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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' POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE**

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Consolidated Complaint should be dismissed. The Charging Parties allege that Respondents Countrywide Financial Corporation ("CFC"), Countrywide Home Loans, Inc. ("CHL"), and Bank of America Corporation ("BAC") (collectively, "Respondents") have improperly restricted former CHL employees, Dominique Whitaker ("Whitaker") and John White ("White") (collectively, "Claimants"), from pursuing a class or collective action lawsuit, 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"). Based on the undisputed stipulated facts and governing law, there is no proper basis for the allegations and the charges should be dismissed in their entirety.

First and foremost, CFC and BAC are not proper parties to this proceeding and must be dismissed. Notably, the Board (and the Charging Parties) baselessly assert claims against BAC solely based on a successor entity theory of liability. However, as demonstrated by the controlling United States Supreme Court precedential decision in *Golden State Bottling*, the facts giving rise to this proceeding, 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, it is undisputed that CHL (and ***not*** CFC) 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, the Arbitration Agreements do not expressly prohibit the exercise of Claimants' substantive rights protected by the NLRA (whether through entering into the voluntarily agreed-upon Arbitration Agreements or otherwise). Unlike the arbitration agreement at issue in *D.R. Horton* (which is the only case that ostensibly provides any legal support for the

Consolidated Complaint and the instant alleged unfair labor practices) – which *expressly* provided 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 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 and 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. In addition, the Arbitration Agreements require only that Claimants arbitrate the types of claims that lawfully can be mandated to arbitration. Thus, under controlling United States Supreme Court precedent, the Arbitration Agreements must be interpreted and enforced only as written and cannot be the basis for a finding of an unfair labor practice.

Moreover, 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. Here, the Charging Parties filed a civil complaint in court and then a demand for arbitration on behalf of both Claimants ***collectively***. Thus, Claimants' Section 7 rights under the NLRA 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 together to assert putative collective claims in their lawsuit against Respondents.

In addition, Respondents' alleged unlawful act involves constitutionally protected conduct. Claimants' baseless argument that Respondents committed an unfair labor practice

merely by filing a motion to compel arbitration in federal court should be rejected for this separate and independent reason as well. Respondents filed their federal court motion, relying on the executed Arbitration Agreements, the Federal Arbitration Act ("FAA"), and binding United States Supreme Court precedent. Specifically, as the United States Supreme Court made clear in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), and its progeny, Respondents' court filing is protected activity under the First Amendment. Thus, Claimants' argument should be rejected and the Consolidated Complaint should be dismissed in its entirety.

II. STATEMENT OF THE CASE

This proceeding arises from unfair labor practice charges filed by two attorneys (the "Charging Parties") who each represented one of the two Claimants in a wage-and-hour lawsuit brought against Respondents. Specifically, on January 19, 2012, Paul Cullen, Esq., filed a charge with the Board, alleging that Respondents violated Section 8(a)(1) of the Act by improperly restricting Claimants from pursuing a class or collective action lawsuit, and thereby interfering with their right to "engage in . . . concerted activities for the purposes of . . . mutual aid or protection."[1] On that same day, Joshua D. Buck, Esq., filed an identical charge against Respondents.[2]

The two charges were consolidated and, on October 23, 2012, the Regional Director issued a Consolidated Complaint and Notice of Hearing.[3] On November 6, 2012, Respondents filed their Answer.[4] On December 10, 2012, the parties participated in a hearing before Administrative Law Judge William G. Kocol (the "ALJ"). At the hearing, pursuant to

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1 General Counsel's Exhibit ("G.C. Ex.") 1(a).

2 G.C. Ex. 1(d).

3 G.C. Ex. 1(g).

4 G.C. Ex. 1(i).

Section 102.38 of the NLRB's Rules and Regulations, the parties agreed to submit a Joint Stipulation of Facts in lieu of calling live witnesses or introducing additional documentary or other evidence.[5] As set forth in Paragraphs 3(b) and 24 of the Joint Stipulation, the parties agreed to admit into evidence all of the exhibits referenced and attached to the Joint Stipulation.

The ALJ directed the parties to submit post-hearing briefs by January 14, 2013. Thereafter, pursuant to Respondents' written request, the Division of Judges granted an extension of time for filing of briefs until January 28, 2013. Accordingly, this Brief is submitted pursuant to the ALJ's direction and Section 102.42 of the NLRB's Rules and Regulations.

III. STATEMENT OF RELEVANT FACTS

A. The Parties

The only relationship between the adverse parties is that Claimants formerly (years ago) were employed with CHL. 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, and well before any of the underlying charges were filed with the Board. CHL is the only Respondent that ever employed either Claimant (or the putative class members in the underlying lawsuit). Specifically, Whitaker began working for CHL, as a Customer Service Telephone Representative, on or about November 19, 2007.[6] She was granted a leave of absence on May 5, 2008, and then never returned to work, ending her employment

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5 References to the Joint Stipulation of Facts will be designated as "Jt. Stip ____."

6 Jt. Stip., ¶ 5(c).

years ago.[7] Meanwhile, White worked for CHL as an Account Manager from on or about November 20, 2008, through on or about November 4, 2009.[8] In addition, neither Claimant ever worked for CFC or BAC.[9] But, in the underlying lawsuit, based on a purported (and unfounded) successor liability claim, Claimants nevertheless asserted claims against BAC.

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.[10] CFC did not employ any non-exempt employees in California and, more specifically, never employed either Claimant.[11] Meanwhile, CHL was a separate company and a wholly-owned subsidiary of CFC.[12]

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.[13] The entity previously named "Countrywide Financial Corporation" that was in existence when Claimants were employed by CHL, has merged out of existence through a complex and involved transaction.[14] As a result of that transaction, BAC became the ultimate parent company of the merged former CFC's subsidiaries, including CHL.[15] Further, unlike CHL's former practice of entering into voluntary arbitration agreements with many of its employees, BAC does not require

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7 *Id.*

8 Jt. Stip., ¶ 6(c).

9 Jt. Stip., ¶¶ 5-6.

10 Jt. Stip., ¶ 4(b).

11 *Id.*

12 *Id.*

13 Jt. Stip., ¶ 4(c).

14 Jt. Stip., ¶ 4(a).

15 *Id.*

its employees to enter into arbitration agreements requiring them to submit to binding arbitration their employment-related disputes with BAC (or any of its subsidiaries).[16]

B. Claimants Each Voluntarily Executed Their Respective Arbitration Agreements That Do Not Expressly Waive Their Rights to Bring Class or Collective Actions and Do Not Prevent Them From Filing Charges With the NLRB, As the Instant Action Demonstrates

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 electronically accepted the Arbitration Agreement.[17] Meanwhile, on September 26, 2008, White also entered into the Arbitration Agreement.[18] The Arbitration Agreements expressly provide, in pertinent part, 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).

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16 G.C. Ex. 1(l) (Declaration of Devra Lindgren, ¶ 8, filed in support of Respondents' Motion for Summary Judgment).

17 Jt. Stip., ¶ 5(b), Ex. 1.

18 Jt. Stip., ¶ 6(b), Ex. 1.

Importantly, the Arbitration Agreements do not contain in any way a provision that expressly 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:

> 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, Claimant Whitaker initiated a lawsuit against Respondents in Ventura County Superior Court, Case No. 56-2009-00347462-CU-OE-VTA (hereafter referenced as "*Whitaker*").[19] On August 12, 2009, Respondents removed that case to federal district court,

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[19] Jt. Stip., ¶ 8, Ex. 3.

Case No. VC 09-5898 CAS (PJWx).[20] During the pendency of the lawsuit, on or about March 16, 2011, Whitaker and BAC filed a joint stipulation in the multi-district litigation entitled *In re: Bank of America Wage and Hour Employment Practices Litigation*, United States District Court for the District of Kansas, Case No. 10-MD-2138-JWL-KGS, in which Claimants confirmed that the putative class in *Whitaker* "will be limited to current and/or former employees of Countrywide and will specifically exclude any current and/or former employees of BOA [that entity herein referenced as "BAC"], and hereby stipulate to the entry of an Order by the *Whitaker* court so confirming that limited scope of any putative class or subclass."[21]

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.[22] Notably, in Paragraph 5 of the TAC, Claimants make clear that they are not bringing their claims against BAC as an employer, and only as a purported "successor in liability," when expressly stating that they "allege that Defendant BofA's involvement in this matter is limited to its role as a successor in liability to the liabilities of the Countrywide entities."[23]

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

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20 Jt. Stip., ¶ 9, Ex. 4.

21 Jt. Stip., ¶ 10, Exs. 5 and 6.

22 Jt. Stip., ¶ 12(a)-(b), Ex. 8.

23 *Id.*

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.[24] Claimants sought to bring these claims on behalf of a putative class of Countrywide employees, 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.[25]

D. Although the District Court Granted Respondents' Motion to Compel Arbitration, the Court Did Not Decide and Left For The Arbitrator To Decide the Issue of Whether or Not Class or Collective Arbitration is Allowed Under the Arbitration Agreements

On August 22, 2011, Respondents filed a motion to compel both Whitaker and White to arbitrate their claims pursuant to the Arbitration Agreements.[26] On September 19, 2011, the District Court, Honorable Christine A. Snyder presiding, granted Respondents' motion to compel arbitration and stayed the litigation.[27] 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***."[28] (Emphasis added.) Accordingly, the District Court did not decide whether Claimants could assert their claims on a class-wide basis in arbitration or if the Arbitration Agreements permit class or collective arbitration.

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24 *Id.*

25 *Id.*

26 Jt. Stip., ¶¶ 13(a)and 14(a), Exs. 9(a) and 10(a) .

27 Jt. Stip., ¶ 16, Ex. 13.

28 *Id.*

Thereafter, on September 30, 2012, the Charging Parties filed a demand for arbitration on behalf of both Claimants ***collectively***.[29] 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.[30] In fact, the parties have yet to even select an arbitrator or otherwise brief the issue as part of the arbitration process.[31]

IV. LEGAL ARGUMENT

A. BAC and CFC Must Be Dismissed From These Matters Because It Is Undisputed That 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, it is undisputed that 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 either Claimant or any California non-exempt employee.[32] 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.[33] Because CHL is

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29 Jt. Stip., ¶ 20, Ex. 18.

30 Jt. Stip., ¶ 21.

31 Jt. Stip., ¶ 20.

32 Jt. Stip., ¶¶ 5-6.

33 Jt. Stip., ¶ 12(a)-(b), Ex. 8 (Claimants admitting that BAC did not employ them and they were employed only by CHL) and Jt. Stip., ¶ 10, Exs. 5-6 (as set forth at Paragraph 15 of Exhibit 15, Claimants acknowledged and agreed that, in the underlying lawsuit, they were not pursuing any direct claims against BAC in which they sought liability on behalf of BAC employees).

the only respondent entity that ever employed Claimants (or the putative class members), CHL is the only entity that potentially could even be a proper party to this proceeding.

In addition, 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 here 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 2012 issuance of *D.R. Horton* and the filing of Claimants' charges with the NLRB (soon after later in January 2012), as well as the lawsuit underlying it (in June 2009). In addition, a United States District Court already expressly ruled that BAC has no successor liability for any actions of CHL (or CFC).[34] 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 BAC must be dismissed for this additional reason.

B. <u>The Arbitration Agreements Do Not Violate the NLRA</u>

1. The Arbitration Agreements Do Not Expressly Prohibit the Exercise of Claimants' Substantive Rights Protected by the NLRA

Respondents did not violate any of Claimants' substantive rights protected by the NLRA. Claimants base their instant charges on the plurality decision issued by the NLRB early last year in *D.R. Horton, Inc.*, 357 NLRB No. 184, 2012 WL 36274 (Jan. 3, 2012). *D.R. Horton* fails to

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[34] G.C. Ex. 1(l) (Declaration of Devra Lindgren, ¶ 6, Ex. C).

support the charges. Rather, *D.R. Horton* is particularly instructive as to why Respondents' position is correct that the charges here 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 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.[35] *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 judicial.").

In reaching its conclusion, the Board 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 plurality in *D.R. Horton*

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[35] 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).

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*** 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 class or collective action waiver, CHL did not require Claimants, as a condition of their employment, to execute a mandatory arbitration agreement that restricted the exercise of their Section 7 rights.[36]

2. Binding United States Supreme Court Precedent Provides Authority for Respondents to Enforce The Arbitration Agreements that Lawfully Require Arbitration of Employment-Related Claims

Respondents did not commit an unfair labor practice by enforcing the terms of the Arbitration Agreements and seeking to compel Claimants to arbitrate their claims. Yet, Claimants appear to be raising just such an argument here, and this baseless assertion does not change the conclusion that Claimants' charges must be dismissed. Here, at any time before or

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[36] In addition, the plurality in *D.R. Horton* explicitly stated that the decision did not apply to circumstances like those presented here. Specifically, the Board 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"). Here, 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. Thus, 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 must be dismissed in their entirety.

when they moved to compel Claimants to arbitrate their claims, as the parties specifically agreed, Respondents did not enter into, invoke, or even seek to invoke, an "unlawful" arbitration agreement, containing any express prohibitions of employees' rights, much less one similar to the agreement at issue in *D.R. Horton.*

Simply put, 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 specifically on the particular terms of the parties' lawful agreement to arbitrate certain employment-related claims, as the Supreme Court specifically permitted in *Gilmer*. In its Order, the District Court-granted Respondents' Motion by relying upon 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. Greeenwood*, 132 S. Ct. 665, 672 (2012) (reaffirming that the FAA mandates that arbitration agreements be enforced according to their terms).

Further, multiple federal and California state courts have granted identical motions and ordered plaintiffs to individually arbitrate their claims because they determined, over plaintiffs' objections, that the arbitration agreements did not authorize class arbitration given that the arbitration agreements were silent as to that issue. *See, e.g.*, *Lopez v. Ace Cash Express, Inc.*, 2012 WL 1655720 (C.D. Cal. May 4, 2012) (granting defendant's motion to compel individual arbitration of plaintiff's claims because "when an arbitration agreement is silent regarding the availability of class-wide arbitration . . . the parties may be compelled to participate in bilateral arbitration only"); *In Re California Ins. Antitrust Litigation*, 2011 WL 2566449 (N.D. Cal. June 27, 2011) (noting that "courts must compel arbitration even in the absence of the opportunity for plaintiffs to bring their claims as a class action" and compelling individual arbitration of plaintiffs' claims where "the applicable arbitration agreements are silent as to class-action waivers"); *Goodale v. George S. May Intern. Co.*, 2011 WL 1337349 (N.D. Ill. April 5, 2011) ("The Plaintiffs insist that the agreement's silence mandates that the Court allows the arbitrator to determine the arbitrability of the class claims. Supreme Court precedent, however, squarely forecloses the possibility that the class claims are arbitrable."); *Valle v. Lowe's HIW, Inc.*, 2011 WL 3667441, * 5 (N.D. Cal. Aug. 22, 2011) (granting motion to compel individual arbitration and 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 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) (granting defendant's motion to compel individual arbitration concluding that Section 7 of the "NLRA does not operate to invalidate or otherwise render unenforceable" arbitration provisions prohibiting class actions); *Nelsen v. Legacy Partners Residential, Inc.*, 207

Cal. App. 4th 1115 (2012) (granting defendant's motion to compel individual arbitration because the agreement was either silent on class arbitration or did not allow for class arbitration since it covered only disputes "between myself [the plaintiff there] and Legacy Partners").

Lastly, the Arbitration Agreements require only that Claimants arbitrate the types of claims that lawfully can be mandated to arbitration. When considering the terms in their totality, it is facially apparent that the Arbitration Agreements apply only to litigation matters that potentially could be filed in a court of law and do not apply to any claims filed with administrative agencies such as the NLRB. For instance, the Agreements discuss how the governing 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.

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, and specifically 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.[37] Simply put, these contractual terms do not apply to administrative matters, such as the matters at issue here before the NLRB. Accordingly, for all the reasons described above, the charges completely lack any merit and must be dismissed in their entirety.

3. Claimants Currently Are Pursuing Their Claims In Arbitration *Collectively* and, Therefore, Already Are Exercising Their Rights Under the Act To Engage In Concerted Activities

Respondents have not violated the NLRA. 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" occurs 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.nlrb.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"); *Spandsco Oil*

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[37] 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, 1142, n. 5 (2011) ("Price does not seek injunctive relief . . . nor could he because he lacks standing as a former Starbucks employee.").

& Royalty Co., 42 NLRB 942, 948-49 (1942) (holding that the filing of a FLSA suit by three employees was considered protected concerted activity).

Here, as set forth above, it is undisputed that Claimants initiated the arbitration process by filing their Demand for Arbitration with JAMS ***collectively***. Thus, it cannot be disputed that Claimants' substantive right under the NLRA to "engage in . . . concerted activities for the purposes of . . . mutual aid or protection" has not been violated in any way. Indeed, even after the District Court granted Respondents' motion to compel arbitration, the Claimants have continued to join together in arbitration to collectively pursue their claims against Respondents. Thus, Claimants 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. Accordingly, the Consolidated Complaint should be dismissed.

C. The Motion to Compel Arbitration That Respondents Filed In Federal District Court Is Constitutionally Protected Conduct Under the First Amendment

Claimants' baseless argument that Respondents committed an unfair labor practice merely by filing a motion to compel arbitration in federal court should be rejected for another separate and independent reason: Respondents' alleged unlawful act involves constitutionally protected conduct. Respondents filed their federal court motion, relying on the executed Arbitration Agreements, the Federal Arbitration Act ("FAA"), and binding United States Supreme Court precedent. Specifically, as the United States Supreme Court made clear in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), and its progeny, Respondents' court filing is protected activity under the First Amendment. Thus, Claimants' argument should be rejected and the Consolidated Complaint should be dismissed in its entirety.

1. Binding Supreme Court Precedent Establishes that Respondents' Actions in the District Court Cannot Be A Basis for Finding that An Unfair Labor Practice Was Committed

The holding in *Bill Johnson's* makes clear that Respondents' actions at issue here cannot be the basis of an unfair labor practice. In that case, a restaurant owner had filed a libel lawsuit against individuals who picketed its restaurant after a waitress was fired. Specifically, the owner alleged that the picketing was harassing and that a leaflet distributed by the picketers was libelous. The waitress then filed a charge with the Board claiming the lawsuit had been filed to retaliate against the engagement of protected activities. The administrative law judge found that the lawsuit constituted an unfair labor practice because it was baseless and designed to punish protected activity. The NLRB affirmed and ordered the owner to withdraw its lawsuit. The Ninth Circuit Court of Appeal enforced the Board's order.

The Supreme Court vacated the judgment on Constitutional grounds. Specifically, the Supreme Court held that the First Amendment and federalism concerns prevented the "filing and prosecution of a well-founded lawsuit" from being "enjoined as an unfair labor practice, even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the Act." *Id.* at 737. In reaching its conclusion, the Supreme Court noted that the First Amendment provides for the fundamental right to petition the Government through access to courts and that the right to petition is one of "the most precious of liberties safeguarded by the Bill of Rights."[38] *Bill Johnson's*, 461 U.S. at 741; *see also BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002) (recognizing that the right to petition is one of "the most precious of liberties safeguarded by the Bill of Rights") (quoting *Mine Workers v.*

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[38] The First Amendment provides, in relevant part, that "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."

Illinois Bar Ass'n, 389 U.S. 217, 222 (1967)). As the Board itself has recognized, "[t]he right of access to a court is too important to be called an unfair labor practice solely on the ground that what is sought in court is to enjoin employees from exercising a protected right." *Peddie Buildings*, 203 NLRB 265, 272 (1973), enforcement denied on other grounds, *NLRB v. Visceglia*, 498 F.2d 32 (3rd Cir. 1974). Thus, under the Supreme Court's pronouncements in *Bill Johnson's* and controlling law, the NLRB may not enjoin a lawsuit or determine that a litigation position taken in court is an unfair labor practice unless the lawsuit is retaliatory *and* lacks a reasonable basis in fact or law.

Here, Respondents' motion to compel arbitration is constitutionally protected activity and cannot be deemed an unfair labor practice. Clearly, here, as the Court acknowledged when it granted the motion to compel arbitration, Respondents had a reasonable basis in fact and law to file its motion in the underlying lawsuit. Indeed, Respondents moved to compel arbitration based on the parties' lawful and enforceable agreement to arbitrate certain employment-related claims. Moreover, the precedential holdings from the United States Supreme Court's recent decisions in *Stolt-Nielsen*, 130 S.Ct 1758, and *AT&T Mobility v. Concepcion*, 131 S.Ct 1740, not only support the position that Respondents had a reasonable basis to have filed their motion, but dictate the conclusion that Respondents acted properly in seeking to arbitrate the employment-related claims brought by Claimants. Accordingly, the litigation position that Respondents took in their motion cannot constitute a violation of Section 8(a)(1) since it was reasonably based in fact and law and, thus, constitutes constitutionally-protected petitioning of the Government under the First Amendment. Thus, Respondents' actions in the District Court cannot be a predicate for an unfair labor practice and, consequently, the Consolidated Complaint should be dismissed on this ground as well.

2. The Limited *Bill Johnson's* Preemption Exception Does Not Apply Here

As explained above, based on controlling United States Supreme Court precedent, as set forth in *Bill Johnson's*, Respondents' filing of a motion to compel arbitration in federal court cannot be the basis for a finding that an unfair labor practice has been committed. Nonetheless, it is expected that the Board (and Claimants as well) will attempt to take out of context and rely on a footnote in *Bill Johnson's* that references how "federal-law preemption" can preclude certain First Amendment protections. *See Bill Johnson's*, 461 U.S. at 737, n.5 ("We are not dealing with a suit that is claimed to be ***beyond the jurisdiction of the state courts because of federal-law preemption.***") (emphasis added); *see also Webco Indus.*, 337 NLRB 361, 363 (2001) ("[I]f a suit is preempted, it violates Section 8(a)(1) if it tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights."). Simply put, that footnote has no relevance to the instant action.

In the referenced *Bill Johnson's* footnote, the Supreme Court was acknowledging that a state court lawsuit, in which the plaintiff [employer] asserts state law claims that are preempted by controlling federal law, is not entitled to First Amendment protection. Consistent with those principles, the United States Supreme Court and the Board have held that a state court lawsuit that is preempted by the Act enjoys no special protection under *Bill Johnson's* and falls outside the scope of the First Amendment protections. *See, e.g.*, *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959) ("When it is clear or may fairly be assumed that the activities which a ***State*** purports to regulate are protected by § 7 of the National Labor Relations Act . . . due regard for the federal enactment requires that state jurisdiction must yield.") (emphasis added); *J.A. Croson Co.*, 359 NLRB 1 (2012) (holding that bringing of state law claims in state court lawsuit that are preempted by the NLRA violated Section 8(a)(1) of the Act and constituted

an unfair labor practice). For example, an employer's state court lawsuit asserting only a trespass cause of action against union picketers would be preempted by the NLRA because the federal labor law trumps the activities the state seeks to regulate through its tort laws. Such a lawsuit would not be protected under the First Amendment and, therefore, *Bill Johnson's* would not apply to provide constitutional protections to those preempted state law claims.

Here, the situation is vastly different. First and most importantly, the instant action does not involve a situation where Respondents filed a state court lawsuit asserting state law claims that are obviously preempted by federal law. Rather, Respondents filed their motion in federal district court (in a case initiated by Claimants), relying upon the controlling federal law under the FAA and supporting Supreme Court precedent, in which they properly requested that the federal court enforce the Arbitration Agreements as written and thereby require Claimants to arbitrate their asserted employment-related claims. Unless the Board can demonstrate that the "FAA's mandate" of enforcing the parties' arbitration agreement "according to [its] terms" has been overridden by a "contrary congressional command," the NLRA cannot be deemed to preempt the FAA and its congressional mandate. *See CompuCredit*, 132 S.Ct. at 669; *see also Gilmer*, 500 U.S. at 26 (stating that there needs to be a congressional "intention to preclude a waiver of judicial remedies for the statutory rights at issue").

The Board cannot demonstrate that Congress intended the NLRA to trump the FAA's mandate that arbitration agreements be enforced according to their terms. Indeed, the NLRA's text contains no command that is contrary to enforcing the FAA's mandate. *See Delock v. Securitas Sec. Svcs. USA, Inc.*, __ F. Supp. 2d __, 2012 WL 3150391, * 2-6 (E.D. Ark. Aug. 1, 2012). Further, the FAA has not been repealed by either the NLRA or the Norris-LaGuardia

Act[39] (which the Board cited in *D.R. Horton*). Notably, the FAA has the latest and most recent enactment date of the three statutes. Though Congress first enacted the FAA in 1925, it reenacted the statute in 1947—*after* passing the Norris-LaGuardia Act and reenacting the NLRA. Federal Arbitration Act, ch. 213, 43 Stat. 883 (1925); Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932); National Labor Relations Act, ch. 120, 61 Stat. 136 (June 23, 1947); Federal Arbitration Act, ch. 392, 61 Stat. 670 (July 30, 1947). Even with the passage of the Norris-LaGuardia Act and the NLRA after the initial enactment of the FAA and then the re-enactment of the FAA after the enactment of those two other statutes, the applicable terms (Section 2) of the FAA have never varied and always contained the same mandate that controls over this situation. As a result, to the extent that there is any "irreconcilable conflict" among those statutes, the FAA must prevail. *See Chicago & N.W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 582 n. 18 (1971) (looking to re-enactment of the Railway Labor Act (RLA) to determine that it post-dated the Norris-LaGuardia Act and concluding, "[i]n the event of irreconcilable conflict" between the two statutes, the latter (the RLA) would prevail).

Simply put, the NLRA does not preempt the FAA and the argument expected to be raised by the Board (and Claimants as well) that Respondents' motion to compel arbitration is preempted by Section 7 of the NLRA is baseless and wrong. Accordingly, the Supreme Court's pronouncements in *Bill Johnson's* apply here to provide constitutional protections to Respondents in their First Amendment-protected activity of filing their motion in federal court.

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[39] Under the Norris–LaGuardia Act, a private agreement that seeks to prohibit a "lawful means [of] aiding any person participating or interested in" a lawsuit arising out of a labor dispute is unenforceable, as contrary to the public policy protecting employees' "concerted activities for . . . mutual aid or protection." 29 U.S.C. § 101, *et seq.*

Thus, the purported violative actions cannot be deemed unfair labor practices and the Consolidated Complaint should be dismissed in its entirety.

D. In Any Event, *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 (and the Board) 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 to the federal appellate court and it is entirely possible (if not likely) that the Fifth Circuit will decline to enforce the *D.R. Horton* decision within the next few months. Consequently, the resulting law very possibly would comport with the controlling United States Supreme Court precedent. As a result, if *D.R. Horton* is overturned, then the entire basis for the charges asserted by Claimants' and the Board will be undercut and ultimately will lack any support at all.

In addition, several federal courts already have expressly declined to follow *D.R. Horton* and, in so doing, have upheld even express waivers against the bringing of a collective action of an employee's FLSA claims. *See, e.g., Owen v. Bristol Care, Inc.*, __ F.3d __, 2013 WL 57874, *4 (8th Cir. Jan. 7, 2013) ("[G]iven the absence of any 'contrary congressional command' from the FLSA that a right to engage in class actions overrides the mandate of the FAA in favor of arbitration, we reject Owen's invitation to follow the NLRB's rationale in *D.R. Horton* and join our fellow circuits that have held that arbitration agreements containing class waivers are enforceable in claims brought under the FLSA"); *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*, 2012 WL at *2-6 (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*, 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."); *Carey v. 24 Hour Fitness USA, Inc.*, 2012 WL 4754726, *2 (S.D. Tex. Oct. 4, 2012) ("The *Horton* decision is neither binding nor subject to deference, and is inconsistent with Fifth Circuit and Supreme Court authority.").

Accordingly, if this matter is not dismissed based on any of the other multiple grounds identified herein, at the very least the instant matter should be stayed 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.

V. CONCLUSION

For the foregoing reasons, the Board (as well as Claimants and the Charging Parties) failed to meet their burden to show that Respondents violated the NLRA in any way. Accordingly, Respondents respectfully request that the ALJ dismiss the Consolidated Complaint in its entirety.

Dated: January 28, 2013

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By

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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 January 28, 2013, I served true copies of the following document(s) described as **RESPONDENTS' POST-HEARING BRIEF TO THE ADMINISTRATIVE LAW JUDGE** on the interested parties in this action as follows:

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☒ **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 January 28, 2013, at Los Angeles, California.

Millie Baello

Millie Baello