

**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)	
_____)	

**RESPONDENTS’ OPPOSITION TO GENERAL COUNSEL’S MOTION TO STRIKE
SECTION II.E OF RESPONDENTS’ REPLY BRIEF**

J.P. Morgan Chase & Co. and J.P. Morgan Securities, LLC (“Respondents”) oppose the General Counsel’s Motion to Strike Section II.E of Respondents’ reply brief in support of their exceptions to the Administrative Law Judge’s decision. The General Counsel’s motion is based on an assertion that Section II.E of Respondents’ reply brief contains a “demonstrably false characterization of the agreement between counsel” in negotiating the stipulation in this case.

Respondents’ characterization of the purpose of the stipulation is, in fact, entirely accurate and cannot legitimately be disputed. There can be no dispute that the purpose of paragraph 9 of the stipulation was to *avoid litigating the joint employer issue*. This purpose is explicitly stated in the email messages exchanged between counsel for the General Counsel and counsel for the Respondents in negotiating the stipulation. Counsel for the General Counsel cannot dispute his own statement that the parties could “*avoid litigating the joint employer issue*” if they could agree on a stipulation that would provide a remedy against J.P. Morgan Chase &

Co. Ex. 1 to Reply Br. (emphasis added). Indeed, *the only reason* that joint employer status was alleged in the first place was to provide a basis for a remedy against J.P. Morgan Chase & Co. Once the parties stipulated as to the availability of a remedy against J. P. Morgan Chase & Co., there was no reason to litigate the joint employer issue.¹

Counsel for the General Counsel now claims that the email correspondence and submission of certain documents into evidence should have put Respondents on notice that the General Counsel intended to litigate the joint employer issue, even though the parties had stipulated to the availability of a remedy against J.P. Morgan Chase & Co. However, that is not what counsel for the General Counsel said at the time. Counsel for the General Counsel stated that there needed to be a factual basis for the stipulation as to a remedy against J.P. Morgan Chase & Co. Therefore, counsel for Respondents understood that the documents that were submitted with the stipulation were intended *to support the stipulation*. This understanding is consistent with the Casehandling Manual, which provides:

Stipulations should contain detailed, factual assertions and should not be conclusionary. For example, a stipulation that the Board has commerce jurisdiction is inadequate, without a recital of supporting facts.

Casehandling Manual ¶ 10382.

Counsel for the General Counsel never said that he intended to use the additional documents to litigate the joint employer issue. Indeed, there was no reason to litigate the joint employer issue once the parties had stipulated to the availability of a remedy against J.P. Morgan Chase & Co., as they did in paragraph 9 of the stipulation.

¹ The superfluous nature of the joint employer issue is demonstrated by the General Counsel's post-hearing brief, which raised the joint employer issue only *as an alternative to* the parties' stipulation as to the availability of a remedy against J.P. Morgan Chase & Co.

Not only did counsel for the General Counsel fail to disclose his intention to litigate the joint employer issue, despite the stipulation, he failed to disclose that intention *when specifically asked* why he wanted to submit additional documents with the stipulation. When asked that specific question by counsel for the Respondents, counsel for the General Counsel said only that the documents “support the Region’s position that a remedy extending to JPMorgan Chase & Co. is appropriate.” Ex. 4 to Reply Br. He said nothing about the joint employer issue. Instead, his statement confirmed what counsel had discussed – that the documents were intended to *support the stipulation* as to the availability of a remedy against J.P. Morgan Chase & Co. If counsel for the General Counsel wished to void the parties’ agreement not to litigate the joint employer issue, it was incumbent upon him to say so. Instead, counsel for the General Counsel merely insinuated that he needed to establish some factual predicate for the parties’ stipulation to extend a remedy to J.P. Morgan Chase & Co. He never said that he intended to litigate the joint employer issue.

The Board has held that due process does not permit an Administrative Law Judge to make a finding on an issue, even when it is alleged in the complaint, when the General Counsel has led the respondent to believe that the complaint allegation is not going to be litigated. For instance, in *Paul Mueller Co.*, 332 NLRB 1350 (2000), the Board held that where the General Counsel’s statements “reasonably led the Respondent to believe” that an issue would not be litigated, the Administrative Law Judge’s subsequent finding of a violation on that issue denied the respondent due process. *Id.* at 1350. *See also Sierra Bullets, LLC*, 340 NLRB 242, 243 (2003) (holding that respondent was denied due process when Administrative Law Judge found violation based on theory that the General Counsel “reasonably led the Respondent to believe that it would not have to defend”).

Here, the General Counsel's agreement to a stipulation that was explicitly intended to avoid litigation of the joint employer issue, coupled with the General Counsel's withdrawal of the trial subpoenas on that issue, reasonably led Respondents to believe that the joint employer issue would not be litigated. No witnesses were presented at the hearing, on the joint employer issue or any other issue. The case was submitted based on the stipulation, which had been painstakingly negotiated to avoid litigating the joint employer issue.

For all of these reasons, the Board should deny the General Counsel's motion to strike and should sustain Respondents' exception to the Administrative Law Judge's finding that the Respondents are joint employers.

Dated: November 27, 2013

Respectfully submitted,

By: /s/ Jonathan C. Fritts

Jonathan C. Fritts
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, NW
Washington, DC 20004
Telephone: 202.739.3000
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 27th day of November, 2013, true and correct copies of the Respondents' Opposition to General Counsel's Motion to Strike Section II.E of Respondents' Reply 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

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