UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

J.P. MORGAN CHASE & CO. and CHASE INVESTMENT SERVICES CORP., now doing business as J.P. MORGAN SECURITIES, LLC, Respondents, and ROBERT M. JOHNSON, JENNIFER ZAAT-HETELLE, SCOTT VAN HOOGSTRAAT, and PETER PICCOLI, Charging Parties.	Case No. 02-CA-098118

CHARGING PARTIES ROBERT M. JOHNSON, JENNIFER ZAAT-HETELLE, SCOTT VAN HOOGSTRAAT, AND PETER PICCOLI'S ANSWERING BRIEF

Rachel Bien
Deirdre Aaron
OUTTEN & GOLDEN LLP
3 Park Avenue, 29th Floor
New York, New York 10016
Telephone: (212) 245-1000

Counsel for Charging Parties Robert M. Johnson, Jennifer Zaat-Hetelle, Scott VanHoogstraat, and Peter Piccoli

Dated: October 25, 2013

INTRODUCTION

J.P. Morgan Chase & Co. and J.P. Morgan Securities, LLC ("Chase") ask the Board to ignore its own precedent and find enforceable an arbitration agreement that bars employees from engaging in concerted activity to challenge the terms and conditions of their employment by filing a class or collective lawsuit or arbitration. The Administrative Law Judge's ("ALJ's") decision that Chase's Binding Arbitration Agreement ("BAA") violates Section 8(a)(1) of the National Labor Relations Act ("NLRA") is based on the Board's well-settled precedent that class and collective actions are protected activity under Section 7, and the Board's well-reasoned decision in *In re D.R. Horton, Inc.*, 357 N.L.R.B. No. 184 (Jan. 3, 2012). Contrary to Chase's arguments, *D.R. Horton* was correctly reasoned and validly decided. The BAA is similar in all relevant respects to the arbitration agreement the Board found unenforceable in *D.R. Horton*, and the Board should reject Chase's attempts to undermine *D.R. Horton* and to distinguish this case from it.

Chase's remaining arguments regarding the ALJ's decision also fall flat. First, res judicata cannot require the Board to adopt a decision of the United States District Court for the Southern District of New York ("District Court"), which found the BAA enforceable, because the decision was issued *after* the ALJ issued his decision. *See Lloyd v. J.P. Morgan Chase & Co.*, No. 11 Civ. 9305, 2013 WL 4828588 (S.D.N.Y. Sept. 9, 2013). Second, the ALJ properly found that the Charging Parties' allegations were timely under Section 10(b) of the NLRA, because Chase maintained and enforced the BAA within 6 months of the filing of their unfair labor practice charge. Third, the ALJ's finding that Chase's motion to compel arbitration constituted a violation of Section 8(a)(1) did not violate Chase's First Amendment right to petition the court, because the motion had an unlawful objective and, in any event, the motion was considered and

ruled upon. Finally, the Regional Director had authority to issue the complaint in this matter, because she was validly appointed and had authority through the General Counsel to issue the complaint.

The Board should adopt the reasoning of the ALJ and find that Chase committed an unfair labor practice by maintaining and enforcing the BAA, which will permit the employees who signed it to pursue their claims collectively, as required by federal employment and labor law.

STATEMENT OF FACTS

Robert M. Johnson, Jennifer Zaat-Hetelle, Scott VanHoogstraat and Peter Piccoli (the "Charging Parties") worked for Chase as Financial Advisors ("FAs") at locations throughout the country. *See JPMorgan Chase & Co.*, JD(NY)-40-13 ("ALJD") at 3. Near the beginning of their employment, Chase required the Charging Parties to sign the BAA as a condition of their employment. *Id*.

The BAA purports to waive the Charging Parties' right to bring or participate in a class or collective action. It provides in relevant part:

> **CLASS ACTION/COLLECTIVE ACTION WAIVER:** All Covered Claims under this Agreement must be submitted on an individual basis. **No claims may be arbitrated on a class or collective basis**. Covered Parties expressly waive any right with respect to any Covered Claims to submit, initiate, or participate in a representative capacity or as a plaintiff, claimant or member in a class action, collective action, or other representative or joint action, *regardless of whether the action is filed in arbitration or in court.* Furthermore, if a court orders that a class, collective, or other representative or joint action should proceed, in no event will such action proceed in the arbitration forum. Claims may not be joined or consolidated in arbitration with disputes brought by other individual(s), unless agreed to in writing by all parties.

Id. at 4-5. The BAA applies to "employment with J.P. Morgan Chase & Co. or any of its direct or indirect subsidiaries." *Id.* at 3-4. The BAA defines "Covered Claims" as "all legally

protected employment-related claims." *Id.* at 4-5. It also provides that employees are not precluded "from filing an administrative claim or charge with the Equal Employment Opportunity Commission ("EEOC") and/or state and local human rights agencies to investigate alleged violations of laws enforced by the EEOC or those agencies," *id.* at 4, but does not include a provision permitting employees to file overtime complaints with the U.S. Department of Labor.

In December 2011, two former employees of Chase who also worked as FAs filed a class and collective action complaint against Chase, alleging that Chase violated the Fair Labor Standards Act ("FLSA"), the New York Labor Law, and the New Jersey State Wage & Hour Law by misclassifying FAs as exempt from overtime protections and by failing to pay them for the hours they worked in excess of forty hours in a workweek. *Lloyd v. J.P. Morgan Chase & Co.*, No. 11 Civ. 9305 (S.D.N.Y. Dec. 19, 2011), Dkt. No. 1. The Charging Parties thereafter filed consents to join the action pursuant to 29 U.S.C. § 216(b).

On January 14, 2013, Chase filed a motion to compel arbitration of the Charging Parties' FLSA claims. Thereafter, on February 11, 2013, the Charging Parties filed an unfair labor practice charge ("charge") with Region 2 of the NLRB. After investigating the Charging Parties' charge, the Regional Director issued a complaint against Chase. The ALJ held a hearing in the matter on May 30, 2013 and, on August 21, 2013, issued a decision finding that the BAA is unenforceable. Specifically, the ALJ concluded that the BAA "clearly inhibits and interferes with [protected] conduct" by requiring that "employees waive their rights to pursue class actions in court or arbitrations as a condition of their employment, which . . . must be found unlawful." ALJD at 9. The ALJ also correctly noted that "*D.R. Horton* is still Board law and has not been overturned by the Supreme Court, or indeed, by any court." *Id.* at 13. After the ALJ issued his decision, the District Court issued an order granting Chase's motion to compel arbitration of the

Charging Parties' claims. *Lloyd*, 2013 WL 4828588, at *6.

ARGUMENT

I. The Board Is Not Bound by the District Court's Decision.

Chase argues that the Board is bound by the District Court's decision finding the BAA enforceable because of the doctrine of res judicata. However, the District Court issued its decision *after* the ALJ issued his decision finding that the BAA violated Section 8(a)(1) of the NLRA. Res judicata can only bar a party from religitating an issue if there was "a judgment in a *prior* proceeding," and if "(1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and actually decided, (3) there was full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits." *NLRB v. Thalbo Corp.*, 171 F.3d 102, 109 (2d Cir. 1999) (internal quotation marks and citation omitted) (emphasis added). Because the ALJ's order was issued *before* the District Court ruled, res judicata does not require the Board to defer to the District Court's order compelling arbitration.[1]

Chase also appears to argue that res judicata applies because the Charging Parties filed their charge after Chase filed its motion to compel in the District Court. This argument makes no sense. Chase violated Section 8(a)(1) *by seeking to enforce* the arbitration agreement *by filing a motion to compel*. The filing of the motion to compel violated Section 8(a)(1) by interfering with the Charging Parties' rights to engage in protected concerted activity under Section 7. Therefore, the Charging Parties could not have filed a charge alleging an unfair labor practice charge *until after* Chase filed its motion to compel.

---

[1] In addition, the District Court arguably did not even "actually decide[]" whether the BAA violates the NLRA, *Thalbo Corp.*, 171 F.3d at 109; it merely stated in a footnote that it was declining to follow *D.R. Horton*. *See Lloyd*, 2013 WL 4828588, at *6 n.7.

Moreover, the cases upon which Chase relies do not support its position. For example, in *NLRB v. Donna-Lee Sportswear Co., Inc.*, 836 F.2d 31 (1st Cir. 1987), the district court's decision was issued "*[a]fter the administrative hearings, but before the ALJ had issued his decision*." *Id*. at 33 (emphasis added). That was also the case in *NLRB v. Heyman*, 541 F.2d 796 (9th Cir. 1976), where the district court's order was issued before any decision by the NLRB. *See Walter E. Heyman*, 216 N.L.R.B. 852, at *1-2 & n.1 (1975). Here, the ALJ issued his decision *before* the District Court issued its decision. Chase's reliance on *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731 (1983) is also inapt. *Bill Johnson's* states only that the Board may still defer to a prior decision by a court on the same issue even when the Board is not bound by res judicata. *Id*. at 749 n.15. However, there is no prior decision here, as the ALJ decided the issue before the district court ruled.

II. The ALJ Correctly Analyzed the 10(b) Issue.

The ALJ correctly found that Chase's maintenance and enforcement of the BAA constituted a violation of the NLRA within the Section 10(b) period. Under Section 10(b) of the NLRA, a policy or rule maintained during the period within six months prior to the filing and service of a charge can be found unlawful, even if the rule was initiated or adopted outside of the 10(b) period. *See* 29 U.S.C. § 160(b) (unfair labor practice must occur within six months prior to the filing of the charge); *Teamsters Local 293* (*Lipton Distrib.*), 311 N.L.R.B. 538, 539 (1993) ("Because the contractual requirement . . . is invalid on its face, Section 10(b) does not preclude the Board from finding that the provision is unlawful more than 6 months after the execution of the contract because of the continuing nature of the violation."); *TeleTech Holdings, Inc.*, 333 NLRB 402, 403 (2001) ("The mere existence of an overly broad [no distribution rule] tends to restrain and interfere with employees' rights under the Act, even if the rule is not enforced").

Chase is wrong that the fact that the Charging Parties signed the BAA outside of the 6-month period prior to filing their charge renders their allegations untimely. The ALJ thoroughly considered Chase's arguments on this front and rejected them. In particular, the ALJ reasoned that Chase's "conduct of filing the motion in court to dismiss the collective action [claims] of the Charging Parties and to compel them to arbitrate individually under the terms of the BAA, clearly occurred within the 10(b) period," and that Chase's maintenance and enforcement of the BAA was "not dependent . . . at all" on "the pre-10(b) events of the hiring of the Charging Parties." ALJD at 6-7. This finding is consistent with Board precedent, which makes clear that unlawful policies promulgated outside the 10(b) period but enforced within the 10(b) period can be found unlawful. *See Carney Hosp.*, 350 N.L.R.B. 627, 640 (2007) (rejecting argument that allegations regarding employer handbook were untimely because handbook was promulgated outside 10(b) period, because the employer "continued to maintain the challenged provisions during the 6-month period prior to the filing of the . . . charge"); *Am. Cast Iron Pipe Co.*, 234 N.L.R.B. 1126, 1127 n.1 (1978) (allegations regarding maintenance and enforcement of rules not barred by 10(b) even though rule was promulgated outside of 6-month period prior to the filing of the charge). Chase does not even attempt to distinguish these cases, which the ALJ relied upon in his decision. *See* ALJD at 7-8.

III. The ALJ's Order Does Not Violate Chase's First Amendment Rights.

Requiring Chase to withdraw its motion to compel does not in any way infringe on its First Amendment right to petition the court. Unlike all of the cases cited by Chase, Chase is not being prevented from filing a "meritorious lawsuit" in the District Court. Chase's Br. at 14. It is Chase that wishes to remove the proceedings from the court to a private arbitral forum.

The ALJ correctly found that, under *Bill Johnson's Rests.*, cases that have an unlawful objective can be enjoined. *Id.*, 461 U.S. at 739. In any event, Chase itself acknowledges that this argument is now moot, as the District Court considered and ruled upon Chase's motion. Therefore, Chase cannot argue that any action by the ALJ or by the Charging Parties interfered with Chase's right to petition the District Court.

IV. The BAA Is Functionally Identical to the Agreement in *D.R. Horton*.

In order to avoid the inevitable conclusion that the BAA interferes with and restricts the Charging Parties' rights under Section 7 of the NLRA, Chase raises specious distinctions between the agreements at issue in *D.R. Horton* and the BAA here in order to argue that *D.R. Horton* cannot apply to this case. These arguments ring hollow. For instance, Chase argues: (1) that the BAA permits employees to seek temporary restraining orders or preliminary injunctions in order to "preserve the status quo pending resolution of a claim through the BAA," Chase's Br. at 18, (2) that the BAA does not preclude employees from filing charges with the Board "or other administrative agencies," and—most dubious of all—that (3) the BAA "does not prohibit employees from participating in a class or collective action in order to challenge the enforceability of the BAA." Chase's Br. at 17-18.

Chase's arguments obscure a key point regarding Section 7 and the holding of *D.R. Horton*: that employers are prohibited from restraining and coercing employees from exercising their Section 7 rights, as well as *interfering with* those rights. *See* 29 U.S.C. § 158(a)(1); *D.R. Horton*, 357 N.L.R.B. No. 184, at *8 ("[I]f the [NLRA] makes it unlawful for employers to require employees to waive their right to engage in one form of activity, it is no defense that employees remain able to engage in *other* concerted activities."). Chase's argument that employees can still file charges with the Board or with other administrative agencies is

particularly flawed. Chase neglects to mention that the BAA does not permit employees to pursue complaints with the U.S. Department of Labor, the agency charged with enforcing the FLSA, the statute upon which their collective action claims are premised. *See* ALJD at 4.

This case is unlike *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991), on which Chase relies. *Gilmer* involved claims under the Age Discrimination in Employment Act ("ADEA"), and the arbitration agreement there did not bar the plaintiff from filing a charge with the Equal Employment Opportunity Commission, the agency charged with enforcing the ADEA.

V. *D.R. Horton* Was Validly Decided.

Chase presents myriad arguments, as it did before the ALJ, that *D.R. Horton* is invalid for both substantive and procedural reasons. The ALJ thoughtfully considered and rejected all of these arguments, and so should the Board. As the ALJ correctly noted in his decision, "*D.R. Horton* is still Board law and has not been overturned by the Supreme Court, or indeed, by any court." ALJD at 13. None of Chase's arguments compel a different conclusion.

1. The Board Had a Valid Quorum When It Decided *D.R. Horton.*

Chase's claim that the Board lacked a quorum when it decided *D.R. Horton* is based on an incorrect interpretation of the NLRA. The three-member panel in *D.R. Horton* was comprised of Chairman Pearson and Members Becker and Hayes, with Hayes recused. *D.R. Horton*, 357 N.L.R.B. No. 184, at *1 & n.1. Although Chase argues that the NLRA requires three members of the Board to constitute a quorum, the full text of the relevant portion of the NLRA specifically states that "three members of the Board shall, at all times, constitute a quorum of the Board, *except that two members shall constitute a quorum* of any group designated pursuant to the first sentence hereof." 29 U.S.C. § 153(b) (emphasis added). That two members of a three-member

panel of the NLRB constitute a quorum is well-established and has been recognized by the U.S. Supreme Court. *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2639-41, 2644 (2010).

Chase relies upon *New Process Steel* to support its argument that the Board must have at least three members in order to issue a decision. Chase's Br. at 19. However, the Supreme Court specifically noted that "throughout its history" the Board has allowed two members to decide a case when one member of a three-member group is recused, citing as an example when a member has to recuse himself from a particular matter, and concluded that "[t]he delegation clause still operates to allow the Board to act in panels of three, and the group quorum provision still operates to allow any panel to issue a decision by only two members if one member is disqualified." *New Process Steel*, 130 S. Ct. at 2639-41, 2644. One member's recusal of himself from the decision in *D.R. Horton*, leaving two members to render the decision, is consistent with the practice endorsed by the Supreme Court in *New Process Steel*. Thus, contrary to Chase's unsupported argument, the decision in *D.R. Horton* was issued by a valid quorum of the Board.

The Third Circuit's decision in *NLRB v. New Vista Nursing and Rehabilitation*, 719 F.3d 203 (3d Cir. 2013), and the D.C. Circuit's decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013),[2] do not change this result. There still remains a split in the Circuits regarding the validity of intra-session recess appointments. *NLRB v. RELCO Locomotives, Inc.*, --- F.3d ----, Nos. 12-2111, 12-2203, 12-2447, 12-2503, 2013 WL 4420775, at *24 (8th Cir. Aug. 20, 2013) (noting that Noel Canning "created a circuit split"). The Third Circuit's conclusion that Board Member Becker's intrasession appointment to the NLRB was invalid is contradicted by several other Circuit Courts, which have held that intrasession recess appointments are valid. *See id.* (collecting cases); *see also Overstreet ex rel. NLRB v. SFTC, LLC*, No. 13 Civ. 0165, --- F. Supp.

[2] In Particular, *Noel Canning* considered the recess appointment of Members Griffin and Block, neither of whom participated in the *D.R. Horton* decision.

2d ----, 2013 WL 1909154, at *3 (D.N.M. May 9, 2013) (explaining that "[t]he *Noel Canning* decision is in conflict with decisions of other circuit courts, which have concluded that intrasession recess appointments to vacancies that arise prior to the recess comply with the Recess Appointments Clause," and citing cases).

Moreover, as stated by the dissent in *New Vista*, "[t]he Majority's rationale undoes an appointments process that has successfully operated within our separation of powers regime for over 220 years." *New Vista*, 719 F.3d at 245 (Greenaway, Jr., J., dissenting).[3] Both the text of the Recess Appointments Clause and its history make no distinction between intersession and intrasession recess appointments. *See Evans v. Stephens*, 387 F.3d 1220, 1225-26 (11th Cir. 2004) ("Twelve Presidents have made more than 285 intrasession recess appointments of persons to offices that ordinarily require consent of the Senate."). Notably, the U.S. Supreme Court has granted the NLRB's petition for certiorari requesting review of *Noel Canning*. *NLRB v. Noel Canning*, 133 S. Ct. 2861 (June 24, 2013).

2. *D.R. Horton* Was Correctly Decided.

Requiring employees to arbitrate their claims individually interferes with an employee's Section 7 right to engage in protected concerted activity. The NLRA was passed to address "inequality of bargaining power between employees . . . and employers" and to "protect[] the exercise by workers of full freedom of association . . . for the purpose of negotiating the terms and conditions of their employment or other mutual aid and protection." 29 U.S.C. § 151(d). To effectuate these goals, Section 7 vests employees with the right to "engage in . . . concerted activities for the purpose of collective bargaining or *other mutual aid or protection*." 29 U.S.C. §

[3] Chase's assertion that the D.C. Circuit "has also indicated that Member Becker's recess appointment was invalid" is incorrect. The D.C. Circuit explicitly did not decide whether Member Becker's appointment was invalid. *See Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 952 (D.C. Cir. 2013).

157 (emphasis added). Employers are explicitly prohibited from interfering with, restraining, or coercing employees in the exercise of their rights under Section 7. 29 U.S.C. § 158(a)(1).

Protected "concerted activities" under Section 7 include employees' participation in class and collective actions. In *D.R. Horton,* the Board held that an employer that requires employees to "waive their right to collectively pursue employment-related claims in all forums, arbitral and judicial," violates Section 8(a)(1) of the NLRA. *Id.*, 357 N.L.R.B. No. 184, at *17. Participation in class or collective actions is "at the core of what Congress intended to protect by adopting the broad language of Section 7." *Id.* at *4. Employers that impose waivers of the right to engage in Section 7 activities—such as engaging in collective actions under the FLSA—as a condition of employment violate Section 8(a)(1) of the NLRA. *Id.* at *17.

The requirement that employees arbitrate their claims on an individual basis, rather than on a collective basis, unlawfully restricts employees' Section 7 rights. The Board correctly reached this conclusion in *D.R. Horton*. The right to pursue a collective action is not merely a "procedural device," Chase's Br. at 31, but an unquestionably protected activity under the NLRA. The Board has repeatedly so found. *See D.R. Horton*, 357 N.L.R.B. No. 184, at *3 ("employees who join together to bring employment-related claims on a classwide or collective basis in court or before an arbitrator are exercising rights protected by Section 7 of the NLRA"); *Saigon Gourmet Rest., Inc.*, 353 N.L.R.B. No. 110, at *1 (Mar. 9, 2009) ("a wage and hour lawsuit" is "clearly protected concerted activity"); *127 Rest. Corp.*, 331 N.L.R.B. 269, 275-76 (2000) (lawsuit by 19 employees was protected activity); *see also Meyers Indus.*, 281 N.L.R.B. 882, 887 (1986) (concerted activity "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action"), *aff'd sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987) (concerted activity "encompasses those circumstances

where individual employees seek to initiate or to induce or to prepare for group action"). Courts have as well. *See Brady v. Nat'l Football League*, 644 F.3d 661, 673 (8th Cir. 2011) ("a lawsuit filed . . . by a group of employees to achieve more favorable terms or conditions of employment *is* 'concerted activity' under [Section] 7 of the National Labor Relations Act"); *Leviton Mfg. Co. v. NLRB*, 486 F.2d 686, 689 (1st Cir. 1973) ("the filing of a labor related civil action by a group of employees is ordinarily a concerted activity protected by [Section] 7").

Chase is wrong that concerted activity is not protected under the NLRA when it is not linked to union organizing and collective bargaining, and the authorities upon which Chase relies for this argument do not support it. Chase's Br. at 37. *Hudgens v. NLRB*, 424 U.S. 507 (1976), does not hold, or even suggest, that concerted activity is unprotected when not linked to union organizing and collective bargaining. *See id.* at 522-23 (discussing accommodation of Section 7 rights and private property rights in the context of union member picketing at a privately owned shopping center). Chase's other authorities pertain to unions, not employees, and are inapplicable. *See United Food & Commercial Workers, AFL-CIO, Local No. 880 v. NLRB*, 74 F.3d 292, 293-94 (D.C. Cir. 1996) (discussing interests of union seeking access to store-owned properties to distribute literature to the stores' customers); *NLRB v. Great Scot, Inc.*, 39 F.3d 678, 682 (6th Cir. 1994) (discussing extent of non-employee picketing under Section 7). As acknowledged in *Great Scot*, "[t]he core activity protected by [Section] 7 is the right of *employees* to 'self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and *to engage in other concerted activities* for the purpose of collective bargaining or other mutual aid or protection.'" *Id.* at 682 (quoting 29 U.S.C. § 157) (second emphasis added). This right extends to former employees such as the Charging Parties. *See Little Rock Crate & Basket Co.*, 227 N.L.R.B. 1406, 1406

(1977) ("[T]he Board has long held that that term [employee under the NLRA] means 'members of the working class generally,' including 'former employees of a particular employer.'") (citations omitted).

Furthermore, courts have followed the reasoning of *D.R. Horton* and refused to enforce agreements that interfere with participation in class and collective actions. *See Brown v. Citicorp Credit Servs.*, No. 12 Civ. 62, 2013 WL 645942, at *3-4 (D. Idaho Feb. 21, 2013); *Herrington v. Waterstone Mortg. Corp.*, No. 11 Civ. 779, 2012 WL 1242318, at *3-6 (W.D. Wis. Mar. 16, 2012); *see also Grant v. Convergys Corp.*, No. 12 Civ. 496, 2013 WL 781898, at *3, 5 (E.D. Mo. Mar. 1, 2013) (finding collective wage and hour litigation is protected as concerted activity under the NLRA, and invalidating a provision requiring individual litigation of employment claims).

Those courts that have declined to follow *D.R. Horton* have done so either under different facts than those present here. For example, in *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013), the Eighth Circuit did not follow *D.R. Horton* because the arbitration agreement there did not preclude employees from filing a complaint with the Department of Labor or the NLRB. *Id.* at 1053-54. Although this distinction is not insignificant, it was not sufficient to render the agreement lawful under the NLRA because employers cannot dictate the ways in which their employees exercise their Section 7 rights. *See* 29 U.S.C. § 158(a)(1); *D.R. Horton*, 357 N.L.R.B. No. 184, at *8 ("[I]f the [NLRA] makes it unlawful for employers to require employees to waive their right to engage in one form of activity, it is no defense that employees remain able to engage in *other* concerted activities"). In addition, the BAA here does not even allow the Charging Parties to file a complaint with the Department of Labor.[4]

[4] The court in *Torres v. United Healthcare Servs., Inc.*, 920 F. Supp. 2d 368 (E.D.N.Y. 2013), also distinguished *D.R. Horton* on the basis that the arbitration agreement before the court did not prevent employees from filing a claim with the Department of Labor. *See id.* at 379.

In other cases, courts declined to follow *D.R. Horton* without any analysis. *See, e.g. Sutherland v. Ernst & Young, LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013) (per curiam) (declining to follow *D.R. Horton* because "we . . . owe no deference to its reasoning" (internal quotation marks and citation omitted)); *see also Raniere v. Citigroup Inc.*, No. 11-5213, 2013 WL 4046278, at *2 (2d Cir. Aug. 12, 2013) (following *Sutherland* but making no mention of *D.R. Horton*); *Dixon v. NBCUniversal Media, LLC*, 12 Civ. 7646, 2013 WL 2355521, at *9 n.11 (S.D.N.Y. May 28, 2013) (stating only that *D.R. Horton* "is entitled to no deference insofar as it purports to interpret the FAA"); *Cohen v. UBS Fin. Servs., Inc.*, No. 12 Civ. 2147, 2012 WL 6041634, at *4 (S.D.N.Y. Dec. 4, 2012) (following *LaVoice v. UBS Fin. Servs., Inc.*, No. 11 Civ. 2308, 2012 WL 124590 (S.D.N.Y. Jan. 13, 2012)); *LaVoice*, 2012 WL 124590, at *6 ("[t]o the extent that [plaintiff] relies on the decision in *Raniere* . . . or . . . *D.R. Horton* . . . as authority to support a conflicting reading of *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011), this Court declines to follow these decisions").

The Board should defer to its decision in *D.R. Horton*, which was well-reasoned and based on long-established precedent, and decline Chase's invitation to overturn it.

3. *D.R. Horton* Is Entitled to Deference Because It Does Not Conflict With or Interpret the FAA.

Chase is wrong that the *D.R. Horton* is not entitled to deference because the Board interpreted the Federal Arbitration Act ("FAA"). The issue in *D.R. Horton* was the adjudication of an administrative unfair labor practice complaint, a matter well within its purview. The Board did not interpret the FAA. It only considered whether its interpretation of the NLRA conflicted with the FAA, and concluded that it did not. *D.R. Horton*, 357 N.L.R.B. No. 184, at *10-15.

However, a class and collective action waiver that *interferes* with an employee's ability to engage in concerted activity in any form is impermissible under the NLRA. *See* 29 U.S.C. § 158(a)(1).

It is well-settled that two courts statutes should be interpreted so as to "give effect to both." *Zenith Elecs. Corp. v. Exzec, Inc.*, 182 F.3d 1340, 1347 (Fed. Cir. 1999) (quoting *United States v. Borden Co.*, 308 U.S. 188, 198 (1939)) (internal quotation marks omitted). When faced with two federal statutes that arguably conflict, "courts are not at liberty to pick and choose among congressional enactments . . . it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Should a conflict between two statutes occur, it is the obligation of the court to "try to harmonize" the two statutes. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 679 (2007). Where a conflict between two laws is unavoidable, a court should minimize the conflict by "adopt[ing] the interpretation that preserves the principal purposes of each." *SmithKline Beecham Consumer Healthcare, L.P. v. Watson Pharm., Inc.*, 211 F.3d 21, 27-28 (2d Cir. 2000).

The FAA was passed to overcome "judicial hostility to arbitration agreements." *AT&T Mobility LLC*, 131 S. Ct. at 1745. In *AT&T Mobility*, the U.S. Supreme Court held that the FAA preempted California's "Discover Bank" rule, which invalidated class action waivers in consumer agreements as unconscionable, because the rule relied on "the uniqueness of an agreement to arbitrate" as grounds for non-enforcement. *Id.* at 1747 (quoting *Perry v. Thomas*, 482 U.S. 483, 493 n.9 (1987)). The Court based its holding on the premise that class action procedures are incompatible with consumer arbitration, citing the average length of consumer arbitrations before the American Arbitration Association. *Id.* at 1751. *D.R. Horton* did not concern consumer arbitration agreements. The Board's holding was based on its expertise in federal labor policy, including the Board's long familiarity with and accommodation of

arbitration in employment. The Board pointed out in *D.R. Horton* that arbitration is "a central pillar of Federal labor relations policy." *D.R. Horton*, 357 N.L.R.B. No. 184, at *17.

D.R. Horton also did not interpret the Norris-LaGuardia Act. It simply looked to the language of the Norris-LaGuardia Act as a guide to statutory construction of the NLRA. *See id.* at *8 (explaining that "[t]he NLRA, passed in 1935, built upon and expanded the policies reflected in the Norris-LaGuardia Act, echoing much of the language of the earlier law"); *see also Nat'l Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612, 620-24 (1967) (examining history of labor law as a guide to interpretation).

Gilmer does not advanced Chase's position. *Gilmer* itself noted that class arbitrations were available in that case. *Gilmer*, 500 U.S. at 32. In addition, although the Supreme Court in *Gilmer* also expressed its belief that an arbitration clause would be enforceable "even if" it prohibited class arbitration, that statement was dicta, and, in any event, the Supreme Court further explained that "arbitration agreements will not preclude the EEOC from bringing actions seeking class-wide and equitable relief." *Id.*

VI. The Regional Director Was Validly Appointed and the Complaint Validly Issued.

As a last-ditch effort to undermine the ALJ's well-reasoned decision, Chase argues that the complaint should not have been issued in the first place because Regional Director Fernbach was not validly appointed and was without power to issue the complaint. First, as set forth in detail above, Chase's argument that the Board was not validly constituted when it appointed Regional Director Fernbach because certain members were appointed during an intrasession recess is not the law of the land. In fact, the cases upon which they rely for this argument are in conflict with the long-held views that intrasession appointments are permissible. *See Evans*, 387

F.3d at 1225-26 (11th Cir. 2004) ("Twelve Presidents have made more than 285 intrasession recess appointments of persons to offices that ordinarily require consent of the Senate").

Second, Regional Director Fernbach's authority to issue the complaint stemmed from the NLRB General Counsel, not the Board itself. The General Counsel, an independent officer who is appointed by the President and confirmed by the Senate, has the authority to issue complaints. *See NLRB v. United Food & Commercial Workers Union, Local 23 ("UFCW"),* 484 U.S. 112, 127-28 (1987); *NLRB v. FLRA*, 613 F.3d 275, 278 (D.C. Cir. 2010). This authority is not delegated by the Board, as Chase suggests, but is authorized by the NLRA itself. Under Section 3(d) of the NLRA, the General Counsel has "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under [Section 10] of this title, and in respect of the prosecution of such complaints before the Board." 29 U.S.C. § 153(d). The General Counsel, in turn, delegates its power to issue complaints to the Regional Directors. *See United Elec. Contractors Ass'n v. Ordman*, 258 F. Supp. 758, 760 (D.C.N.Y. 1965) ("[t]he General Counsel has delegated authority to the Regional Directors to issue . . . complaints."). The complaint was validly issued by Regional Director Fernbach, under authority delegated from the General Counsel, and Chase's arguments to the contrary have no merit.

CONCLUSION

For the foregoing reasons, the ALJ correctly found that Chase violated Section 8(a)(1) of the NLRA by unlawfully maintaining and seeking to enforce the BAA. The Charging Parties respectfully request that the Board sustain the recommendations of the ALJ.

Dated: October 25, 2013

Respectfully submitted,
OUTTEN & GOLDEN LLP
By:

/s/ Rachel Bien
Rachel Bien

OUTTEN & GOLDEN LLP
Rachel Bien
Deirdre Aaron
3 Park Avenue, 29th Floor
New York, New York 10016
Telephone: (212) 245-1000

Counsel for Charging Parties Robert M. Johnson, Jennifer Zaat-Hetelle, Scott VanHoogstraat, and Peter Piccoli

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of October, 2013, true and correct copies of the Charging Parties Robert M. Johnson, Jennifer Zaat-Hetelle, Scott Van Hoogstraat, and Peter Piccoli's Answering Brief have been served by electronic mail upon the following:

Matthew Murtaugh
Jamie Rucker
National Labor Relations Board, Region 2
26 Federal Plaza, Room 3614
New York, New York 10278-0004
Email: Matthew.Murtagh@nlrb.gov
Jamie.Rucker@nlrb.gov

Jonathan C. Fritts
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Email: jfritts@morganlewis.com

Christopher D. Havener
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103
Email: chavener@morganlewis.com

s/ *Rachel Bien*