UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

JPMORGAN CHASE & CO. and CHASE INVESTMENT SERVICES CORP., now doing business as JPMORGAN SECURITIES, LLC, Joint Employers,

and

Case No. 02-CA-098118

ROBERT M. JOHNSON, JENNIFER ZAAT-HETELLE, SCOTT VAN HOOGSTRAAT, and PETER PICCOLI, Individuals.

ACTING GENERAL COUNSEL'S ANSWERING BRIEF IN OPPOSITION TO RESPONDENTS' EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. Synopsis[1]

This case involves Respondents' attempts to compel the Charging Parties to waive their rights to collective action for mutual aid and protection by imposing certain arbitration agreements upon them. Specifically, Respondents seek to preclude the Charging Parties from banding together to enforce some of the most basic of their employment rights, including minimum compensation under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.* The ALJ, applying clear Board law and well-established precedent, found that the arbitration agreements (as maintained and enforced by Respondents) violated the rights of the Charging Parties under Section 7 of the National Labor Relations Act ("Act" or "NLRA"), 29 U.S.C. § 157. Respondents challenge the conclusions of the ALJ, claiming those conclusions (1) are barred by Section 10(b) of the Act, 29 U.S.C. § 160(b), (2) violate Respondents' First Amendment rights, (3) conflict with the Congressional intent embodied in the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, (4) flow from a purportedly invalid decision, *viz.*, *D. R. Horton*, 357 NLRB No. 184 (2012), and (5) depend on an allegedly *ultra vires* complaint. Respondents' arguments misunderstand the operation of Section

[1] This matter was previously consolidated for trial with another case involving affiliated respondents, namely JPMorgan Chase & Co. and JPMorgan Chase Bank, N.A., Joint Employers, Case No. 02-CA-088471. (See G.C. Exh. 1(j).) Because the Charging Party in that matter, Tiffany Ryan, requested withdrawal of her charge, at hearing counsel for the Acting General Counsel moved to sever that case, withdraw the complaint in that matter, and have the case remanded to the Regional Director. That unopposed motion was granted by the Administrative Law Judge.

10(b), presume what they set out to demonstrate, fail to give due deference to the Board's interpretation of the National Labor Relations Act, and misapprehend the nature of the General Counsel's authority. In short, Respondents' arguments miss the mark in all regards and should be rejected.

II. Statement of Facts[2]

Respondents are or were finance firms engaged in interstate commerce. (Facts, ¶¶ 2 through 6.)

Johnson, Piccoli, Van Hoogstraat, and Zaat-Hetelle worked for Chase Investment Services Corp. ("CISC"), (Facts, ¶ 10), a wholly-owned subsidiary of Respondent JPMorgan Chase & Co., (Exh. E, Amended Answer, ¶ 2), though a number of their employment terms were set by Respondent JPMorgan Chase & Co. ("JPMC"), (see, e.g., Exh. N at 1 (welcoming Zaat-Hetelle to JPMC), at 2 (listing licenses required by JPMC and subjecting Zaat-Hetelle to the JPMC Code of Conduct), and at 3 (indicating that fringe benefits will be supplied through the JPMC Benefits Program); see also generally Exhs. F through I (listing employment-related duties and obligations owed by each Charging Party to various entities, including JPMC)).

[2] At the hearing in this matter, held May 30, 2013, counsels for Respondents, the Acting General Counsel, and Charging Parties submitted a Joint Motion to Submit Stipulated Facts and Exhibits to the Administrative Law Judge, which was accepted by Administrative Law Judge Steven Fish. That joint submission contains an agreed-upon list of documentary exhibits, comprising Exhibits A through N, and a Stipulation of Facts numbered 1-14. Citations herein are generally either to the Stipulation of Facts ((Facts, ¶__) or Joint Exhibits (Exh. __) contained in the Joint Motion. Citations to the hearing transcript are as "Tr., XX:YY," where XX and YY designate page and line numbers, respectively.

At the time of hire, each of the four Charging Parties executed a "Supervision, Arbitration, Confidentiality, and Non-Solicitation Agreement" which included a Binding Arbitration Agreement. (Facts, ¶¶ 11(a)-(d); Exhs. K-N.) The Charging Parties---indeed Respondents' employees generally---were required to enter into a Binding Arbitration Agreement as a condition of hire. (Facts, ¶ 8; Exh. J.)

The Binding Arbitration Agreement ("Agreement") requires that any employment-related claim an employee may have against JPMC or any of its direct or indirect subsidiaries must be resolved solely on an individual basis---all class or collective claims are precluded---by final and binding arbitration before a single arbitrator at the American Arbitration Association. (Exh. J.)

Respondents admit they have attempted to enforce the Agreements against the Charging Parties by, on January 14, 2013, moving to dismiss or stay the Charging Parties' collective wage and hour actions and force them to arbitrate those claims on an individual basis. (Facts, ¶¶ 12-13.) Respondents also admit that Chase Investment Services Corp. ("CISC") has, "from at least August 31, 2009 until [October 1, 2012]…maintained and enforced the Binding Arbitration Agreement" against its current and former employees. (Resp. Answer, ¶ 4(a) and Facts, ¶¶ 4-5.) Respondents thereby admit that they require their employees to surrender their ability to collectively pursue legal remedies regarding employment terms.

III. Argument

A. The ALJ Properly Found Respondents to Be Joint Employers

In exceptions 2-4, Respondents take issue with the Administrative Law Judge's conclusion that Respondents are joint employers, asserting that (1) "no evidence was introduced…to support" that finding and (2) "the parties' stipulation…did not make any representations regarding the joint employer issue."[3] Respondents make no arguments to support these claims and the claims themselves are incorrect.

With respect to JPMorgan Securities, LLC, Respondents have stipulated and admitted that the Charging Parties worked for that entity under its previous incarnation, Chase Investment Services Corp. (Facts, ¶ 10.) With respect to JPMorgan Chase & Co., Respondents' own documents constitute evidence that JPMC shared responsibility for various aspects of the Charging Parties' employment terms, *Riverdale Nursing Home, Inc.*, 317 NLRB 881, 882 (1995).

Respondent do not contest the authenticity of Exhibits F through N, (Facts, ¶ 14), and Respondents implicitly admit---by enforcing the terms of those documents against the Charging Parties---that those documents governed the employment conditions for the Charging Parties. In various places, those documents state that the Charging Parties were employed by JPMorgan Chase &

[3] Respondents assert the joint stipulation in this case "intentionally" failed to make certain representations. Of course, the stipulation has no psychological states whatsoever. To the extent Respondent meant instead to characterize the parties' reasons for entering into the stipulation, counsel for the General Counsel denies both the accuracy and the relevance of such characterization.

Co. and that certain working conditions were set by it. E.g., Exh. N at 1 (welcoming Zaat-Hetelle to JPMC), at 2 (listing licenses required by JPMC and subjecting Zaat-Hetelle to the JPMC Code of Conduct), and at 3 (indicating that fringe benefits will be supplied through the JPMC Benefits Program); Exh. M at 1 (stating Van Hoogstraat must be authorized to work in the United States in order "to remain working at JPMC"), at 2 (listing licenses required by JPMC and subjecting Van Hoogstraat to the JPMC Code of Conduct), and at 3 (indicating that fringe benefits will be supplied through the JPMC Benefits Program); Exh. L at 1-2 (same for Johnson); Exh. K at 1-2 (same for Piccoli); see also generally Exhs. F through I (listing employment-related duties and obligations owed by each Charging Party to various entities, including JPMC), especially Sec. 18.a ("[T]he terms and conditions of your employment…are subject to change and may be modified by JPMC [defined as JPMorgan Chase & Co. and all its subsidiaries, direct or indirect] at any time…and that JPMC has the right to condition your continued employment upon your agreement to such modified terms and conditions")). Thus, the record contains substantial evidence that JPMC controlled significant employment conditions of each of the Charging Parties.

Because JPMC had the authority to determine nearly every aspect of the employment relationship with the Charging Parties and thereby shared with CISC the ability to affect "those matters governing the essential terms and conditions of employment," *NLRB*

v. Browning Ferris Industries, 691 F.2d 1117, 1123 (3d Cir. 1982); *Riverdale Nursing Home*, supra at 882; *Continental Winding Co.*, 305 NLRB 122, 123 n.4 (1991); *Salem Electric Co.*, 331 NLRB 1575, 1576-1577 (2000), the ALJ properly found Respondents are joint employers and jointly liable for the remedial obligations of one another, *Summit Express, Inc.*, 350 NLRB 592, 596-597 (2007).

Respondents' exceptions provide no argument or evidence to contravene the foregoing, all of which was set forth in the General Counsel's brief to the ALJ. Respondent's exceptions 2-4 (and exception 18 regarding the ALJ's first conclusion of law) should therefore be rejected.

B. Section 10(b) Does Not Bar the Allegations in This Case and the ALJ Properly So Found

Broadly speaking, Section 10(b) of the Act precludes the Board from finding that acts occurring more than six months before the filing and service of a charge constitute unfair labor practices. Because the charge in this matter was filed February 11, 2013 and served the following day, the six-month Section 10(b) period extends back to August 12, 2012.

Section 10(b) permits the Board to find that a policy or rule maintained within six months prior to the filing and service of a charge is unlawful, even though that rule was initiated or adopted outside of the 10(b) period. *Carney Hospital*, 350 NLRB 627, 628 (2007); *Teamsters Local 293 (Lipton Distributing)*, 311 NLRB 538, 539 (1993); see also *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir 1999) ("Where the

rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent evidence of enforcement"); *Franklin Iron & Metal Corp.*, 315 NLRB 819, 820 (1994), enfd. 83 F.3d 156 (6th Cir. 1996); *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").

Respondents admit they have issued and continue to issue the Agreements to employees and have required and continue to require employees to enter into those Agreements. (Facts, ¶¶ 7 and 8.) In other words, Respondents admit that they have required employees to enter into the Agreements within the Section 10(b) period. Respondents thereby also admit they have maintained the Agreements during the 10(b) period.[4] Because the Agreements unlawfully restrict Section 7 rights, as held by the Board in *D.R. Horton*, 357 NLRB No. 184 (2012), their maintenance violates Section 8(a)(1).

Respondents also admit that Chase Investment Services Corp. ("CISC") has, "from at least August 31, 2009 until [October 1, 2012]…maintained and enforced the Binding Arbitration Agreement" against its current and former employees. (Resp. Answer, ¶ 4(a) and Facts, ¶¶ 4-5.) Respondents thereby admit that CISC, now operating as JPMorgan Securities, LLC, (Facts at ¶ 5), has maintained the Agreements during the Section 10(b) period.

[4] Counsel for Respondents also admitted this at hearing. (Tr., 12:21-13:1.)

Again, because the Agreements unlawfully restrict Section 7 rights, maintenance of those Agreements within the Section 10(b) period violates Section 8(a)(1).

Finally, Respondents admit that on January 14, 2013 they moved in federal district court to enforce the Agreements against the Charging Parties and dismiss or stay their collective wage and hour claims. (Facts, ¶ 13.) That event occurred less than a month before the filing and service of the charge. (Facts, ¶ 1.) Consequently, the Respondents attempted to enforce the Agreements within the 6-month period set by Section 10(b) and that action can be properly held unlawful. *American Cast Iron Pipe*, 234 NLRB 1126, 1127 n.1 (1978), enfd. 600 F.2d 132 (8th Cir. 1979).

Respondents fail to address any of this clear case law. Instead, Respondents argue that the Supreme Court's decision in *Local Lodge 1424 v. NLRB (Bryan Manufacturing)*, 362 U.S. 411 (1960) conflicts with the ALJ's conclusion that Respondents violated the Act. In particular, Respondents contend that the violations found are "inescapably grounded on events predating the limitations period." *Id.* at 422. Respondents are simply incorrect as a matter of logic and law.

Bryan Manufacturing stands for the proposition that Section 10(b) bars the Board from finding otherwise lawful conduct to be unlawful by virtue of unfair labor practices which occurred outside the period circumscribed by the statute of limitations. *Id.* at 416-417. According to Respondents, the violations found in this case depend critically on the facts that the Charging

Parties executed the unlawful arbitration agreements more than six months before the filing and service of the charge. Respondents are wrong.

It is immaterial whether Respondents' insistence that the Charging Parties execute the arbitration agreements was lawful or unlawful. In fact, the execution of the Agreements is entirely irrelevant and could be ignored entirely without any effect on the legal conclusions in this case.

If the Charging Parties had never executed the Agreements, it would not thereby make Respondents' attempts to enforce those Agreements lawful. Put another way, the Charging Parties' executions of the Agreements may be critical to Respondents' claims that the Charging Parties are bound by those Agreements, but do not matter at all to whether the Agreements restrict Section 7 rights. Thus, *Bryan Manufacturing* is inapplicable to the allegations of the complaint and the ALJ's so finding was correct.

Indeed, the Administrative Law Judge fully considered and explained his reasoning for rejecting Respondents' 10(b) argument at pages 5-8 of his decision, but Respondents have failed to address any of the cogent arguments made therein. Consequently, Respondents' exceptions 5-7 and 9 should be rejected.

C. The First Amendment Does Not Bar the ALJ's Conclusions, Nor Is The Board Collaterally Estopped From Finding Respondents' Motion to Compel Individual Arbitration Unlawful

Respondents contend that the Administrative Law Judge erred in finding that their motion to compel individual arbitration had

an illegal objective within the scope of footnote 5 of the Supreme Court's decision in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 737 n.5 (1983). According to Respondents, their motion cannot have had an unlawful objective because (1) the district court which heard the motion concluded otherwise and (2) the Board has not yet specifically ruled that the Respondents' motion had an unlawful objective. Both arguments miss the point.

Starting with the second claim, Respondents argue that the cases relied on by the ALJ critically involved court actions filed to avoid or circumvent earlier Board determinations. That misconstrues the import of those cases. Rather, the essential element of each cited case was an attempt to obtain a legal decision incompatible with the Act.

Indeed, Respondents concede as much at footnote 3 of their brief. In particular, Respondents there correctly characterize *Laundry Workers, Local 3 (Virginia Cleaners)*, 275 NLRB 697 (1985) as an "attempt to use…law to achieve a result…contrary to the NLRA." That is a concise and cogent statement of the meaning of the cases cited by the ALJ in support of the conclusion that Respondents' motion to compel arbitration and dismiss the Charging Parties' claims had an illegal objective.

Suits preempted by the Act, grievance proceedings (which may eventually be enforced in court) which attempt to enforce unlawful contract provisions or interpretations, and suits to enforce contracts which are unlawful under the Act are all

attempts to "attempt to use…law to achieve a result…contrary to the NLRA." Thus, they all have an unlawful objective within the meaning of footnote 5 of the Supreme Court's decision in *Bill Johnson's*. Because Respondents have used legal action against the Charging Parties to enforce the Agreements and those Agreements unlawfully restrict the Charging Parties' Section 7 rights, that legal action had an unlawful objective.

It does not matter that the Board has not ruled specifically ruled that Respondents' Agreements are unlawful. As Respondents must concede, if they were to sue to enforce "yellow dog" contracts,[5] the Board could lawfully conclude that Respondents' suit had an illegal objective without first ruling on the unlawfulness of those contracts. The current situation is exactly analogous: Respondents brought a motion in federal court to enforce provisions of precisely the kind the Board has ruled are unlawful. That motion therefore has an illegal objective and Respondents do not have a First Amendment right to pursue it. E.g. *Dilling Mechanical Contractors, Inc.*, 357 NLRB No. 56, slip op. at 3 (2011) (holding that discovery request (in state court lawsuit) for names of union applicants had an illegal objective and agreeing with the D.C. Circuit court's conclusion that the Supreme Court's decision in *BE&K Construction v. NLRB*, 536 U.S. 516 (2002), "did not affect the footnote 5 exemption in *Bill*

[5] "Before hiring workers, employers required them to sign agreements stating that the workers were not and would not become labor union members. Such anti-union practices were so obnoxious to workers that they gave these required agreements the name of 'yellow dog contracts.'" *Lincoln Federal Labor Union No. 19129, A.F. of L. v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 534 (1949).

Johnson's." Can-Am Plumbing v. NLRB, 321 F.3d 145, 151 (D.C. Cir. 2003)).

Respondents' other argument is that the district court decision granting Respondents' motion to compel individual arbitration bars the Board from deciding that the motion had an unlawful objective. At heart, this is just the claim that the Board is collaterally stopped from concluding that the Agreements violate the Act. The doctrine of collateral estoppel, or "issue preclusion," provides that "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States*, 440 U.S. 147, 153 (1979). Thus, collateral estoppel bars not only the decision-making court, but also any other, from reconsidering the same issue. *United States v. Stauffer Chemical*, 464 U.S. 165 (1984).

Four elements must be present for collateral estoppel to apply: (1) the issue at stake must be identical to that alleged in the prior litigation; (2) the issue must have been actually litigated in the prior proceeding by the party against whom preclusion is asserted; (3) there must have been a full and fair opportunity for litigation of that issue in the prior proceeding; and (4) the determination of the issue must have been a critical and necessary part of the final judgment in the earlier action. *Faulkner v. National Geographic Enterprises, Inc.*, 409 F.3d 26, 37 (2d Cir. 2005).

As a general rule, the federal government is not barred from subsequently litigating an issue involving enforcement of Federal law which a private plaintiff has litigated unsuccessfully unless the federal government was a party in the prior litigation. *United States v. Mendoza*, 464 U.S. 154, 162 (1984); *Field Bridge Associates*, 306 NLRB 322 (1992), enfd. sub nom. *Local 32B-32J Service Employees Intern. Union, AFL-CIO v. NLRB*, 982 F.2d 845 (2d Cir. 1993), cert. denied 509 U.S. 904 (1993). The Board has long held that "if the Government was not a party to the prior private litigation, it is not barred from litigating an issue involving enforcement of Federal law which the private plaintiff has litigated unsuccessfully." *Field Bridge Associates*, 306 NLRB at 322, citing *Allbritton Communications*, 271 NLRB 201, 202 fn.4 (1984), enfd. 766 F.2d 812 (3d Cir. 1985), cert. denied 474 U.S. 1081 (1986); see also, e.g., *Precision Industries*, 320 NLRB 661, 663 (1996), enfd. 118 F.3d 585 (8th Cir.1997), cert. denied 523 U.S. 1020 (1998). As the Board has stated, "Congress has entrusted to the Board exclusively the prosecution of the proceeding by its own complaint, the conduct of the hearing, the adjudication and the granting of appropriate relief," and the Board is "the public agency…chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce." *Field Bridge Assocs.*, 306 NLRB at 322, quoting *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 265 (1940).

The General Counsel recognizes that two circuit court decisions have applied collateral estoppel principles and denied enforcement of Board orders in unfair labor practice cases which turned on the existence of a contract. *NLRB v. Donna-Lee Sportswear*, 836 F.2d 31 (1st Cir. 1987); *NLRB v. Heyman*, 541 F.2d 796 (9th Cir. 1976). In *Donna-Lee Sportswear*, the First Circuit held the Board was precluded from finding an effective contract because a court had already ruled that no binding contract existed. 836 F.2d at 35. The court emphasized that (1) it was not unusual for a court to determine whether there was a valid contract and (2) the private interests of the disputants, rather than public rights, predominated. *Id.* at 36-38. In *NLRB v. Heyman*, the Ninth Circuit denied enforcement of a Board order that the employer had unlawfully repudiated a collective-bargaining agreement and refused to bargain with the union. Instead, the court held the Board was bound by an earlier district court decision in a Section 301 lawsuit that rescinded the collective-bargaining agreement due to the union's purported lack of majority status: "An implicit collateral attack, launched through the filing of charges premised on the contract, may not be entertained by the Board under the guise of different policy considerations." 541 F.2d at 799. The Board has noted that in both of those cases the issue in the unfair labor practice case was precisely the issue decided in the court proceeding, viz., whether a valid contract existed. See, e.g., *Precision Industries*, 320 NLRB at 663 n.13.

In the present case, the Board was not a party to the private court action. Under established law, therefore, the Board is not precluded from proceeding against the unlawful motion at issue here. Moreover, the issue at stake is not identical to that decided in the district court litigation. This case deals with whether Respondent's Arbitration Policy unlawfully interferes with employees' Section 7 rights under the NLRA, while the district court---and indeed all the decisions relied upon by Respondents---considered only whether to compel individual arbitration under the FAA. Finally, the issue here does not concern a private dispute about the mere existence of a contract in which the particular interests of the disputants predominate. Rather, this case deals with whether Respondent's enforcement of the Agreements violates employees' Section 7 rights---an issue regarding a public right within the exclusive authority and expertise of the Board. Thus, even under the rationale of *Donna-Lee Sportswear*, the Board is not precluded from finding that Respondent violated Section 8(a)(1) of the Act by moving to compel individual arbitration, even after a federal court has granted such a motion.

Respondents' two arguments that their motion to compel arbitration was protected by the First Amendment both fail. Respondents' exception 16 should therefore be denied.

D. The Agreements Are Not Materially Different From the Agreement at Issue in *D.R. Horton*

In exceptions 11 and 12, Respondents assert that the Agreements are distinguishable in relevant respects from the

collective action waivers in *D.R. Horton*. First, Respondents assert that the Agreements do not preclude employees from collectively challenging the Agreements. To the extent that is true, it is irrelevant. The right to *ask* for something is not the same as the right to the thing itself. The Agreements are unlawful because they prohibit employees from bringing collective actions. The ability to collectively challenge that restriction is not equivalent to the right to bring the collective action.[6] As the Board said in *D.R. Horton*, "[I]t is no defense that employees remain able to engage in *other* concerted activities." 357 NLRB No. 184 at 6 (emphasis in original).[7] In fact, the Board specifically considered and dismissed this argument in rejecting the position taken by the then-General Counsel in GC Memo 10-06.[8] *Id.*

The Respondents' other argument is that because the United States Department of Labor could conceivably pursue a claim on behalf of the Charging Parties or other collectives of employees, the Agreements do "not foreclose the pursuit of group-wide

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[6] Put another way, if Respondents contend (1) collectively challenging the enforceability of the class action waiver provision of the Agreements is equivalent to collectively pursuing wage and hour claims and (2) the former is permissible under the Agreements, why do Respondents challenge the Charging Parties' right to the latter?

[7] This is also the answer to Respondents' claim that because the Agreements provide for the possibility of preliminary injunctive relief, (Resp. Exc. Brf. at 18), the Agreements do not unduly restrict employee rights.

[8] In that memo, the then-General Counsel took "the position that a class-action waiver [would] not [be] *per se* unlawful, so long as the waiver [made] clear to employees that they [could] act concertedly to challenge the waiver itself and [would] not be subject to retaliation by their employer for doing so." *D.R. Horton, Inc.*, 357 NLRB No. 184, slip op. at 6 (2012). The *Horton* Board provided a full explanation of the legal and logical problems with that position.

remedies." (Resp. Exc. Brf. at 18-19.) Again, however, this misses the point. The problem with the Agreements is not that there is no possibility the Charging Parties could find their claims vindicated, whether individually or collectively, but that the Agreements prohibit individuals from acting collectively.

E. Horton Is Not Procedurally Defective

Respondents assert that the Board did not have the authority to issue its decision in *D.R. Horton*. (Resp. Exception 13.) This claim has three parts, *viz.*, (1) the decision was made without a quorum based on Member Hayes' recusal, (Resp. Brf. at 21), (2) the decision was made by a Board whose composition has been challenged in various courts, (Resp. Brf. at 19-20), and (3) the Regional Director who issued the complaint in this matter was appointed by a Board whose composition has been challenged, (Resp. Brf. at 47-48).[9] All three arguments are unpersuasive and Exception 13 should therefore be denied.

Neither the Board nor the Supreme Court has overturned *D.R. Horton*, which still remains good law. Thus, Respondents' challenge to *D.R. Horton* on these grounds is without merit.

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[9] Respondents appear to further argue that the Acting General Counsel lacked authority to issue the complaint through the Regional Director because one court has concluded that the Acting General Counsel was improperly appointed. (Resp. Brf. at 48-49.) The Board has explicitly refused to consider such arguments: "Historically, the Board has declined to determine the merits of claims attacking the validity of Presidential appointments to positions involved in the administration of the Act. Instead, it has applied the well-settled presumption of regularity of the official acts of public officers in the absence of clear evidence to the contrary. See, e.g., *Lutheran Home at Moorestown,* 334 NLRB 340, 340-341 (2001) (challenge to authority of Acting General Counsel) (citing *U.S. v. Chemical Foundation,* 272 U.S. 1, 14-15 (1926))." *Center for Social Change, Inc.*, 358 NLRB No. 24 (2012).

It is correct that, contrary to *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), petition for certiorari granted 133 S.Ct. 2861 (June 24, 2013), Presidential Recess Appointee Craig Becker, a Board Member who participated in *D.R. Horton*, was not appointed during an intersession recess of the Senate. Further, *Noel Canning* held that Members Griffin and Block, current Board Members serving alongside Chairman Pearce, were not validly appointed because they were appointed during an intra-session recess. However, Respondents' reliance on *Noel Canning* is misplaced. As noted above, the Supreme Court has granted the Board's request for review of the D.C. Circuit's decision and may well reverse the Circuit Court. Furthermore, in *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. 1, fn.1 (Mar. 13, 2013), the Board took note that in *Noel Canning*, the D.C. Circuit Court itself recognized that its conclusions concerning the Presidential appointments had been rejected by other circuit courts which had addressed the issues. Compare *Noel Canning v. NLRB*, 705 F.3d at 505-510 (D.C. Cir. 2013) with *Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004) (en banc); *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (en banc); *United States v. Allocco*, 305 F.2d 704, 709-15 (2d Cir. 1962). Thus, in *Belgrove*, the Board concluded that because the "question [of the validity of the recess appointments] remains in litigation," until such time as it is ultimately resolved, "the

Board is charged to fulfill its responsibilities under the Act."[10] The Board's conclusion in *Belgrove* is equally applicable here.

Respondents further argue that Regional Director Fernbach was not adequately appointed because the Board was supposedly improperly composed at the time and that this alleged infirmity deprives the complaint of any force. As set forth above, the issue of the Board's composition is currently being litigated will be eventually decided by the Supreme Court. The Board's *Belgrove* rationale is therefore equally applicable to this argument.

F. *D.R. Horton* Was Properly Decided and the Board Should Decline to Overrule It

Respondents' exceptions 8, 10, 14, 15, and 17, plus that part of exception 18 regarding the ALJ's second and third conclusions of law, all depend on the assertion that the Board's decision in *D.R. Horton* was incorrect and should be overruled. Respondents' arguments rest on three claims: (1) there is supposedly no Section 7 right to engage in collective legal action regarding employment conditions; (2) the Board has purportedly failed to give adequate deference to the policy purposes of the Federal Arbitration Act, as interpreted by the Supreme Court; and (3) the Board has allegedly misinterpreted the

[10] The Third Circuit's decision in *NLRB v. New Vista Nursing and Rehabilitation,* 719 F.3d 213 (3d Cir. 2013), does not change this result. As noted above, there still remains a split in the circuits regarding the validity of intra-session recess appointments.

Norris-LaGuardia Act.[11] These arguments are unpersuasive and should be rejected.

Respondents first cite a number of cases which have declined to follow *D.R. Horton*.[12] Notably, only one of those cases considers the central issue of *Horton*, namely the Section 7 rights of individuals to collectively pursue legal claims regarding their employment conditions. Because the National Labor Relations Board is the administrative agency charged with interpreting the Act and its interpretation of the Act is therefore due substantial deference, *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984), any judicial analysis of the propriety of the *Horton* decision must begin by accepting the Board's conclusion regarding employees' Section 7 rights. Only then can a court consider what accommodation between the Federal Arbitration Act and the National Labor Relations Act may be necessary.[13]

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[11] Respondents list five arguments they contend support their position, (Resp. Exc. Brf. at 24-25), but the first and second are legally equivalent, as are the third and fourth.

[12] A significant number of the cases cited by Respondents appear to have been included only to lengthen the citation, since they have no informational value, e.g., *Noffsinger-Harrison v. LP Spring City, LLC*, 2013 WL 499210 (E.D. Tenn. Feb. 7, 2013) ("[*D.R. Horton*] is largely distinguishable on its facts given that the parties in the instant case have not raised any concerns about class action waivers in arbitration agreements, which was the underlying issue in *D.R. Horton, Inc.*"); *Brown v. Trueblue, Inc.*, 2012 WL 1268644 (M.D. Pa. 2012) (noting inapplicability of *Horton* where arbitration agreements allowed for collective judicial actions); *Palmer v. Convergys Corp.*, 2012 WL 425256 (M.D. Ga. 2012) (finding that *Horton* "does not meaningfully apply to the facts of the present case"); *Coleman v. Jenny Craig, Inc.*, 2012 WL 3140299 (S.D. Cal. 2012) (no mention of *Horton*, much less discussion); *Johnmohammadi v. Bloomingdale's, Inc.*, 2012 WL 3144882 (C.D. Cal. 2012) (same).

[13] Notably, the only decision cited by Respondents which even considered whether employees have a Section 7 right to collectively litigate

Because the courts to thus far consider *D.R. Horton* have generally failed to even apply the correct analytical framework, those decisions are unpersuasive.[14] Additionally, the *D.R. Horton* Board provided substantial precedent and analysis in support of its conclusion that the collective action precluded by the employment agreements in that case (and this one) constitutes core Section 7 rights. Suffice it to say that the Board has already considered and rejected Respondents' arguments to the contrary. *Horton*, 357 NLRB No. 184 at 2-7.

The *Horton* Board also correctly concluded that its holding did not impair arbitration as a mechanism for resolving disputes or even its purported advantages as a streamlined procedure. *Id.* at 9-12. All *Horton* precludes is an employer's blanket prohibition, made a condition of continued employment by a private agreement, against collective legal action. Employers remain free to both (i) prevent employees from pursuing collective actions in arbitration and (ii) insist that employees pursuing individual employment claims do so in arbitration. *Horton* thereby restricts private agreements, not to the extent such agreements involve arbitration, but only to the extent such agreements restrict collective employment-related legal action. Thus, *Horton* does not fail to accommodate the Federal Arbitration

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employment conditions, *Jasso v. Money Mart. Exp., Inc.*, 879 F.Supp.2d 1038, 1046-1047 (N.D. Cal. 2012), found it obvious such a right existed.

[14] Further, decisions by these state and lower federal courts are not binding upon the Board, which is exclusively charged with interpreting and enforcing the National Labor Relations Act. *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 (1963).

Act but simply refuses to accept all private agreements as written regardless of the impact of those agreements on Section 7 rights. The *Horton* Board correctly noted the well-established principle that courts have a duty not to enforce private agreements which violate federal laws, *id.* at 11, and it is plain that the Agreements' prohibition against collective employment-related legal action violates Section 8(a)(1) of the Act by requiring employees to abandon a core Section 7 right as a condition of employment.

Finally, it is Respondents rather than the Board who misinterpret the Norris-LaGuardia Act ("NLGA"), 29 U.S.C. § 101 *et seq.* For instance, Respondents contend that law is restricted in application to "yellow-dog" contracts. (Resp. Exc. Brf. at 46 ("The NLGA specifically defines those contracts to which it applies…as limited to contracts not to join a union or to quit employment if one becomes a member of a union").) Yet the *Horton* Board explicitly and correctly noted the broader prohibition embodied in the NLGA against enforcement of contracts which interfere with, restrain, or coerce employees in the exercise of concerted activities for mutual aid or protection. *Horton*, 357 NLRB No. 184 at 5.[15]

[15] Respondents also appear confused about the significance of the enactment (or re-enactment) dates of legislation, attempting to read whatever conclusion they like into the relative temporal ordering of statutes. For example, at one point Respondents contend that the enactment of the NLRA subsequent to passage of the NLGA meant the latter had to yield to the former even absent any explicit statutory instruction to that effect, (Resp. Exc. Brf. at 46-47), while the passage of the NLRA subsequent to the enactment of the FAA meant that the latter prevails over the former unless there is explicit statutory

Respondents also argue that the core substantive right recognized by the NLRA---to act collectively regarding employment terms---cannot apply to subsequently created or codified rights, like those embodied in the Fair Labor Standards Act. (Resp. Exc. Brf. at 46.) The nature of this argument can be best appreciated by extension: on this reasoning, Section 7 does not provide any right to collectively challenge any circumstances that came into existence after 1935.

In short, since Respondents provide no persuasive response to the extensive and compelling analysis provided in the *D.R. Horton* decision, the Board should decline to overrule itself and Respondents' exceptions to the propriety of that decision (and its application to the present case) should be rejected.

G. The Remedies Sought in the Complaint Are Appropriate and Within the Scope of the Board's Authority

Respondents except to the remedies recommended by the Administrative Law Judge, (Resp. Exc. 19), but provide no argument in support of that exception. The ALJ recommended six (6) specific remedies, namely (i) a nationwide notice posting, (ii) rescission of the unlawful rule, (iii-iv) cessation of administering and maintaining the rule, (v) a make-whole remedy for the Charging Parties, and (vi) withdrawal of the unlawful motion in district court. The first four of these remedies are standard and well within the Board's broad discretionary powers

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construction otherwise, (*id.* at 47), while at yet another point Respondents contend that the statement of the NLGA that it repealed "[a]ll acts and parts of acts in conflict" with it cannot apply to the earlier-enacted FAA because the FAA was subsequently re-enacted, (*id.* at 45).

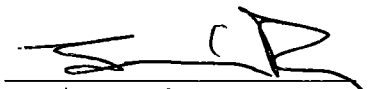
to fashion appropriate remedies. E.g., *Target Corp.*, 359 NLRB No. 103, slip op. at 3-4 (Apr. 26, 2013); *Guardsmark, LLC,* 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007). Similarly, withdrawal of an unlawful lawsuit or motion, together with reimbursement of legal expenses incurred defending against such unlawful actions, are standard Board remedial measures where a respondent maintains an unlawful legal action. See, e.g., *Federal Security, Inc.*, 359 NLRB No. 1, slip op. at 18-19 and n.123 (Sept. 12, 2012); *Plasterers Local 200 (Standard Drywall, Inc.)*, 357 NLRB No. 160, slip op. at 4 and n. 15 (Dec. 29, 2011); *Webco Industries, Inc.*, 337 NLRB 361, 365-366 (2001); *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 835-836 and n. 10 (1991), enfd. 973 F.2d 230 (3d Cir. 1992), cert. denied 507 U.S. 954 (1993); *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 747 (1983) ("If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorneys' fees and other expenses. It may also order any other proper relief that would effectuate the policies of the Act").

Nor can Respondents' persuasively argue that the remedies should not be applied against both of them. First, Respondents have stipulated that any remedial measures taken against JPMorgan Securities, LLC are equally proper as applied against JPMorgan Chase & Co. (Facts, ¶ 9.) Second, as argued above, Respondents were joint employers of the Charging Parties.

IV. Conclusion

It is submitted that the facts and law fully support the conclusions, findings, and recommended order of the Administrative Law Judge, and the Board should so rule.

Dated at New York, New York this 30th day of October 2013



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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

JPMORGAN CHASE & CO. and CHASE INVESTMENT SERVICES CORP., now doing business as JPMORGAN SECURITIES, LLC, Joint Employers,

and **Case No. 02-CA-098118**

ROBERT M. JOHNSON, JENNIFER ZAAT-HETELLE, SCOTT VAN HOOGSTRAAT, and PETER PICCOLI, Individuals.

AFFIDAVIT OF SERVICE OF THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF IN OPPOSITION TO RESPONDENTS' EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

STATE OF NEW YORK)
):
COUNTY OF NEW YORK)

AFFIRMATION OF SERVICE

I, Jamie Rucker, being duly sworn, say: On October 30, 2013, I served a true copy of the Acting General Counsel's Answering Brief in Opposition to Respondents' Exceptions to the Decision of the Administrative Law Judge by electronic mail to Respondent counsel Jonathan C. Fritts, Esq., Morgan, Lewis & Bockius, LLP, 1111 Pennsylvania Ave., N.W., Washington, D.C. 20004 at jfritts@morganlewis.com and to Charging Parties counsel Dierdre Aaron, Esq., Outten & Golden, LLP, Three Park Ave., 29th Floor, New York, NY 10016 at daaron@outtengolden.com.

Dated at New York, New York
This 30th day of October 2013

Jamie Rucker