UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, DC

THE NEIMAN MARCUS GROUP, INC.

Case 31-CA-074295

and

SHEILA MONJAZEB, an Individual.

COUNSEL FOR THE ACTING GENERAL COUNSEL'S OPPOSITION TO THE RESPONDENT'S MOTION TO DISMISS THE ACTING GENERAL COUNSEL'S COMPLAINT DUE TO SETTLEMENT BAR AND ESTOPPEL

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Counsel for the Acting General Counsel (AGC) hereby opposes the Motion to Dismiss the Acting General Counsel's Complaint Due to Settlement Bar and Estoppel (Motion to Dismiss) filed by Respondent The Neiman Group, Inc. (Respondent). The Respondent's Motion to Dismiss states that the settlement reached in *Neiman Marcus*, Case No. 20-CA-033510, estops and bars the AGC from asserting that the Respondent's Mandatory Arbitration Agreement (MAA) at issue, here, violates the Act.

The AGC submits that there should be no settlement bar to litigating the instant case, because the unlawful conduct alleged in the Complaint in the instant matter occurred after the settlement agreement was executed, and because the Board clearly and expressly repudiated the legal theory underlying the asserted settlement.

I. BACKGROUND FACTS

From November 2009 through May 2010, the Charging Party in the instant case Sheila Monjazeb (Monjazeb) worked for the Respondent. When she was hired by the Respondent, Monjazeb was required to acknowledge that she was bound to the Respondent's Mandatory Arbitration Agreement (MAA), as were all other of the Respondent's employees. The MAA requires that all disputes be subject to binding arbitration and prohibits the arbitrator from consolidating different employees' claims or holding a class action arbitration. In particular, the MAA applicable to Monjazeb states that:

> UNDER THIS AGREEMENT, THE COMPANY AND ALL COVERED EMPLOYEES KNOWINGLY AND VOLUNTARILY WAIVE ANY AND ALL RIGHTS THEY HAVE UNDER LAW TO A TRIAL BEFORE A JURY OR BEFORE A JUDGE IN A COURT OF LAW.

In addition, the MAA states that:

> **Class Action Prohibition**. The arbitrator shall not consolidate claims of different employees into one (1) proceeding, nor shall the arbitrator have the authority to consider, certify, or hear an arbitration as a class action.

Thus, the MAA expressly interferes with employees' Section 7 right to engage in collective legal activity.

In August 2010, Monjazeb filed a California state-court class action wage-and-hour lawsuit against the Respondent. In August 2011, the Respondent filed a motion to compel individual arbitration of Monjazeb's claims, based on the MAA. In December 2011, the court granted the Respondent's motion to compel individual arbitration. In January 2012, Monjazeb filed a demand for class-wide arbitration with the American Arbitration Association (AAA). In February 2012, the Respondent asserted its position that based on the MAA, the arbitrator could not consolidate claims of different employees into one claim. Nonetheless, the AAA granted Monjazeb's demand for class-wide arbitration. In March 2012, the Respondent filed an application to stay the class-wide arbitration in the AAA matter, which was granted by the AAA. In October 2012, the California state court vacated its order to compel arbitration. The Respondent

has appealed the court's vacation of the order to compel arbitration; that appeal is still pending.

In November 2012, the Region issued the Complaint in the instant case. The Complaint alleges that, since August 2011, the Respondent has violated Section 8(a)(1) of the Act by maintaining and enforcing its MAA, because the MAA interferes with employees' Section 7 right to participate in collective and class litigation, and because several of the program's documents interfere with employees' access to the Board and its processes. The administrative hearing on the outstanding Complaint is currently scheduled for September 10, 2013.

In June 2013, the Respondent filed the instant motion to dismiss the Complaint, based on a settlement agreement it executed in Case 20-CA-033510, and which Region 20 approved in May 2010.[1]

The charge in Case 20-CA-033510 alleged that the Respondent violated Section 8(a)(1) of the Act by maintaining its MAA clause that unlawfully prohibited

[1] In its motion, the Respondent also refers to another case, 20-CA-033613, which was withdrawn in December 2007, after the parties agreed to a non-Board adjustment. As Case 20-CA-033613 did not involve a Board settlement agreement, but instead a non-Board adjustment and withdrawal, that case cannot be the basis for a settlement bar. See, e.g., *Auto Bus, Inc.*, 293 NLRB 855, 855-56 (1989) ("the non-Board adjustment did not estop the Regional Director from proceeding on any new charges alleging the same conduct as the withdrawn charges"); *Quinn Co.*, 273 NLRB 795, 799 (1984) ("the Board has also consistently held that where a charging party requests that a charge be withdrawn, and the Regional Director approves that request, the allegations contained in the withdrawn charge may nonetheless be realleged and litigated . . . [i]n the absence of a Regional Director signing or approving a settlement agreement, any such agreement between a charging party and a respondent which resulted in the withdrawal of the charge is viewed by the Board as a private arrangement which does not estop the Regional Director from proceeding on any new charges alleging the same conduct as the withdrawn charges").

consolidation of employee claims at arbitration and class actions. Former General Counsel Meisburg concluded that the Respondent did not violate Section 8(a)(1) by prohibiting arbitrators from considering or certifying claims as class actions. As a result, in June 2008, Region 20 dismissed the allegation that the MAA unlawfully precluded class actions. The partial dismissal letter issued in Case 20-CA-033510 stated that, "[S]o long as the Employer permits the filing of joint claims, it does not unlawfully interfere with its employees' right to engage in concerted activity by prohibiting class actions."

However, Former General Counsel Meisburg concluded that the MAA violated Section 8(a)(1) to the extent that it prohibited arbitrators from consolidating or joining two or more claims. In August, 2008, the Respondent signed a draft settlement agreement of this limited allegation; the draft would have only required the Respondent to revise the MAA to state that:

> [A]n arbitrator may consolidate or join claims of different employees into one proceeding provided the claims meet the standards for joinder under Rule 20 of the Federal Rules of Civil Procedure. Class or representative actions, however, are precluded.

That draft settlement agreement was never approved. Instead, after an appeal by the charging party in that case and a long period of discussion with the parties, a new unilateral settlement agreement in 20-CA-033510 was ultimately approved by Region 20

in May 2010. As a result of the settlement agreement, the Respondent agreed to revise its MAA (Revised MAA) to state:

> **1. Exclusive Agreement to Resolve Disputes Through Arbitration.**
>
> Subject to the remaining terms hereof, the following is agreed:
>
> * * * * *
>
> Under this Agreement the company and each covered employee knowingly and voluntarily waive any and all rights each individually has under law to a trial before a jury or before a judge in a court of law, including the right individually to initiate a class action. Consistent with the foregoing:
>
> (1) No term of this Agreement is intended to constitute a waiver of any employee's collective rights under Section 7 of the National Labor Relations Act. The company recognizes that Section 7 gives the covered employees the collective right to attempt to pursue any covered claim before a state or federal court on a class, collective, or joint action basis subject to the applicable law governing such a claim and subject to the limitations otherwise set forth in subparagraph (d)(3) below and in Section 15 of this Agreement.
>
> (2) The company recognizes that any covered employee may challenge in state or federal court, or in proceedings before any administrative agency with authority to act in the matter, including but not limited to the NLRB and the EEOC, the enforceability of this Agreement or any provision hereof upon such grounds as may exist at law or in equity. No employee shall be disciplined or discharged for exercising their rights under Section 7 and other laws.
>
> (3) Each covered employee recognizes that, if a court upholds the validity of each individual employee's agreement to arbitrate his or her covered individual employment claims, the company is entitled to obtain dismissal of class, collective, or

joint actions brought by those covered employee(s) notwithstanding any other provision contained in this Agreement. Each covered employee expressly reaffirms agreeing to have all his or her covered employment claims resolved in arbitration.

* * * * *

15. Class and Joint Actions.

(a) The arbitrator shall not have the authority to consider, certify or hear an arbitration as a class or representative action in any form including, without limitation, as an opt-in class action (including e.g., actions under 29 U.S.C. §216(b) or other similar local, state or federal statutes) or an opt-out class action. The arbitrator shall not have the authority to authorize or facilitate the circulation of notice of the pendency of any action or claim for arbitration to potential class members.

(b) Two or more employees may file a joint claim or separate claims for arbitration which may be heard in a single arbitration if it is determined BOTH that the claims are in respect to or arise out of the same transaction, occurrence, or series of transactions or occurrences, AND questions of law or fact common to all of those filing a joint claim will arise in the arbitration. Similarly, the Company may request that the claims of two or more employees be joined together in one proceeding if they meet the same criteria. The determination of whether any action meets the criteria specified above shall be made by a neutral Third Party Arbitrator selected and empowered as set forth in Section 12(g) above. The Third-Party Arbitrator shall also determine, in the case of severance, which action shall continue as the pending case (and the arbitration agency shall implement the procedures for neutral arbitrator selection for the severed actions), and in the event of joinder, which proceeding they shall be joined into.

* * * * *

The Revised MAA was given to all then-current employees, and those subsequently hired, but not to former employees. Because Monjazeb in the instant case had ceased her employment with the Respondent (as had the charging party in Case 20-CA-033510) prior to May 2010, she was never given the Revised MAA. In fact, after the May 2010 execution of the settlement agreement in Case 20-CA-033510, the Respondent applied the MAA, and not the Revised MAA, to Monjazeb's August 2010 legal claims, the act that is relevant to the current proceeding.

The settlement in Case 20-CA-033510 was wholly based on the analysis set forth in Memorandum GC 10-06, *Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Employee Waivers in the Context of Employers' Mandatory Arbitration Policies* (June 16, 2010). Memorandum GC 10-06 articulated an approach to employers' mandatory arbitration policies that recognized employees' Section 7 right to concertedly file and participate in collective or class legal actions, but nonetheless permitted employers to require employees, as a condition of employment, to individually waive their right to sue under employment rights statutes, and to require that they resolve such claims in individual arbitration proceedings. The Board expressly rejected this analysis in *D.R. Horton, Inc.*, 357 NLRB No. 184, slip op. at 6-7 (2012).

II. ARGUMENT

In *Hollywood Roosevelt Hotel Co.*, the Board made clear the general rule that "a settlement agreement disposes of all issues involving pre-settlement conduct unless

prior violations of the Act were unknown to the General Counsel, not readily discoverable by investigation, or specifically reserved from the settlement by the mutual understanding of the parties." [2] 235 NLRB 1397, 1397 (1978). The Board has also made clear that, generally, "[a] determination of compliance with a settlement agreement does not bar litigation of post-settlement unfair labor practice complaint allegations." *Tambe Electric, Inc.*, 346 NLRB 380, 385 (2006).

To this end, post-settlement conduct may be litigated where the post-settlement conduct "was not simply the natural result of" the pre-settlement conduct, "but rather was a new and independent act . . . that occurred after the settlement." *Host International*, 290 NLRB 442, 442 (1988). Here, the alleged unlawful conduct - filing and continuing to litigate its motion to compel arbitration in an attempt to interfere with employees' collective legal activity - occurred in and after September 2010, at least three months after the settlement agreement was executed. Therefore, the Respondent's acts were new and independent unlawful post-settlement acts; and, therefore, there should be no settlement bar to litigating the instant case.

Respondent argues that although its alleged unlawful conduct in the case at bar occurred after the execution of the settlement agreement in Case 20-CA-033510, it falls into the limited circumstances where post-settlement conduct is barred by an earlier

[2] The Board's settlement bar rule is also an affirmative defense; it must be raised in the pleadings or at trial or else it is waived. See, e.g., *Richard Mellow Electrical Contractors Corp.*, 327 NLRB 1112, 1112-13 (1999).

settlement agreement. In support of its argument, Respondent relies on *Leeward Nursing Home*, 278 NLRB 1058, 1083 (1986).

The Board, however, has recognized that, "under limited circumstances, a settlement agreement may also bar litigation of post-settlement conduct grounded in pre-settlement conduct that would itself be settlement-barred from litigation." *Doubletree Guest Suites Santa Monica*, 347 NLRB 782, 783 (2006). Unlike the case at bar, such cases have generally involved a discrete course of unlawful conduct directed at one individual employee, in which the post-settlement conduct could only be found to be unlawful by determining that the previously settled conduct also was unlawful. Thus, for example, in *Leeward Nursing Home*, 278 NLRB 1058, 1083 (1986), which the Respondent relies on here, the settlement agreement was held to bar not only the litigation of a pre-settlement discriminatory schedule change of one individual employee, but also of the post-settlement discharge of that employee for failing to comply with the newly-imposed schedule. Similarly, in *Ventura Coastal Corp.*, 264 NLRB 298, 301 (1983), the settlement was held to bar not only litigation of a pre-settlement demotion of one individual employee into a new position, but also the post-settlement layoff of the same individual due to the layoff status of the new position. In each of those cases, the Board found the post-settlement conduct to be "inescapably grounded in," *Leeward Nursing Home*, 278 NLRB at 1085, or "inextricably linked to," *Ventura Coastal*, 264 NLRB at 301, the previously settled allegations. That is, the Board

found that the post-settlement conduct could only be found unlawful by determining that the prior settled conduct was unlawful because there was no evidence showing that the post-settlement conduct was independently unlawful.

In *Ratliff Trucking Corp.*, 310 NLRB 1224 (1993), the Board found that the settlement of an unfair labor practice case challenging one aspect of a union-security clause also acted to bar a later challenge to the maintenance and enforcement of other language in the same contract clause during the same three-year term of the parties' collective-bargaining agreement. The Board held that "the Respondents could . . . reasonably believe that the settlement disposed of the legality vel non of the entire clause, at least during the term of the contract in which it was contained." *Id.*, at 1224. The Board emphasized that "our decision here does not necessarily preclude a complaint on the union-security clause in a subsequent collective-bargaining agreement." *Id.*, at 1224 n.1. Thus, as the Board noted in a subsequent case, "[t]he result reached in *Ratliff* was clearly a product of its special facts." *B & K Builders*, 325 NLRB 693, 694 n.4 (1998).

These cases are all properly distinguished from the instant case on two significant bases.[3] First, the cited cases all involved conduct that occurred within a

[3] We would not, however, rely on the different language used in the settlement agreements at issue in *Ratliff Trucking* and here. We recognize that the settlement agreement in *Ratliff Trucking* said that it "settles only the unfair labor practices alleged in the above-captioned case, and does not constitute a settlement of any other *case*" and the agreement at issue here said that it "settles only the allegations in the above-captioned case(s), and does not constitute a settlement of any other *case(s) or matters*" (emphasis

limited time period. In *Leeward Nursing Home* and *Ventura Coastal*, the relevant pre- and post-settlement conduct all took place in a single course of conduct within 3-4 months. *Leeward Nursing Home*, 278 NLRB at 1060; *Ventura Coastal*, 264 NLRB at 301. In *Ratliff Trucking*, the Board expressly emphasized that it was only addressing conduct occurring within a single three-year collective bargaining agreement. 310 NLRB at 1224, n.1.

In contrast, it has been almost six years since the charge in Case 20-CA-033510 was filed, and it has been more than three years since the settlement in that case was approved. The Respondent nevertheless contends that the maintenance and enforcement of MAA can never be "relitigated" and has indicated that it would have no time limit on its settlement bar claim. Essentially, the Respondent claims that its current MAA forever privileges it from the non-enforcement of the Act. Thus, finding such a settlement bar here would give this particular respondent a "free pass" to commit ongoing violations of the Act involving the MAA in perpetuity as to all of its past, present, and future employees. Such a result has never been suggested by any

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added). But, while this different language may well be dispositive in other circumstances (see, e.g., *B & K Builders*, 325 NLRB at 694 ("the express reservation language in the settlement agreement at issue here is even more specific than in *Ratliff Trucking*")), it does not affect the result here, because the MAA language at issue in the instant case was included in the settlement agreement in Case 20-CA-033510 itself.

In addition, we would not rely on the fact that the charge in the instant case was filed by a different charging party than the one that filed the charge in Case 20-CA-033510. See, e.g., *E.S.I. Meats*, 270 NLRB 1430, 1431 (1984) (the fact that the charges which initiated the settled cases and those underlying subsequent cases "were filed by different charging parties . . . is insufficient to change the rules barring litigation of discoverable pre-settlement conduct").

previous Board or court precedent, and would clearly be contrary to the purposes and policies underlying the Act.

Second, as discussed above, the post-settlement allegations in the cited cases could *only* be established by finding previously settled conduct to have been unlawful. Thus, the discharge in *Leeward Nursing Home*, the layoff in *Ventura Coastal*, and the discharge in *Ratliff Trucking* were all facially lawful; they could *only* be found to be unlawful if the previously settled schedule change, demotion, or contract clause were themselves found to be unlawful. Here, however, the alleged unlawful conduct was new and independent conduct that occurred at least three months after the settlement agreement was executed. See *Host International*, supra (stating that post-settlement conduct may be litigated where the post-settlement conduct "was not simply the natural result of" the pre-settlement conduct, "but rather was a new and independent act . . . that occurred after the settlement").

In contrast, the Board has found that post-settlement conduct may be litigated where the post-settlement conduct "was not simply the natural result of" the pre-settlement conduct, "but rather was a new and independent act . . . that occurred after the settlement." *Host International*, 290 NLRB 442, 442 (1988). Thus, in *Host International*, which was decided after *Leeward Nursing Home* and *Ventura Coastal*, the Board found that a post-settlement refusal-to-rehire allegation could be litigated, even though the allegations concerning the initial discharge had been settled. *Ibid.*

In the instant case, as in *Host International*, the Respondent has committed new and independent unlawful post-settlement acts -- by filing and continuing to litigate its motion to compel arbitration in an attempt to interfere with employees' collective legal activity. Not only was the Respondent's motion in the instant case unlawful because it is simply an attempt to enforce the underlying unlawful MAA, but it is also unlawful because it is directly aimed at preventing employees' protected conduct. Indeed, the *only* objective of the Respondent's motion is to prohibit employees from engaging in Section 7 activity -- the Respondent's motion attempts to impose individual arbitration, specifically seeking to prevent employees' protected collective legal activity. Thus, even without the earlier maintenance of the MAA that was the subject of the settlement in Case 20-CA-033510, the Respondent's post-settlement conduct in the instant case would violate Section 8(a)(1) of the Act. Therefore, we conclude that there should be no settlement bar to litigating the instant case.

Finally, even if the Board were to find a settlement bar in the instant case, any such settlement bar should cease to privilege the Respondent's conduct as of January 3, 2012, when the Board issued *D.R. Horton*. In *D.R. Horton*, the Board expressly rejected the analysis on which the settlement in Case 20-CA-033510 was based. Instead, the Board set forth the appropriate legal framework for considering the legality of employers' policies and agreements that limit collective and class legal activity in non-union settings. 357 NLRB at slip op. at 1-7. In particular, the Board

held that "an employer violates Section 8(a)(1) of the National Labor Relations Act when it requires employees covered by the Act, as a condition of their employment, to sign an agreement that precludes them from filing joint, class, or collective claims addressing their wages, hours or other working conditions against the employer." *Id.*, slip op. at 1. This was precisely the allegation that was dismissed in Case 20-CA-033510, and the Board's subsequent holding was explicitly contrary to the terms of the settlement agreement there.

In this regard, the Board made clear in *Ratliff Trucking* that a settlement agreement will only privilege an employer's unlawful post-settlement conduct for a limited period of time, even if such conduct is "inextricably bound up with the status of" the settled conduct. 310 NLRB at 1224, n.2. The Board noted there that the settlement only disposed of the legality of the contract clause at issue "during the term of the contract in which it was contained," *id.*, at 1224, and emphasized that its decision did not preclude a complaint after that time. *Id.*, at 1224 n.1. Here, the only logical ending point for a settlement bar, should the Board find any, would be when the Board expressly rejected the legal theory underlying the asserted settlement and put the Respondent on notice that its conduct was clearly unlawful.[4] Therefore, even

[4] An apt analogy here may be to the Board's retroactivity analysis, under which the usual practice of retroactive application of a new rule of law will be abandoned when it results in "manifest injustice," determined under a three-factor test: (1) the reliance of the parties on preexisting law; (2) the effect of retroactivity on accomplishment of the purposes of the underlying law which the decision refines; and (3) any particular injustice to the losing party under retroactive application of the change of law. See, e.g., *Wal-Mart Stores, Inc.*, 351 NLRB 130, 134 (2007); *SNE Enterprises, Inc.*, 344 NLRB 673, 673 (2005) (internal

if the Board were to find a settlement bar here, the Board should not apply any settlement bar after January 3, 2012, when *D.R. Horton* issued.

III. CONCLUSION

As argued above, there should be no settlement bar to litigating the instant case, as the Complaint only addresses post-settlement conduct, and as the Board clearly and expressly repudiated the legal theory underlying the asserted settlement.

Accordingly, the AGC submits that there is no settlement bar to litigating the instant case and that, even if the Board were to find a settlement bar, it should not be applied to privilege the Respondent's unlawful conduct after January 3, 2012.

Dated at Los Angeles, California, this 20th day of August, 2013.

Respectfully submitted,

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citations omitted). It may be argued that a respondent's reliance on the terms of a settlement agreement might also raise a kind of manifest injustice in the subsequent litigation of related allegations, at least in the absence of an intervening Board statement clarifying the applicable law. As in the context of the retroactive application of a new rule of law, however, even if such manifest injustice is found, the new rule of law is always applied prospectively. Similarly, here, even if the Respondent was somehow entitled to a settlement bar for some period here, no such bar should preclude the enforcement of Section 8(a)(1) against the Respondent's interference with employees' right to engage in collective legal activity after the Board clearly spoke to the protection of such rights in *D.R. Horton*.

Re: THE NEIMAN MARCUS GROUP, INC.
Case: 31-CA-074295

CERTIFICATE OF SERVICE

I hereby certify that I served the attached **COUNSEL FOR THE ACTING GENERAL COUNSEL'S OPPOSITION TO THE RESPONDENT'S MOTION TO DISMISS THE ACTING GENERAL COUNSEL'S COMPLAINT DUE TO SETTLEMENT BAR AND ESTOPPEL** on the parties listed below on the 20th day of August, 2013:

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