

**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)	Case No. 02-CA-098118
)	
ROBERT M JOHNSON, JENNIFER)	
ZAAAT-HETELLE, SCOTT VAN)	
HOOGSTRAAT, AND PETER PICCOLI,)	
)	
Charging Parties)	
_____)	

**J.P. MORGAN CHASE & CO. AND J.P. MORGAN SECURITIES, LLC'S REPLY
BRIEF IN FURTHER SUPPORT OF THEIR EXCEPTIONS TO THE DECISION OF
THE ADMINISTRATIVE LAW JUDGE**

Jonathan C. Fritts
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Telephone: 202.739.5687
Facsimile: 202.739.3001

Christopher D. Havener
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103
Telephone: 215.963.5512
Facsimile: 215.963.5001

Dated: November 15, 2013

*Counsel for Respondents J.P. Morgan Chase &
Co. and J.P. Morgan Securities, LLC*

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I. INTRODUCTION

J.P. Morgan Chase & Co. and J.P. Morgan Securities, LLC (“Respondents”) submit this reply brief in further support of their exceptions to the Administrative Law Judge’s decision finding that the Respondents’ Binding Arbitration Agreement (“BAA”) violates the Act under *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012). In this reply brief, Respondents do not attempt to respond to all of the arguments in the General Counsel’s answering brief. Respondents only address those arguments about which there are glaring factual or legal inaccuracies, including the General Counsel’s failure to address the Supreme Court’s recent decision in *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013). As another Administrative Law Judge has recognized, *D. R. Horton* cannot be sustained in the face of *Italian Colors*.

II. ARGUMENT

A. The Board Is Collaterally Estopped by the District Court’s Decision.

Because the United States District Court for the Southern District of New York (“District Court”) has ruled that the BAA is lawful and enforceable – the precise issue before the Board in this case – the Board is collaterally estopped from finding that the BAA is unenforceable. The General Counsel argues, however, that (1) the Board cannot be collaterally estopped because the Board was not a party to the proceedings in the District Court; and (2) this case is distinguishable from the cases holding that the Board was collaterally estopped by court decisions to which the Board was not a party. Both of these arguments fail.¹

¹ The Charging Parties make the additional argument that collateral estoppel is improper because the ALJ issued his decision before the District Court ruled on Respondents’ motion to compel arbitration. This argument misses the point. Respondents are arguing that collateral estoppel applies to *the Board’s* final decision in this case. The ALJ’s decision is not final, nor is it binding on the Board.

The General Counsel's first argument is contrary to *NLRB v. Heyman*, 541 F.2d 796 (9th Cir. 1976), and *NLRB v. Donna-Lee Sportswear Co.*, 836 F.2d 31 (1st Cir. 1987), two cases in which circuit courts found that the Board was collaterally estopped by a district court's decision, even though the Board was not a party to the litigation before the district court. As the Ninth Circuit held in *Donna-Lee Sportswear*, "the rule against applying the principles of issue preclusion against the Government is not absolute." 836 F.2d at 37. The First Circuit reached the same conclusion in *Heyman*. *Heyman*, 541 F.2d at 799 ("the Board's authority does not supplant the jurisdiction of the courts").

Clearly, the District Court had jurisdiction to decide that the BAAs between Respondents and the Charging Parties are lawful and enforceable under the Federal Arbitration Act ("FAA") and the Fair Labor Standards Act ("FLSA"), and to reconcile those statutes with the National Labor Relations Act. The Board is precluded from issuing a decision that would supplant the District Court's jurisdiction to enforce arbitration agreements covering claims (in particular, collective actions under the FLSA) that the Board has no authority to adjudicate.

The General Counsel's second argument is that *Heyman* and *Donna-Lee* are distinguishable because the issue here is "not identical" to the issue decided by the District Court. GC Br. at 15. This is plainly incorrect. In the *Lloyd* litigation, the Charging Parties argued that the BAA is unenforceable under *D. R. Horton*. The District Court considered and rejected that argument, and held that the BAA is enforceable. *See Lloyd v. J.P. Morgan Chase & Co.*, Nos. 11 Civ. 9305, 12 Civ. 2197, 2013 WL 4828588, at *6 n.7 (S.D.N.Y. Sept. 9, 2013).

As in *Heyman*, this case represents "[a]n implicit collateral attack, launched through the filing of charges premised on the contract." 541 F.2d at 799. The Charging Parties filed their charge one month after the Respondents filed their motion to compel arbitration in the District

Court. The private interests of the Charging Parties predominate in this case, and their effort to collaterally attack the jurisdiction of the District Court “may not be entertained by the Board under the guise of different policy considerations.” *Id.*

B. The Board Should Defer to the District Court’s Decision.

In the alternative, the Board should defer to the District Court’s decision as a matter of comity. Both the Board and the Supreme Court have held that the Board must defer to federal courts’ interpretation of federal laws other than the NLRA. *See Electrical Workers Local 48 (Kingston Constructors)*, 332 NLRB 1492, 1500-01 (2000) (deferring to court’s interpretation of the Davis-Bacon Act); *PCC Structurals, Inc.*, 330 NLRB 868, 871 (2000) (deferring to court and EEOC interpretations of the Americans with Disabilities Act); *see also Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 529 n.9 (1984); *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942).

Respondents made this deference argument at length in their brief in support of their exceptions. Exceptions Br. at 9-11. However, the General Counsel has not responded to this argument. Presumably that is because there is no question that this case involves statutes (specifically, the FAA and the FLSA) that the Board has no authority to interpret or enforce. The Board should defer to the District Court’s accommodation of the FAA, the FLSA, and the NLRA. *See Southern Steamship*, 316 U.S. at 47 (“the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives”).

C. Respondents’ Motion to Compel Arbitration Is Protected by the First Amendment.

Because the District Court held that the BAA is lawful and enforceable, despite the Board’s decision in *D. R. Horton*, Respondents’ motion to compel arbitration cannot be found to

have an unlawful objective within the meaning of footnote 5 of *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 737 n.5 (1983). Therefore, the motion was protected by the First Amendment. The Board cannot find a violation of the Act based on that motion, nor can the Board order any remedy requiring Respondents to withdraw that motion or to pay the Charging Parties' attorneys' fees related to the motion.

Counsel for the General Counsel cites no case in support of the proposition that a motion filed in federal court can have an "unlawful objective" even though the federal court has granted the motion and specifically rejected the argument that it has an objective that is unlawful under the Act. Counsel for the General Counsel cites only cases involving state court litigation in which the state court did not consider any alleged violation of the Act. *See Dilling Mechanical Contractors, Inc.*, 357 NLRB No. 56 (2011) (attempting to use state law discovery process to gain information protected from disclosure by the Act); *Laundry Workers Local 3 (Virginia Cleaners)*, 275 NLRB 697 (1985) (attempting to use state law action to collect fines from employees who had resigned from the union).

Here, Respondents filed a motion to compel arbitration in federal court, pursuant to federal law. The District Court considered but declined to follow *D. R. Horton*, and held that the BAA is lawful and enforceable under the FAA and the FLSA. The motion to compel arbitration cannot be found to have an unlawful objective in these circumstances.

D. The Complaint Is Barred by Section 10(b) of the Act.

Counsel for the General Counsel answers Respondents' Section 10(b) argument with the bizarre assertion that it is "immaterial whether Respondents' insistence that the Charging Parties execute the arbitration agreements was lawful or unlawful." GC Br. at 9. This assertion is not only bizarre; it is contrary to *D. R. Horton*, which is predicated on an employer's insistence that the agreement be entered into as a condition of employment. The holding of *D. R. Horton* is

limited to arbitration agreements that are mandated as a condition of employment. The Board specifically declined to reach the “more difficult question” of whether an arbitration agreement that “is not a condition of employment” violates the Act. *D. R. Horton*, 357 NLRB No. 184, slip op. at 13 n.28.

Thus, the theory of violation under *D. R. Horton* depends on the circumstances in which the arbitration agreement was entered into – *i.e.*, whether the employer insisted on it as a condition of employment. In this case, the Charging Parties entered into the BAAs on various dates in 2009 and 2010, which were well outside the Section 10(b) period, and their employment ended outside the Section 10(b) period. The only complaint allegation that is within the Section 10(b) period is the allegation concerning Respondents’ filing of their motion to compel arbitration on January 14, 2013. In addition to being barred by the First Amendment, as argued above, the complaint allegation concerning the motion to compel arbitration is time-barred because it is “inescapably grounded on events predating the limitations period” – specifically, Respondents’ insistence that the Charging Parties enter into the BAA as a condition of employment. *Local Lodge No. 1424 v. NLRB*, 362 U.S. 411, 422 (1960) (*Bryan Manufacturing*).

E. The Respondents Are Not Joint Employers, Nor Did the Parties Litigate or Stipulate to that Issue.

In arguing that the ALJ properly found the Respondents to be joint employers, counsel for the General Counsel has repudiated the specific understandings reached by counsel in negotiating the stipulation in this case. This is no mere issue of counsel’s “psychological state[]” as counsel for the General Counsel quips in a footnote. GC Br. at 4 n.3. Rather, the explicitly stated purpose of paragraph 9 of the stipulation was to ensure that the Board would have the ability to enforce a remedy against J.P. Morgan Chase & Co., *without litigating the issue of joint employer status*.

In order to respond to counsel for the General Counsel's outrageous repudiation of this explicit understanding, Respondents are attaching as exhibits to this reply brief copies of emails exchanged between counsel for the Respondents and counsel for the General Counsel in negotiating the stipulation. In an email sent on Tuesday, May 21, 2013, at 10:40 a.m., counsel for the Respondents proposed revisions to the stipulation "*to avoid the need to litigate the joint employer issue....*" Ex. 1 (emphasis added). Counsel for the General Counsel responded at 10:51 a.m. by proposing that "[w]e can only *avoid litigating the joint employer issue*" if the Respondents agreed to stipulate that J.P. Morgan Chase & Co. is a beneficiary of the arbitration agreements between its subsidiaries and the subsidiaries' employees. *Id.* (emphasis added).

When the parties could not agree on language reflecting the third party beneficiary concept, counsel for the Respondents proposed to stipulate to the availability of a remedy against J.P. Morgan Chase & Co. "*as an alternative to the joint employer allegation or the third party beneficiary concept you proposed.*" Ex. 2 (email sent on Friday, May 24, 2013 at 6:03 p.m.) (emphasis added). Based on that proposal, counsel proceeded to negotiate the language which became paragraph 9 of the stipulation. When the parties ultimately agreed to the stipulation, counsel for the General Counsel withdrew "*the subpoenas ad testificandum and the paragraphs of the subpoenas duces tecum related to the joint employer issue.*" Ex. 3 (email sent on Wednesday, May 29, 2013 at 8:55 p.m.) (emphasis added).

Based on these explicit understandings, the parties did not litigate the joint employer issue at the hearing – indeed, there was no testimony at all at the hearing. As counsel agreed, there was no need to litigate the joint employer issue because the parties had stipulated to the availability of a remedy against J.P. Morgan Chase & Co. Thus, it is entirely disingenuous for counsel for the General Counsel to assert that the joint employer issue was litigated or that the

ALJ's finding on that issue is consistent with the stipulation. Counsel for the General Counsel cites certain documents that were attached as exhibits to the stipulation, but counsel for the General Counsel never represented that those documents would be used to support the very joint employer allegation that the parties agreed to avoid litigating. To the contrary, counsel for the General Counsel represented only that the documents would be used to support the availability of a remedy against J.P. Morgan Chase & Co., as the parties had agreed in paragraph 9 of the stipulation. *See Ex. 4* (email sent on Wednesday, May 29, 2013 at 3:24 p.m.).

For all of these reasons, the ALJ's finding on the joint employer issue violates due process because the issue was not actually litigated, as counsel specifically agreed in negotiating the stipulation. *See Baptist Medical Center*, 338 NLRB 346, 348-49 (2002); *New Era Cap Co.*, 336 NLRB 526, 526 (2001); *Paul Mueller Co.*, 332 NLRB 1350, 1350 (2000).²

F. The BAA Is Distinguishable from the Arbitration Agreement Found Unlawful in *D. R. Horton*.

The fact that the BAA permits employees to collectively challenge its enforceability in court distinguishes the BAA from the arbitration agreement at issue in *D. R. Horton*. The right to challenge the BAA in court preserves employees' ability to engage in concerted activity and also demonstrates that the parties have agreed that the enforceability of the agreement should ultimately be determined in court, which is exactly what has happened here. While the Board in *D. R. Horton* did not endorse this position, as set forth in GC Memo 10-06, that aspect of the Board's decision was *dicta* because the arbitration agreement in *D. R. Horton* did not permit such challenges. 357 NLRB No. 184, slip op. at 6. Allowing employees to collectively

² Counsel for the General Counsel notes that he raised the joint employer issue in his post-hearing brief to the ALJ, as an alternative basis for a remedy against J.P. Morgan Chase & Co. GC Br. at 6. This is not sufficient to satisfy due process. Counsel *agreed* that the stipulation obviated the need to litigate the joint employer issue and, based on that agreement, the joint employer issue was not actually litigated at the hearing.

challenge the enforceability of an arbitration agreement does protect employees' right to engage in concerted activity with respect to that agreement. Equally importantly, such a provision respects the court's jurisdiction to determine the enforceability of the arbitration agreement.

G. *D. R. Horton* Was Invalidly Issued and Wrongly Decided.

Respondents have already set forth at length in their exceptions brief the arguments as to why *D. R. Horton* was invalidly issued and wrongly decided. Respondents will not reiterate those arguments here, but rather will only address the points on which the General Counsel's answering brief is incorrect or conspicuously silent.

First, while the General Counsel makes a number of arguments concerning the validity of *D. R. Horton* despite the D.C. Circuit's decision in *Noel Canning*, the General Counsel failed to respond to the argument that, even if Member Becker's recess appointment had been constitutional, *D. R. Horton* is invalid because it was issued by only two members without a prior delegation to a three-member panel. For this reason, which the General Counsel has not addressed, *D. R. Horton* is invalid and has no precedential effect.

Second, the General Counsel fails to even mention the Supreme Court's recent decision in *Italian Colors*, which held that class and collective action waivers in arbitration agreements are enforceable unless the statute under which the plaintiff attempts to bring suit contains a clear "congressional command" to the contrary. *American Exp. Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304, 2309 (2013) (citing *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012)). As another ALJ has recently held, *D. R. Horton* cannot survive the Supreme Court's decision in *Italian Colors*. See *Chesapeake Energy Corp.*, JD-78-13, slip op. at 9 (Nov. 8, 2013). There is no clear contrary congressional command in the FLSA (or the NLRA, for that matter) and, therefore, the BAA must be enforced pursuant to the FAA. The General Counsel's argument that *D. R. Horton* remains good law (GC Br. at 17) is simply incorrect in light of *Italian Colors*.

Third, the General Counsel incorrectly argues that “any judicial analysis of the propriety of the *Horton* decision must begin by accepting the Board’s conclusion regarding employees’ Section 7 rights.” GC Br. at 20. This argument is not only contrary to the standard of *Italian Colors*, which requires a clear congressional command to override the FAA, but it also ignores the well-established case law holding that Section 7 rights are not absolute and must be balanced against other legitimate rights and interests. *See, e.g., Hudgens v. NLRB*, 424 U.S. 507, 522 (1976) (the Board must consider “the nature and strength of the respective Section 7 rights”). Thus, the correct analysis does not begin with recognition of a Section 7 right to engage in class or collective action litigation. Rather the correct analysis begins with the FAA and its “liberal federal policy favoring arbitration agreements.” *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24-25 (1991).

Fourth, the General Counsel confuses the simple principle that when two statutes present an irreconcilable conflict, the later enacted statute takes precedence over the earlier one. It is important to note that no irreconcilable conflict exists here. The FAA, the FLSA, the NLRA, and the Norris-LaGuardia Act (“NLGA”) can be – and indeed must be – reconciled to permit the enforcement of class and collective action waivers in keeping with the last decade of Supreme Court precedent. But to the extent a conflict exists, the FAA takes precedence because it was re-enacted in 1947, “twelve years after the NLRA and fifteen years after the passage of the Norris-LaGuardia Act.” *Owen v. Bristol Care*, 702 F.3d 1050, 1053 (8th Cir. 2013). “The decision to reenact the FAA suggests that Congress intended its arbitration protections to remain intact even in light of the earlier passage of three major labor relations statutes [including the FLSA].” *Id.* The FLSA was enacted after the original Wagner Act, and courts are in agreement that the FLSA permits enforcement of class and collective action waivers in arbitration agreements. *See, e.g.,*

Richards v. Ernst & Young, LLP, --- F.3d ---, No. 11-17530, 2013 WL 4437601 (9th Cir. Aug. 21, 2013); *Sutherland v. Ernst & Young LLP*, --- F.3d ---, No. 12-304-CV, 2013 WL 4033844 (2d Cir. Aug. 9, 2013); *Raniere v. Citigroup Inc.*, No. 11-5213-CV, 2013 WL 4046278 (2d Cir. Aug. 12, 2013) (summary order).

III. CONCLUSION

Respondents urge the Board to dismiss the complaint for any or all of the following reasons, as set forth above and in Respondents' exceptions and supporting brief: (1) the Board is collaterally estopped by the District Court's ruling in *Lloyd* that the BAA is enforceable under the FAA and the FLSA, notwithstanding *D. R. Horton*; (2) the Board should defer to the District Court's decision in *Lloyd*; (3) Respondents' filing of a motion to compel arbitration in *Lloyd* was protected by the First Amendment; (4) the complaint is time-barred under Section 10(b) of the Act; (5) the BAA is distinguishable from the arbitration agreement at issue in *D. R. Horton*; (6) *D. R. Horton* was invalidly issued and was wrongly decided; and (7) the Regional Director and/or the Acting General Counsel lacked authority to issue and prosecute the complaint.

Date: November 15, 2013

Respectfully submitted,

By: /s/ Jonathan C. Fritts

Jonathan C. Fritts
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Telephone: 202.739.5867
Facsimile: 202.739.3001

Christopher D. Havener
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103
Telephone: 215.963.5512
Facsimile: 215.963.5001

*Counsel for Respondents J.P. Morgan Chase
& Co. and J.P. Morgan Securities, LLC*

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of November, 2013, true and correct copies of the Respondents' Reply Brief in Further Support of Their Exceptions to the Decision of the Administrative Law Judge 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

Rachel Bien
Dierdre Aaron
Outten & Golden
3 Park Avenue 29th Floor
New York, New York 10016
Email: rmb@outtengolden.com
daaron@outtengolden.com

/s/ Jonathan C. Fritts

EXHIBIT 1

From: Rucker, Jamie [<mailto:Jamie.Rucker@nlrb.gov>]
Sent: Tuesday, May 21, 2013 10:51 AM
To: Fritts, Jonathan C.
Cc: Reiss, Stephanie Rosel; Murtagh, Matthew S.
Subject: RE: JPMorgan Chase & Co., et al., Case Nos. 02-CA-088471 and 02-CA-098118

Every proposed amendment after paragraph five is a non-starter.

We can only avoid litigating the joint employer issue if you agree to language essentially like that proposed, namely that (i) JPMorgan Chase & Co. binds all its subsidiaries' employees to arbitration agreements with JPMorgan Chase & Co. as a beneficiary of those agreements (and (ii) the subsidiary employers are wholly-owned subsidiaries of JPMorgan Chase & Co., whether through one, two, or more companies.

I am in no position to bind the Board and Justice Department, which will litigate any *Noel Canning* issues, to your proposed stipulations. To the extent those proposals are matters of public record, you should ask the ALJ to take notice of them.

From: Fritts, Jonathan C. [<mailto:jfritts@morganlewis.com>]
Sent: Tuesday, May 21, 2013 10:40 AM
To: Rucker, Jamie
Cc: Reiss, Stephanie Rosel
Subject: JPMorgan Chase & Co., et al., Case Nos. 02-CA-088471 and 02-CA-098118

Jamie:

Attached are our proposed revisions to the stipulation. These revisions are intended to avoid the need to litigate the joint employer issue by stipulating as to jurisdiction over all Respondents while preserving our position that JP Morgan Chase & Co. did not employ any of the Charging Parties. The additions at the end on quorum/recess appointment issues should be a matter of public record, but we think it would be helpful to include them in the stip.

Please let me know if you would like to discuss any of this.

Best regards,

Jonathan C. Fritts
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW | Washington, DC 20004-2541
Direct: 202.739.5867 | Main: 202.739.3000 | Fax: 202.739.3001
jfritts@morganlewis.com | www.morganlewis.com
Assistant: Nancye G. Mittendorff | 202.739.5757 | nmittendorff@morganlewis.com

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EXHIBIT 2

From: Fritts, Jonathan C. [<mailto:jfritts@morganlewis.com>]
Sent: Friday, May 24, 2013 6:03 PM
To: Rucker, Jamie
Subject: RE: JPMorgan Chase & Co., et al., Case Nos. 02-CA-088471 and 02-CA-098118

Jamie:

Per our call yesterday, Respondents are agreeable to language that would simply stipulate to the availability of a remedy against JPMorgan Chase & Co., as an alternative to the joint employer allegation or the third party beneficiary concept you proposed. Here is some language to accomplish that:

Respondents stipulate that, to the extent the NLRB issues an order in this case concerning the Binding Arbitration Agreement between any of the Charging Parties and JPMorgan Chase Bank, N.A. or Chase Investment Services Corp., now doing business as JPMorgan Securities, LLC, the NLRB's order shall apply equally to JPMorgan Chase & Co. with respect to the Binding Arbitration Agreements signed by the Charging Parties.

We are proposing this language with the understanding that you would agree to our proposed paragraphs 10, 11, and 12 in the stipulation.

Please let me know if this is acceptable.

Thanks.

Jonathan C. Fritts
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW | Washington, DC 20004-2541
Direct: 202.739.5867 | Main: 202.739.3000 | Fax: 202.739.3001
jfritts@morganlewis.com | www.morganlewis.com
Assistant: Nancye G. Mittendorff | 202.739.5757 | nmittendorff@morganlewis.com

From: Rucker, Jamie [<mailto:Jamie.Rucker@nlrb.gov>]
Sent: Thursday, May 23, 2013 9:46 AM
To: Fritts, Jonathan C.
Cc: Murtagh, Matthew S.; Jaffe, Leah Z.; Aaron, Deirdre; Howard Schragin
Subject: RE: JPMorgan Chase & Co., et al., Case Nos. 02-CA-088471 and 02-CA-098118

We are failing to communicate. We require that Respondents stipulate that JPMorgan Chase & Co. requires all its subsidiaries to require their employees to enter into the arbitration agreements. Your firm keeps proposing to stipulate that each subsidiary requires its employees to enter into the arbitration agreement. The first implies the second, but the second does not imply the first. We require that you stipulate to the first.

The Region will not agree to 12. That is a denial of joint employer status and of what we require Respondents to stipulate if you wish to avoid producing the subpoenaed records.

From: Fritts, Jonathan C. [<mailto:jfritts@morganlewis.com>]
Sent: Thursday, May 23, 2013 7:38 AM
To: Rucker, Jamie

Cc: Reiss, Stephanie Rosel; Murtagh, Matthew S.

Subject: RE: JPMorgan Chase & Co., et al., Case Nos. 02-CA-088471 and 02-CA-098118

Jamie:

Here is how we propose to address your language in (i) and (ii) below. This version is more accurate and I think it accomplishes the same result for you:

All U.S. based employees of JPMorgan Chase & Co., Chase Investment Services Corp., now doing business as JPMorgan Securities, LLC, and JPMorgan Chase Bank, N.A. hired after July 1, 2009 are required to enter into Arbitration Agreements covering employment related claims. Any employment claims by employees described above against JPMorgan Chase & Co. and its related and affiliated entities must be arbitrated according to the terms of those agreements.

We think it is important to retain our proposed paragraphs 10, 11, and 12. We would be willing to drop our paragraphs 19-24, with the understanding that we will cite them as matters of public record, if you can confirm that the Board did not delegate its authority to a three-member panel in *D.R. Horton*. I don't think the Board has ever said that it did and I don't think that requires you to do anything that is within the purview of the DOJ.

Please let me know if we can resolve the stipulation on these terms.

Thanks.

Jonathan C. Fritts

Morgan, Lewis & Bockius LLP

1111 Pennsylvania Avenue, NW | Washington, DC 20004-2541

Direct: 202.739.5867 | Main: 202.739.3000 | Fax: 202.739.3001

jfritts@morganlewis.com | www.morganlewis.com

Assistant: Nancye G. Mittendorff | 202.739.5757 | nmittendorff@morganlewis.com

From: Rucker, Jamie [<mailto:Jamie.Rucker@nlrb.gov>]

Sent: Tuesday, May 21, 2013 11:38 AM

To: Fritts, Jonathan C.

Cc: Reiss, Stephanie Rosel; Murtagh, Matthew S.

Subject: RE: JPMorgan Chase & Co., et al., Case Nos. 02-CA-088471 and 02-CA-098118

If your client were to agree to the language described in (i) and (ii) below, I would not object to adding your proposed paragraphs 10 and 11.

From: Fritts, Jonathan C. [<mailto:jfritts@morganlewis.com>]

Sent: Tuesday, May 21, 2013 10:59 AM

To: Rucker, Jamie

Cc: Reiss, Stephanie Rosel; Murtagh, Matthew S.

Subject: RE: JPMorgan Chase & Co., et al., Case Nos. 02-CA-088471 and 02-CA-098118

If we were to agree to language as you describe in (i) and (ii), which I will need to discuss with my client, do you have any objection to identifying which Respondent employed which Charging Parties?

Jonathan C. Fritts

Morgan, Lewis & Bockius LLP

1111 Pennsylvania Avenue, NW | Washington, DC 20004-2541

Direct: 202.739.5867 | Main: 202.739.3000 | Fax: 202.739.3001

jfritts@morganlewis.com | www.morganlewis.com

Assistant: Nancye G. Mittendorff | 202.739.5757 | nmittendorff@morganlewis.com

From: Rucker, Jamie [<mailto:Jamie.Rucker@nlrb.gov>]
Sent: Tuesday, May 21, 2013 10:51 AM
To: Fritts, Jonathan C.
Cc: Reiss, Stephanie Rosel; Murtagh, Matthew S.
Subject: RE: JPMorgan Chase & Co., et al., Case Nos. 02-CA-088471 and 02-CA-098118

Every proposed amendment after paragraph five is a non-starter.

We can only avoid litigating the joint employer issue if you agree to language essentially like that proposed, namely that (i) JPMorgan Chase & Co. binds all its subsidiaries' employees to arbitration agreements with JPMorgan Chase & Co. as a beneficiary of those agreements (and (ii) the subsidiary employers are wholly-owned subsidiaries of JPMorgan Chase & Co., whether through one, two, or more companies.

I am in no position to bind the Board and Justice Department, which will litigate any *Noel Canning* issues, to your proposed stipulations. To the extent those proposals are matters of public record, you should ask the ALJ to take notice of them.

From: Fritts, Jonathan C. [<mailto:jfritts@morganlewis.com>]
Sent: Tuesday, May 21, 2013 10:40 AM
To: Rucker, Jamie
Cc: Reiss, Stephanie Rosel
Subject: JPMorgan Chase & Co., et al., Case Nos. 02-CA-088471 and 02-CA-098118

Jamie:

Attached are our proposed revisions to the stipulation. These revisions are intended to avoid the need to litigate the joint employer issue by stipulating as to jurisdiction over all Respondents while preserving our position that JP Morgan Chase & Co. did not employ any of the Charging Parties. The additions at the end on quorum/recess appointment issues should be a matter of public record, but we think it would be helpful to include them in the stip.

Please let me know if you would like to discuss any of this.

Best regards,

Jonathan C. Fritts
Morgan, Lewis & Bockius LLP
1111 Pennsylvania Avenue, NW | Washington, DC 20004-2541
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EXHIBIT 3

From: Rucker, Jamie [mailto:Jamie.Rucker@nlrb.gov]
Sent: Wednesday, May 29, 2013 8:55 PM
To: Fritts, Jonathan C.
Cc: Murtagh, Matthew S.; Jaffe, Leah Z.
Subject: RE: JPMorgan Chase & Co., et al., Case Nos. 02-CA-098118 and 02-CA-088471

The documents do not have to be included in the stipulation. Counsel for the Acting General Counsel will simply submit them into the record separately.

Because you have agreed to the stipulation previously sent to you, I am hereby withdrawing the subpoenas ad testificandum and the paragraphs of the subpoenas duces tecum related to the joint employer issue. And as I have already advised you, based on the request of Tiffany Ryan to withdraw the charge in her case, I have withdrawn the other paragraphs of the subpoenas duces tecum.

From: Fritts, Jonathan C. [jfritts@morganlewis.com]
Sent: Wednesday, May 29, 2013 7:21 PM
To: Rucker, Jamie
Cc: Murtagh, Matthew S.
Subject: RE: JPMorgan Chase & Co., et al., Case Nos. 02-CA-098118 and 02-CA-088471

Jamie:

Are these documents intended to be part of the stipulation at this point? If so, I don't yet have authority to include them. Perhaps we can discuss in the morning.

The stipulation is otherwise agreeable, per my other message.

Best regards,

Jonathan C. Fritts
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<mailto:nmittendorff@morganlewis.com>

From: Rucker, Jamie [mailto:Jamie.Rucker@nlrb.gov]
Sent: Wednesday, May 29, 2013 2:59 PM
To: Fritts, Jonathan C.
Cc: Murtagh, Matthew S.
Subject: RE: JPMorgan Chase & Co., et al., Case Nos. 02-CA-098118 and 02-CA-088471

These were submitted by JPMorgan in the district court wage and hour case as attachments to Heather Emmert's statement, I believe.

From: Fritts, Jonathan C. [mailto:jfritts@morganlewis.com]
Sent: Wednesday, May 29, 2013 2:56 PM
To: Rucker, Jamie

Subject: RE: JPMorgan Chase & Co., et al., CAsE Nos. 02-CA-098118 and 02-CA-088471

Jamie:

Can you send me copies of the offer letters that you would like to submit?

We are intending to litigate the Ryan supervisory issue. Please call my cell (202-236-8673) when you have a chance so we can discuss the docs in response to the subpoena on that issue.

Jonathan C. Fritts
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Assistant: Nancye G. Mittendorff | 202.739.5757 | nmittendorff@morganlewis.com
<mailto:nmittendorff@morganlewis.com>

From: Rucker, Jamie [mailto:Jamie.Rucker@nlrb.gov]
Sent: Wednesday, May 29, 2013 2:42 PM
To: Fritts, Jonathan C.; Aaron, Deirdre; Miazad, Ossai; Howard Schragin
Cc: Murtagh, Matthew S.
Subject: JPMorgan Chase & Co., et al., CAsE Nos. 02-CA-098118 and 02-CA-088471

Attached please find the latest version of the proposed stipulation in the above-referenced matters. It is intended to be a final version. I have incorporated all of Respondent's proposed changes in the early paragraphs up through jurisdiction and commerce, modified paragraphs 8 and 9 to be close to what Respondents suggested, added the paragraphs Respondents wanted as paragraphs 10 and 11, and added the paragraph negotiated over the past few days.

The stipulation is designed to obviate the need for (1) Respondents to produce documents in response to a number of the subpoenas issued earlier in this case and (2) testimony regarding the joint employer issue. Counsel for the General Counsel nonetheless intends to submit the offer letters sent to Charging Parties Johnson, Zaat-Hetelle, Piccoli, and Van Hoogstraat into the record. If Respondents are willing to have those documents also made part of the stipulation, I can add those four documents to the list of exhibits.

Are Respondents still intending to present evidence on the supervisory issue of Tiffany Ryan or would it be possible to forego that and thereby proceed without any testimony at all?

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EXHIBIT 4

From: Rucker, Jamie [<mailto:Jamie.Rucker@nlrb.gov>]
Sent: Wednesday, May 29, 2013 3:24 PM
To: Fritts, Jonathan C.
Cc: Murtagh, Matthew S.
Subject: RE: JPMorgan Chase & Co., et al., CAs Nos. 02-CA-098118 and 02-CA-088471

They support the Region's position that a remedy extending to JPMorgan Chase & Co. is appropriate.

From: Fritts, Jonathan C. [<mailto:jfritts@morganlewis.com>]
Sent: Wednesday, May 29, 2013 3:03 PM
To: Rucker, Jamie
Cc: Murtagh, Matthew S.
Subject: RE: JPMorgan Chase & Co., et al., CAs Nos. 02-CA-098118 and 02-CA-088471

Can you explain for what purpose you would be submitting these?

Jonathan C. Fritts
Morgan, Lewis & Bockius LLP
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Assistant: Nancye G. Mittendorff | 202.739.5757 | nmittendorff@morganlewis.com

From: Rucker, Jamie [<mailto:Jamie.Rucker@nlrb.gov>]
Sent: Wednesday, May 29, 2013 2:59 PM
To: Fritts, Jonathan C.
Cc: Murtagh, Matthew S.
Subject: RE: JPMorgan Chase & Co., et al., CAs Nos. 02-CA-098118 and 02-CA-088471

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Sent: Wednesday, May 29, 2013 2:56 PM
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To: Fritts, Jonathan C.; Aaron, Deirdre; Miazad, Ossai; Howard Schragin
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Subject: JPMorgan Chase & Co., et al., CAse Nos. 02-CA-098118 and 02-CA-088471

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