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I. INTRODUCTION AND SUMMARY OF REPLY

The General Counsel's Opposition and the Charging Parties' Brief make clear that Respondents' Motion for Summary Judgment should be granted and the Charging Parties' own motion for summary judgment (if any) should be denied outright in its entirety. Indeed, the Charging Parties expressly concede that no material facts are in dispute and the issues addressed in this Motion raise pure legal questions. Meanwhile, by failing to present any contrary evidence, the General Counsel also makes clear that all of the material facts are undisputed and that the relevant issues can be decided now as a matter of law. Specifically, the following material facts are completely undisputed: (a) Claimants voluntarily signed arbitration agreements that do not contain an express class or collective action waiver; (b) Respondents filed a motion to compel Claimants to arbitrate their claims pursuant to the terms of their arbitration agreements; (c) the District Court granted Respondents' Motion to Compel Arbitration, but specifically 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*;" (d) Claimants *collectively* initiated the arbitration process by *together* filing their Demand for Arbitration with JAMS; and (e) 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. Accordingly, and as further set forth in the Motion and below, there has been no violation of the Act here based upon these undisputed facts.

First, Claimants have not been prevented in any way, shape, or form, from exercising their Act-protected rights of engaging in concerted activity. Simply put, it is black-letter law that the Act protects the rights of employees to engage in "concerted activity," which is when two or more employees take action for their purported mutual aid or protection. It cannot be, and in fact is not, disputed that Claimants *collectively* filed a demand for arbitration. Thus, it is clear that

Claimants' substantive rights under the Act to "engage in . . . concerted activities for the purposes of . . . mutual aid or protection" have not been violated in any way, since they have continued to join and act together to collectively pursue their claims against Respondents. Accordingly, on this basis alone, the Consolidated Complaint should be dismissed in its entirety.

Second, there is no support for the baseless argument that Respondents committed an unfair labor practice by merely seeking to compel Claimants to individually arbitrate their claims. Specifically, the Charging Parties attempt to argue that the Administrative Law Judge is "bound to follow *D.R. Horton* because the facts are not materially different in this case." (Opp., at 14.) There simply is no truth to this bald assertion. Unlike the situation presented in *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' rights 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. The Charging Parties and the General Counsel have presented no authority (and Respondents are aware of none) that holds that an employer commits an unfair labor practice simply by seeking to enforce an arbitration agreement according to its terms based on United States Supreme Court controlling precedent. Accordingly, there is no support for this claim.

Lastly, the sole basis for the claims asserted against Respondents – relying on the *D.R. Horton* decision – has no support and is undermined by the decision itself. Notably, the plurality in *D.R. Horton* explicitly stated that the decision did not apply to the circumstances presented

here. Specifically, the NLRB held that its decision did not apply to a situation where employees could seek to pursue their class claims in arbitration. It is undisputed that no decision has been issued that precludes Claimants from seeking to pursue their claims on a class-wide basis and Claimants together are collectively pursuing their claims in arbitration. Because there 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, it is very possible that Claimants actually could pursue their claims on a class-wide basis in the pending arbitration. Thus, since *D.R. Horton* does not apply in such a situation, the Consolidated Complaint should be dismissed on this basis also.

Accordingly, Respondents respectfully request that their Motion be granted (and the Charging Parties' counter motion, if any, be denied accordingly) and that the Consolidated Complaint be dismissed in its entirety.

II. LEGAL ARGUMENT

A. The Charging Parties Do Not Dispute Any Material Facts At Issue Here and The General Counsel Failed To Present Any Evidence To Dispute Any Such Material Facts

There are no disputed issues of material fact here. The General Counsel and the Charging Parties do not dispute any of the material facts: (a) Claimants voluntarily signed arbitration agreements that do not contain an express class or collective action waiver; (b) Respondents filed a motion to compel Claimants to arbitrate their claims pursuant to the Arbitration Agreements; (c) the District Court granted Respondents' Motion to Compel Arbitration, but specifically 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*;" (d) Claimants initiated the arbitration process *together* by *collectively* filing their Demand for Arbitration with JAMS; and (e) 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.¹ As further explained in the Motion and in more detail below, because there are no disputed material facts and this matter raises only pure legal questions, the Board should find that, as a matter of law, there has been no violations of the Act here and, consequently, should grant Respondents' Motion in its entirety.

B. There Have Been No Violations of the Act Because Claimants Currently Are Collectively Pursuing Their Claims In Arbitration and, Therefore, Are Exercising Their Rights Under the Act To Engage In Concerted Activities

Respondents have not violated the Act. The Act protects employees' rights to engage in "concerted activities" for their mutual aid or protection related to terms and conditions of employment. It is black-letter law that "concerted activities" occur when two or more employees take action for their purported mutual aid or protection. *See Meyers Indus.*, 268 NLRB 493, 497 (1984); *see also* NLRB website at <https://www.nlr.gov/rights-we-protect/employee-rights> (stating that "the National Labor Relations Board protects the rights of employees to engage in 'concerted activity,' which is when two or more employees take action for their mutual aid or protection regarding terms and conditions of employment").

Here, as set forth above, the Charging Parties and the General Counsel do not dispute that Claimants initiated the arbitration process by *collectively* filing their Demand for Arbitration with JAMS. Thus, it cannot be disputed that Claimants' substantive rights under the Act to

¹ Moreover, the General Counsel could not dispute these material facts because, if it did attempt to do so towards any of the identified facts, then the claims set forth in the Consolidated Complaint would be completely undermined. Instead, the General Counsel merely cites general law regarding the appropriate summary judgment standard and argues in a conclusory fashion that summary judgment cannot possibly be granted here given that Respondents denied "virtually every complaint allegation" and, therefore, "cannot argue that there is no material issue with regard to the facts." (Opp., at 3.) Notwithstanding the General Counsel's baseless pleas, based upon the undisputed material facts (and actual evidence), there are no violations of the Act here.

“engage in . . . concerted activities for the purposes of . . . mutual aid or protection” have not been violated in any way. Indeed, even after the District Court granted Respondents’ motion to compel arbitration, Claimants have continued to act together to pursue their claims collectively against Respondents in arbitration. Thus, Claimants have absolutely no basis to claim an unfair labor practice in these matters or otherwise assert they were prevented from engaging in concerted activities for the purpose of mutual aid or protection. Accordingly, the Consolidated Complaint should be dismissed in its entirety.

C. **Contrary to The Charging Parties’ Baseless Argument, Respondents Did Not Commit an Unfair Labor Practice by Merely Seeking to Compel Claimants to Individually Arbitrate Their Claims and D.R. Horton Does Not Support the Alleged Unfair Labor Practices**

Respondents have not violated the Act and the decision in *D.R. Horton, Inc.*, 357 NLRB No. 184, 2012 WL 36274 (Jan. 3, 2012), fails to support the unfair labor practice charges. Nonetheless, the Charging Parties baselessly argue that Respondents committed an unfair labor practice merely by seeking to compel Claimants to individually arbitrate their claims. In support of their argument, the Charging Parties mistakenly argue that the Administrative Law Judge is “bound to follow *D.R. Horton* because the facts are not materially different in this case.” (Opp., at 14.) However, rather than support the Charging Parties’ argument, *D.R. Horton* actually supports Respondents’ position that the charges should be dismissed in their entirety.

Unlike the instant situation, *D.R. Horton* involved an express class action waiver. 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 precondition 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 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. *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.”).

Here, unlike the situation in *D.R. Horton*, 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. Respondents therefore did not move to compel arbitration based on an agreement that expressly (or in any other way) 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. 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”); *see also CompuCredit v. Greenwood*, 132 S.Ct. 665, 672 (2012) (reaffirming that the Federal Arbitration Act (FAA) mandates that arbitration agreements be enforced according to their terms). 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” agreement, containing any express (or implied) prohibitions of employees’ rights, much less one similar to the agreement at issue in *D.R. Horton*.

Other cases cited by the Charging Parties – *24 Hour Fitness, USA, Inc.*, 2012 WL 5495007 (N.L.R.B. Div. of Judges Nov. 6, 2012) and *Convergys Corp.*, 2012 WL 549472 (N.L.R.B. Div. of Judges Oct. 25, 2012) – reaffirm why *D.R. Horton* fails to support the claims raised against Respondents here.² Similar to the agreement found to be unlawful in *D.R. Horton*, *24 Hour Fitness* and *Covergys* both involved arbitration agreements with **express** class action waivers that again were found to violate the employees’ Section 7 rights, since they directly fit within the pronouncements set forth in *D.R. Horton*. *See 24 Hour Fitness*, 2012 WL 5495007

² The other cited cases also provide no support for a finding that Respondents in any way violated the Act, as they have nothing to do with the issues presented here and address arbitration agreements that are very different from those at issue here. *See Bill’s Electric*, 350 NLRB 292, 296 (2007) (affirming finding that employer violated Section 8(a)(1) by maintaining and enforcing arbitration policy that prevented employees from filing unfair labor practice charges with the Board); *U-Haul Co. of California*, 347 NLRB 375, 377 (2006) (same).

(holding that arbitration agreement stating that “there will be no right or authority for any dispute to be brought, heard, or arbitrated as a class action” fit within *D.R. Horton*’s finding that “the mandatory arbitration agreement . . . violated Section 8(a)(1) because it **expressly** restricted protected activity”); *Convergys Corp.*, 2012 WL 549472 (holding that arbitration agreement stating that “I further agree that I will pursue my claim or lawsuit relating to my employment with Convergys . . . as an individual, and will not lead, join, or serve as a member of a class or group of persons bringing such a claim or lawsuit” violated *D.R. Horton* because it contained an **express** class action waiver) (emphases added). Yet, the *24 Hour Fitness* and *Convergys Corp.* decisions – just like the *D.R. Horton* one – are inapposite, because the Arbitration Agreements at issue here do not contain express (or even implied) class action waivers.

Meanwhile, controlling precedent dictates a finding that Respondents acted properly and did not violate the Act. While citing inapposite decisions, the Charging Parties ignore the United States Supreme Court’s governing decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). In *Gilmer*, the Supreme Court unequivocally 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*, and explaining why it did not control the situation it faced there, 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. Just like the agreement found to be lawful in *Gilmer* and distinguished by the NLRB from the unlawful express class-waiver agreement in *D.R. Horton*, as noted above, the Arbitration Agreements at issue here do not contain any language specifically waiving class or collective claims. Thus, Respondents did not move to compel arbitration based upon an arbitration agreement that

contained an express class action waiver or any unlawful provisions. Because 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, as a matter of law, Respondents cannot be found to have violated the Act.

In sum, Respondents have not engaged in any impermissible conduct whatsoever. Most notably, Claimants continue to engage in “concerted activities” by pursuing their claims together in arbitration, as demonstrated by the undisputed fact that they *collectively* filed a demand for arbitration. *D.R. Horton* is distinguishable and does not apply to the circumstances presented here. Thus, based on the undisputed facts, the Board should grant Respondents’ Motion (and deny the Charging Parties’ counter motion, if any, accordingly) and find that, as a matter of law, Respondents have not engaged in any impermissible or NLRA-violative conduct whatsoever.

D. Additionally, The Board in *D.R. Horton* Expressly Held That Its Decision Did Not Apply to the Circumstances Presented Here

D.R. Horton itself made clear that its pronouncements are inapplicable here. Indeed, the plurality in *D.R. Horton* explicitly stated that the decision did not apply to the circumstances presented here. Specifically, the NLRB held that its decision did not apply to a situation where employees could pursue their class claims in arbitration. *D.R. Horton*, 2012 WL 36274, at *18 n. 28 (stating that decision did not address question of “whether an employer can require employees, as a condition of employment, to waive their right to pursue class or collective action in court so long as the employees retain the right to pursue class claims in arbitration”). Because there 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, it is very possible that Claimants still could pursue their claims on a class-wide basis in the pending arbitration. 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.

III. CONCLUSION

As demonstrated, based upon the undisputed material facts, and as a matter of law, Respondents did not violate the Act in any way. Accordingly, Respondents respectfully request that their Motion be granted (and the Charging Parties' counter motion, if any, be denied accordingly) and that the Consolidated Complaint be dismissed in its entirety.

Dated: November 28, 2012

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By



Gregg A. Fisch

Attorneys for Respondents

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COUNTRYWIDE HOME LOANS, INC., and
BANK OF AMERICA CORPORATION

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 28, 2012, I served true copies of the following document(s) described as **RESPONDENTS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO THE CHARGING PARTIES' COUNTER MOTION FOR SUMMARY JUDGMENT** on the interested parties in this action as follows:

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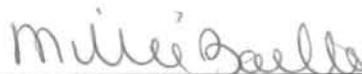
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 28, 2012, at Los Angeles, California.



Millie Baello