims on a class-wide basis unless they expressly agree to do so. *See Concepcion*, 131 S.Ct 1740 ("[t]he overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings"); *Stolt-Nielsen*, 130 S.Ct. at 1775-76 (holding 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" and rejecting that "the parties' mere silence on the issue of class action arbitration constitutes

consent to resolve their disputes in class proceedings"). As a result, if *D.R. Horton* is overturned, then the entire basis for Claimants' charges will be undercut and lack any support at all.

Many courts already have rejected the findings in *D.R. Horton*. Notably, the California courts have declined to follow *D.R. Horton*, as the Court of Appeal rejected its holdings and the Supreme Court recently declined to review that rejection. *See Nelsen v. Legacy Partners Residential, Inc.*, 207 Cal. App. 4th 1115, 1133 (2012), *cert denied* (Oct. 31, 2012) (declining to follow *D.R. Horton* because "[it] cites no clear precedent for its holdings that 'an individual who files a class . . .action regarding wages, hours, or working conditions' is per se 'engaged in conduct protected by Section 7,' or that the FAA's policy favoring arbitration must yield to the NLRA in the manner it proposes").

In addition, at least two federal courts already have expressly declined to follow *D.R. Horton* and, in so doing, upheld an express waiver against the bringing of a collective action of an employee's FLSA claims. *LaVoice v. UBS Financial Servs., Inc.*, 2012 WL 124590 (S.D.N.Y. Jan. 13, 2012) ("*Concepcion* precludes any argument, such as that made in *Horton*, that an absolute right to collective action can be reconciled with the FAA's 'overarching purpose' of 'ensuring the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.'"); *Delock v. Securitas Sec. Svcs. USA, Inc.*, __ F. Supp. 2d __, 2012 WL 3150391 (E.D. Ark. Aug. 1, 2012) (same). Numerous other federal district courts, including those in California, have rejected *D.R. Horton's* reasoning as well. *See, e.g.*, *Valle v. Lowe's HIW, Inc.*, 2011 WL 3667441, at * 5 (N.D. Cal. Aug. 22, 2011) (rejecting as "nonsensical" plaintiffs' argument that waiver of right to proceed on class basis in putative wage-and-hour class action rendered arbitration agreement invalid because it would violate NLRA Section 7 right to "engage in other concerted activities for the purpose of collective

bargaining or other mutual aid or protection"); *Grabowski v. Robinson*, 817 F. Supp. 2d 1159, 1169 (S.D. Cal. 2011) (concluding that Section 7 of the "NLRA does not operate to invalidate or otherwise render unenforceable" arbitration provisions prohibiting class actions); *Morvant v. P.F. Chang's China Bistro, Inc.*, __ F. Supp. 2d __, 2012 WL 1604851, at *12 (N.D. Cal. May 7, 2012) ("While the NLRB's analysis in *D.R. Horton* makes somewhat a compelling argument that agreements that require employees to submit to individual arbitration should not be enforced as against public policy, that reasoning does not overcome the direct, controlling authority holding that arbitration agreements, including class action waivers contained therein, must be enforced according to their terms.").

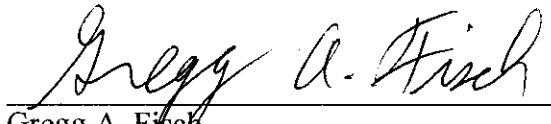
Accordingly, if this matter is not dismissed based on any of the other multiple groudns identified herein, the Board should at the very least stay the instant matter until after the Fifth Circuit (and possibly even the Supreme Court, if appropriate) enters its ruling on the applicable issues, and *D.R. Horton* becomes final. It would be a waste and inefficient use of everyone's scarce resources to otherwise proceed during the pendency of the *D.R. Horton* appeal.

IV. CONCLUSION

For the foregoing reasons, Respondents respectfully submit that there is no genuine issue in dispute here and that, as a matter of law, Claimants have no proper basis to assert that there have been any violations of the NLRA. Accordingly, the Consolidated Complaint, and all of the claims asserted therein, should be dismissed in their entirety.

Dated: November 12, 2012

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By 

Gregg A. Fisch
Attorneys for Respondents CFC, CFC, and BAC

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Los Angeles, State of California. My business address is 1901 Avenue of the Stars, Suite 1600, Los Angeles, CA 90067-6055.

On November 12, 2012, I served true copies of the following document(s) described as **RESPONDENTS' MOTION FOR SUMMARY JUDGMENT** on the interested parties in this action as follows:

Joshua D. Buck, Esq.
josh@thiermanlaw.com
Thierman Law Firm P.C.
7287 Lakeside Drive
Reno, NV 89511
Tele: 775-284-1500
Fax: 775-284-1606

Paul Cullen, Esq.
paul@cullenlegal.com
The Cullen Law Firm
29229 Canwood Street
Suite 208
Agoura Hills, CA 91301-1515
Tele: 626-744-9125
Fax: 626-744-9436

☐ **BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

☐ **BY FEDEX:** I enclosed said document(s) in an envelope or package provided by FedEx and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of FedEx or delivered such document(s) to a courier or driver authorized by FedEx to receive documents.

☒ **BY E-MAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the document(s) to be sent from e-mail address mbaello@shepparmullin.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 12, 2012, at Los Angeles, California.

Millie Baello

Millie Baello