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July 30, 2010

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Lester A. Heltzer
Executive Secretary
National Labor Relations Board
1099 Fourteenth Street, N.W.
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Re: Operative Plasterers & Cement Masons' International
Association, Local 200 (Standard Drywall Inc.),
Case Nos. 21-CD-659, 21-CD-660, and 21-CD-661.
Request for Leave to File Supplemental Brief.

Dear Executive Secretary Heltzer,

Respondents Operative Plasterers' & Cement Masons International Association ("OPCMIA") and Operative Plasterers' & Cement Masons International Association, Local 200 ("Local 200") respectfully request leave to file a short supplemental brief on the issues raised by *Small v. Operative Plasterers' & Cement Masons' International Association, Local 200*, ___ F.3d ___ (9th Cir. July 8, 2010).

In *Small*, the Ninth Circuit held that a district court had not abused its discretion by issuing a preliminary injunction under Section 10(l) of the Act, prohibiting Local 200 from prosecuting two state-court lawsuits. The Ninth Circuit found it likely that the Board would hold Local 200's lawsuits to violate Section 8(b)(4)(ii)(D) of the Act and that the lawsuits threatened irreparable harm. *Small*, slip op. at pp. 9814-9815.

But the Ninth Circuit did not consider or discuss the Board's decision on remand in *BE&K Construction*. There, the Board held categorically that "it is necessary to construe the Act to prohibit only lawsuits that are both objectively and subjectively baseless, in order to avoid chilling the fundamental First Amendment right to petition." *BE&K Construction*, 351 NLRB 451, 458 (2007). The Ninth Circuit panel did not find that either of Local 200's lawsuits was objectively baseless.

In reaching its conclusion in *Small*, the Ninth Circuit panel noted that in the antitrust context, "only lawsuits that are both objectively baseless and subjectively intended to abuse process constitute 'sham petitioning' and are therefore stripped of First Amendment protection," *BE&K Construction v. NLRB*, 536 U.S. 516 (2002). But the panel concluded that the Supreme Court's *BE&K Construction* decision "left open the question whether a similar two-part test would apply in the labor relations context." *Small*, slip op. at 9810 (internal citation omitted). The Ninth Circuit therefore applied a different

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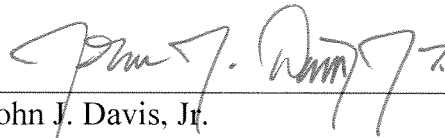
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standard than the Board's in ruling that the Board was likely to hold Local 200's lawsuits to violate Section 8(b)(4)(ii)(D).

Given the importance of the issue presented and the conflict between the Ninth Circuit's interpretation of the Act and the Board's, OPCMIA and Local 200 respectfully renew their request for oral argument in this matter, and request leave to submit a short, supplemental brief on the issue.

Respectfully submitted,



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