

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE NEIMAN MARCUS GROUP, INC.,

Respondent,

and

SHEILA MONJAZEB,

Charging Party.

Case 31-CA-074295

**BRIEF IN SUPPORT OF
RESPONDENT THE NEIMAN MARCUS GROUP, INC.'S
EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE AND TO THE
RULINGS ON RESPONDENT'S PRE-TRIAL MOTIONS**

David S. Bradshaw
JACKSON LEWIS P.C.
801 K Street, Suite 2300
Sacramento, CA 95814
Telephone: (916) 341-0404
Facsimile: (916) 341-0141
E-mail: bradshawd@jacksonlewis.com

Attorneys for Respondent
THE NEIMAN MARCUS GROUP, INC.

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I

INTRODUCTION

For the reasons set forth in this Brief and the accompanying Exceptions, the Decision of Administrative Law Judge Eleanor Laws (“ALJ”) is seriously flawed and cannot stand.

II

**THE ALJ ERRED BY REFUSING TO STAY THIS CASE
UNTIL THE BOARD RULED ON RESPONDENT’S
PENDING MOTION FOR JUDGMENT ON THE PLEADINGS,
AND FURTHER ERRED BY DENYING RESPONDENT’S MOTION**

On April 17, 2013, Associate Chief Administrative Law Judge Gerald M. Etchingham (“ACALJ”) issued an Order referring The Neiman Marcus Group, Inc.’s (“Respondent”) Motion for Judgment on the Pleadings to the Board for a ruling. (GC Ex. 1(y)) Because the Board had not ruled on the Motion before this case transferred to the Division of Judges, Respondent filed a

motion on December 16, 2013 to stay all proceedings before the ALJ until the Board issued a ruling. The ALJ denied Respondent's motion for a stay, and proceeded to issue her Decision after the parties had filed their briefs. In her Decision, the ALJ specifically addressed the Motion for Judgment on the Pleadings, which had been referred to the Board, and denied the Motion.

The arguments set forth in Respondent's Motion for Judgment on the Pleadings (GC Ex. 1(j)) are pivotal to this case. Respondent's Motion addresses the impact of the six-month limitations period in Section 10(b) of the National Labor Relations Act ("NLRA" or the "Act") on the General Counsel's Complaint. Thus, the Motion demonstrates that the General Counsel cannot contest the circumstances under which the Charging Party entered into her arbitration agreement with Respondent, since the Charging Party entered into the arbitration agreement well over six months before she filed her unfair labor practice charges with the Board. Accordingly, the General Counsel is barred from litigating in this case whether Respondent violated the Section 7 rights of the Charging Party by requiring her to enter into the arbitration agreement, with its class action waiver, at the time she was hired. The General Counsel must accept that the agreement was a lawful, binding agreement to arbitrate that was entered into voluntarily by the Charging Party when she made the decision to accept employment with Respondent.

At the time Respondent filed its motion to compel arbitration in the Charging Party's class action lawsuit on August 3, 2011, the Charging Party had been gone from Respondent's employ for 14½ months. Moreover, Respondent's arbitration agreement had been modified by that time as a result of lengthy negotiations with Board officials, including then General Counsel Ronald Meisburg. (GC Ex. 1(cc)) These negotiations were triggered by unfair labor practice proceedings (Case Nos. 20-CA-33510 and 20-CA-33613) initiated by another former employee

named Tayler Bayer, who contested the lawfulness of Respondent’s arbitration agreement, as set forth in detail in Respondent’s Motion to Dismiss Due to Settlement Bar and Estoppel. (GC Ex. 1(cc)) Key issues in the negotiations were the lawfulness of the class action waiver in the agreement, as well as the adequacy and clarity of the agreement’s exclusion of Board charges from arbitration—the very issues involved in the present case. As a result of these negotiations, Respondent modified its arbitration agreement and the charges were dismissed. (GC Ex. 1(cc))

Thus, at the time Respondent filed its motion to compel arbitration on August 3, 2011, Respondent was using a *different* arbitration agreement than the one Charging Party had agreed to during her employment with Respondent. And, this revised agreement had been approved by Region 20 and the General Counsel’s Office. This critical fact is absent from the ALJ’s Decision in this case. Due to its settlement with the Board, Respondent was “maintaining and enforcing”—during the Section 10(b) period in this case—the agreement approved by the General Counsel in 2010, *not* the agreement entered into by the Charging Party in October 2009.

Certainly, Charging Party’s unfair labor practice charge cannot support the General Counsel’s Complaint in this case, since she was not a party to the arbitration agreement that Respondent was using—and allegedly “maintaining”—during the six-month limitations period applicable to Respondent’s unfair labor practice charge, which commenced on August 7, 2011. In this case, the General Counsel is seeking remedies requiring Respondent to modify or stop using an arbitration agreement which Region 20 and the former General Counsel specifically approved, and one which Charging Party did not enter into.

Moreover, as pointed out in Respondent’s Motion for Judgment on the Pleadings, an arbitration agreement is not an employment “rule” but a “contract” that specifically binds the parties to the contract. (GC Ex. 1(j), p. 5) The Board’s decisions involving “rules,” as set forth

in *Lafayette Park Hotel*, 326 NLRB 824 (1998) and *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), have no applicability to “contracts.” A rule can be unilaterally modified by an employer, but not a contract. A contract is binding and enforceable according to its terms. And, because of this, allegations that a contract violates the Section 7 rights of employees must be brought within six months of the date the contract was entered into, not within six months of the date it is “enforced.”

The bottom line is that the ALJ’s Decision completely fails to account for the fact that the arbitration agreement entered into between Charging Party and Respondent in October 2009 had been superseded by a modified agreement approved by Region 20 and the then General Counsel on or about August 24, 2010. The stipulated record in this case contains all the pertinent documents dealing with the changes Respondent made to the arbitration agreement as a result of the settlement of the charges brought by Tayler Bayer. (GC Ex. 1(cc)) This being the case, it is not clear why the ALJ’s Decision fails to recognize and address the fact that the arbitration agreement in effect during the six-month limitations period in this case was not the agreement Charging Party had signed.

The ALJ should have stayed this case pending the Board’s ruling on Respondent’s Motion for Judgment on the Pleadings. Alternatively, the ALJ should have recognized that Charging Party did not sign the modified agreement which was in effect in 2011, and that Respondent was not “maintaining” the old agreement that Charging Party entered into during the Section 10(b) period.¹

¹ Of course, Respondent’s motion to compel arbitration was based on the old agreement that Charging Party entered into, since she terminated before the revised agreement was implemented.

III

BOTH THE ACALJ AND THE ALJ ERRED BY REFUSING TO STAY THIS CASE IN ACCORDANCE WITH SUPREME COURT PRECEDENTS PROTECTING RESPONDENT’S CONSTITUTIONAL RIGHT TO PURSUE LITIGATION IN COURT THAT IS NOT OBJECTIVELY BASELESS

As set forth in detail in Respondent’s Motion for Stay (GC Ex. 1(dd)) based on the U.S. Supreme Court’s decisions in *Bill Johnson’s Restaurants, Inc. v. NLRB*, 103 S.Ct. 2161 (1983) and *BE&K Construction Company v. NLRB*, 122 S.Ct. 2390 (2002), this is a classic case for the application of the stay mandated by the Supreme Court to protect an employer’s First Amendment right to “petition the government” by engaging in litigation that is not “objectively baseless.” In this case, both the ACALJ and the ALJ have infringed on Respondent’s constitutional rights by refusing to follow the Supreme Court’s mandate on the grounds that Respondent’s claims have an “objective that is illegal under federal law.” The ACALJ’s Order Denying Motion to Stay Proceeding (GC Ex. 1(qq)), dated August 30, 2013, stated: “As indicated by the General Counsel, *the theory in this proceeding* is not that the Respondent’s actions were ‘objectively baseless’ and retaliatory, but that Respondent’s actions had an illegal objective under Federal law.” (GC Ex. 1(qq), p.1; emphasis added) In other words, the ACALJ denied Respondent’s motion—not because of any facts or evidence that Respondent’s actions had an illegal objective—but because that was the General Counsel’s *theory*.

The ACALJ’s Order did not discuss the Supreme Court’s recent decisions broadly interpreting the Federal Arbitration Act (“FAA”) as a favored mechanism for dispute resolution. Thus, the FAA “reflects an emphatic federal policy in favor” of arbitration. *KPMG, LLP v. Cocchi*, 132 S.Ct. 23, 25 (2011). Arbitration agreements are to be read liberally to effectuate their purpose, *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Co.*, 103 S.Ct. 927, 941 (1983),

and are to be “rigorously enforced,” *Perry v. Thomas*, 107 S.Ct. 2520, 2526 (1987). The FAA “requires courts to enforce agreements to arbitrate according to their terms.” *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 669 (2012); see also *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011); *Marmet Health Care Ctr. v. Brown*, 132 S.Ct. 1201 (2012).

Moreover, the U.S. Supreme Court’s June 2013 decision in *American Express Co. v. Italian Colors Rest.*, 133 S.Ct. 2304, 2309 (2013)—issued approximately two months before the ACALJ’s Order denying Respondent’s Motion for Stay—held that a class action waiver must be enforced according to its terms in the absence of a “contrary congressional command” in the federal statute at issue. No such command exists in the NLRA. Significantly, the Supreme Court in *American Express* also held that a class action waiver is not invalidated by the so-called “effective vindication” doctrine. *Id.* at 2310.

Clearly, the ACALJ had no sound basis for concluding that Respondent, by filing a motion to compel arbitration, had an “illegal objective” when the Supreme Court had just held that class action waivers in arbitration agreements must be enforced.

Nor did the ACALJ apparently consider that at the time Respondent filed its motion to compel Charging Party to arbitrate her claims, the Board had not yet issued its decision in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012) and the NLRB General Counsel’s Memorandum 10-06 was still in effect.

With respect to the ALJ’s Decision, the ALJ followed suit with the ACALJ: “I find that [the] instant case falls within the exception set forth in *Bill Johnson’s* at footnote 5, which states in relevant part: ‘. . . We are not dealing with a suit that is claimed to beyond the jurisdiction of the state courts because of federal-law preemption, or a suit that has an objective that is illegal under federal law.’” (ALJ Decision, “ALJ Dec.,” 9:27-33) According to the ALJ, “. . .

Respondent's attempt to enforce the MAP in state court by moving to compel arbitration fall[s] within the unlawful objective exception in *Bill Johnson's*." (ALJ Dec., 9:24-10:19) This conclusion obviously cannot be squared with the U.S. Supreme Court's recent decisions in *Concepcion*, *CompuCredit*, *Marmet* and *American Express*.

In sum, neither the ACALJ nor the ALJ came close to articulating a sound reason for their denial of Respondent's First Amendment Rights under *Bill Johnson's* and *BE&K*. The Supreme Court in those cases *mandated* a stay, a fact that clearly appears in the Board's own decision upon remand from the Supreme Court: "Should the Board determine that a reasonable basis for the suit exists, however, then the Board may not enjoin the suit, but must stay its unfair labor practice proceeding until the state court suit has been concluded." *Bill Johnson's Restaurants, Inc.*, 290 NLRB 29, 30 (1988) (emphasis added).

Respondent respectfully submits that the Board should do now what the ACALJ and the ALJ did not do, and comply with the Supreme Court's mandate by staying this case immediately.

IV

THE BOARD SHOULD NOT HAVE DENIED RESPONDENT'S MOTION TO DISMISS THIS CASE DUE TO THE LACK OF A VALID QUORUM

On May 10, 2013, the Board denied Respondent's Motion to Dismiss the Complaint Due to the Board's Lack of a Proper Quorum. (GC Ex. 1(t) [Motion]; GC Ex. 1(bb) [Order]) In this Motion, Respondent contended that the Board lacked a valid quorum because three members of the Board—Sharon Block, Terence F. Flynn and Richard F. Griffin, Jr.—were not validly appointed pursuant to the Recess Appointments Clause of the Constitution (U.S. Const. art. II, § 2, cl. 3). The Board's "Order Denying Motion," dated May 10, 2013, was decided by three members, two of which—Sharon Block and Richard F. Griffin, Jr.—were the subject of

Respondent's Motion alleging they were invalid appointees. On this basis alone, the Board should reconsider its Order and vacate it.

The ALJ, in her Decision, also weighed in on the issue, despite the fact that the Board had already ruled on Respondent's Motion, stating: "This argument derives from the D.C. Circuit's decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), which the Board has rejected *and so must I.*" (ALJ Dec., 9:16-17; emphasis added)

In any case, Respondent relies on the District of Columbia Circuit's *Noel Canning* decision, which is now before the U.S. Supreme Court. It seems clear that if the Supreme Court affirms the Circuit Court's decision on the quorum issue, the present case will have to be dismissed. Additionally, it seems likely that the Board's *D.R. Horton* decision will be overturned, since Member Craig Becker (one of the two Board Members who decided that case) would be an invalid *intrasession* recess appointee, as explained in more detail in Respondent's Motion.

If the Supreme Court upholds the District of Columbia Circuit's *Noel Canning* decision, it also seems likely that Board appointments at a time when the Board did not have a valid quorum (i.e., since the expiration of Member Wilma B. Liebman's term on August 27, 2011 until new Board members were confirmed by the Senate) would be invalid and that their actions would be void *ab initio*. Thus, the District of Columbia Circuit in *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 472-73 (D.C. Cir. 2009) determined that (a) a Board delegation "cannot survive the loss of a quorum on the Board"; (b) "an agent's delegated authority terminates when the powers belonging to the entity that bestowed the authority are suspended"; and (c) "an agent's delegated authority is also deemed to cease upon the resignation or termination of the delegating authority." Respondent, throughout the entire course of this

proceeding, has taken the position that prior to the recent Board appointments confirmed by the Senate, the Board did not have a valid quorum and the appointments of agents and delegates made by the Board at a time when it did not have a valid quorum are void.

V

**THE BOARD SHOULD RECONSIDER ITS RULING
DENYING RESPONDENT'S MOTION TO DISMISS
DUE TO SETTLEMENT BAR AND ESTOPPEL**

The Board issued an Order dated December 20, 2013 denying Respondent's Motion to Dismiss Complaint Due to Settlement Bar and Estoppel. (GC Ex. 1(cc) [Motion]) Except for Member Johnson's footnote 2, no reason was given other than "[t]he Respondent has failed to establish that it is entitled to judgment as a matter of law." (Order Denying Motion, dated December 20, 2013) Nevertheless, Member Johnson's footnote clearly sets forth the critical fact—which is not acknowledged in the ALJ's Decision—that there are two agreements at play in this case: the original agreement and the revised agreement. As noted by Member Johnson: "However, the Respondent's litigation forming the basis for the charge in this case actually involved enforcement of the original, allegedly unlawful arbitration agreement, which did not include the revised agreement's additional language allowing joint legal claims under certain circumstances." (Order Denying Motion, dated December 20, 2013 at fn. 2)

Member Johnson is correct that the original arbitration agreement is the one that Charging Party agreed to and the one that formed the basis for Respondent's motion to compel arbitration. *However, it is the revised agreement, not the original agreement, which was in effect during the limitations period applicable to the present case (i.e., the period beginning August 7, 2011).* The General Counsel's claim is that Respondent maintained and enforced an arbitration agreement during the limitations period, but the only agreement that was "maintained and

enforced” during that period was the 2010 agreement. This is because Respondent had agreed to change the agreement in October 2010 per the Board settlement. But these changes did not apply to Charging Party since she was no longer an employee in October 2010, and she was never covered by the revised agreement. Moreover, the six-month statute of limitations had expired on any charges she might have had with respect to the old agreement which she entered into upon being hired in 2009. To use a term from civil litigation, Charging Party has no *standing* to pursue charges dealing with an arbitration agreement she did not sign and which was implemented after she terminated her employment with Respondent.

As Respondent set forth in its Motion for Judgment on the Pleadings (GC Ex. 1(j)), which was referred to the Board but not decided, there is *no valid charge in this proceeding* to support the General Counsel’s theory since the Charging Party was covered by the old agreement and the General Counsel’s theory that Respondent maintained and enforced an unlawful agreement during the limitations period *necessarily relates only to the 2010 revised agreement being maintained and enforced at that time*. In the absence of a charging party who was covered by the 2010 agreement, the General Counsel is seeking to pursue an impermissible “declaratory relief” action in this proceeding. See *The Carney Hospital and Service Employees International Union, Local 285*, 350 NLRB 627 (2007). As stated in *Carney Hospital*:

Section 10(b) provides that “no complaint shall issue based upon any unfair labor practice occurring more than 6 months prior to the filing of the charge with the Board.” This statutory provision serves “two separate functions.” *Precision Concrete v. NLRB*, 334 F.3d 88, 90 (D.C. Cir. 2003) (quoting *Ross Stores, Inc. v. NLRB*, 235 F.3d 669, 677 (D.C. Cir. 2001) (Randolph, J., concurring)). First, it underscores that the General Counsel and Board lack independent authority to initiate unfair labor practice proceedings in the absence of a charge filed by an outside party. In this respect, Section 10(b) operates as a jurisdictional limitation, under which the Board (through the General Counsel) “may investigate and prosecute conduct only in response to the filing of

a ‘charge.’” 334 F.3d at 90. Second, Section 10(b) functions in part as a statute of limitations by prohibiting the issuance of a complaint based on conduct occurring more than [six] months prior to the filing of a charge. [Fn. w/citation omitted.]

Carney Hospital, 350 NLRB 627 at *7.

Apart from the “standing” and Section 10(b) issues, there is the larger issue of the impact of the settlement Respondent reached with Region 20 and the General Counsel’s office in 2010. As is very clear from General Counsel’s Exhibit 1(cc)—which consists of documents produced in response to a Freedom of Information Act request—the arbitration agreement which the General Counsel is now attacking is the same agreement that resulted from the settlement of Case No. 20-CA-33510. In this regard, the pertinent documents in Exhibit 1(cc) are the following:

Case No. 20-CA-33510

- Exhibit 18, which is the unilateral settlement agreement approved by the Regional Director of Region 20 on May 21, 2010.
- Exhibit 19 is the charging party’s appeal from the settlement.
- Exhibit 20 is the charging party’s letter brief in support of the appeal.
- Exhibit 21 is the General Counsel’s denial of the appeal.
- Exhibit 22 is the Notice to Employees posted by Respondent in all stores.
- Exhibit 23 is Region 20’s announcement of intent to close case.
- Exhibit 24 is the revised arbitration agreement per the settlement.
- Exhibit 25 is the charging party’s objection to the cover sheet of the revised agreement.
- Exhibit 26 is the Respondent’s revised cover sheet.
- Exhibit 27 is Region 20’s letter, dated October 25, 2010, closing the charging party’s case.

It is well-established that a settlement agreement may bar litigation of post-settlement conduct grounded in pre-settlement conduct that would itself be settlement-barred from litigation. *Ratliff Trucking Corp.*, 310 NLRB 1224 (1993). In that case, the Board held that a settlement agreement barred the General Counsel from examining language in a union-security clause which had been the subject of a settlement agreement. The language that the General Counsel alleged as unlawful even appeared in the same sentence as other language modified by the settlement agreement. The Board determined the respondents could reasonably believe the settlement resolved the legality of the relevant contract clause. According to the Board, in order for the issue of the clause to be relitigated and be called a “new” or “other” case, the General Counsel had to show “a *specific* reservation of the right to proceed on the ‘union security clause’s unaltered provisions.’” *Id.* Thus, the unfair labor practices alleged did not constitute a “new” or “other” case or involve different pre-settlement events, and the settlement barred litigation of post-settlement language which was grounded in the pre-settlement language.

Applying that principle here, the lawfulness of the revised arbitration agreement cannot be litigated because this is not a new or different case. The General Counsel is attempting to litigate the same issues that were already litigated and resolved via the settlement agreement. In *Leeward Nursing Home*, 278 NLRB 1058, 1083 (1986), the administrative law judge went even further, stating, with Board approval, that a settlement agreement may have “a certain ‘prospective’ reach in that it will bar efforts to litigate postsettlement violations which are themselves inescapably grounded in presettlement actions which would be barred by a settlement from litigation.” Given that even post-settlement violations are barred from litigation, the unfair practice charges in this case are settlement-barred, and the General Counsel’s Complaint should be dismissed.

Moreover, the General Counsel is foreclosed by general principles of estoppel from asserting that the revised arbitration agreement and its class action waiver are unlawful. The settlement negotiated in Case No. 20-CA-33510 involved not only officials of Region 20, but the then General Counsel and his staff. Clearly, the General Counsel pursuing this case is estopped from contending the revised arbitration agreement is unlawful when the prior General Counsel obviously had concluded it was lawful. Respondent properly relied on this determination when it revised its original arbitration agreement in the respects required by the settlement.

VI

THE ALJ ERRED IN REFUSING TO FOLLOW SUPREME COURT PRECEDENTS INTERPRETING THE FAA AND MANDATING THAT ARBITRATION AGREEMENTS BE ENFORCED ACCORDING TO THEIR TERMS

A. The Validity of Respondent’s Arbitration Agreement and the Class Action Waiver Contained in the Agreement Must Be Determined Under the FAA and Not Under *D.R. Horton* or the NLRA

Respondent’s Third Affirmative Defense in its “Amended Answer to Complaint and Affirmative Defenses,” filed on November 7, 2013, alleges, in part:

The Complaint is barred because it is based on the Board’s decision in *D.R. Horton, Inc. and Michael Cuda*, [357] NLRB No. 184 (2012), which is contrary to recent decisions of the United States Supreme Court holding that arbitration agreements must be enforced according to their terms, including *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 [2011]; *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012), and *Marmet Health Care Ctr. v. Brown*, 132 S.Ct. 1201 (2012).

(GC Ex. 1 (tt), pp. 7-8)² To these authorities could be added the Supreme Court’s most recent decision interpreting the FAA and upholding class action waivers in *American Express*. In this

² See also Respondent’s Fourth and Fifth Affirmative Defenses, which allege that the Board cannot act in derogation of the FAA and does not have authority to invalidate individual arbitration agreements. (GC Ex. 1(tt), p. 8)

decision, issued after the Board's decision in *D.R. Horton*, the Supreme Court held that a class action waiver must be enforced according to its terms in the absence of a "contrary congressional command" in the federal statute at issue. *American Express*, 133 S.Ct. at 2309; see also *CompuCredit*, 132 S.Ct. at 669 (also issued after the Board's decision in *D.R. Horton*). The Supreme Court also held in *American Express* that a class action waiver is not invalidated by the so-called "effective vindication" doctrine, which originated as dictum in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 105 S.Ct. 3346 (1985). *American Express*, 133 S.Ct. at 2310.

Under the U.S. Supreme Court's decisions in *Concepcion*, *CompuCredit*, *Marmet* and *American Express*, it is completely clear that the validity of Respondent's arbitration agreement and the class action waiver contained in the agreement must be determined under the FAA and not under *D.R. Horton* or the NLRA. To demonstrate the enforceability of Respondent's arbitration agreement under the FAA and the inapplicability of the Board's reasoning in *D.R. Horton* insofar as it concerns employment arbitration agreements containing class action waivers, Respondent sets forth below a distillation of the critical principles gleaned from Supreme Court precedents construing the broad reach and preemptive effect of the FAA.

- The FAA reflects an "emphatic policy in favor" of arbitration. Enacted in 1925, the FAA places arbitration agreements on the same footing as other contracts and "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law for the revocation of any contract." 9 U.S.C. § 2. The FAA "reflects an emphatic federal policy in favor" of arbitration. *KPMG, LLP*, 132 S.Ct. at 25 (citations omitted). As the Supreme Court has emphasized, arbitration agreements are to be read liberally to effectuate their purpose, *Moses H. Cone*

Mem'l Hosp. v. Mercury Constr. Co., 103 S.Ct. 927, 941 (1983), and are to be “rigorously enforced,” *Perry v. Thomas*, 107 S.Ct. 2520, 2526 (1987).

- Arbitration agreements, including those containing class action waivers, are enforceable in accordance with their terms. “The FAA reflects the fundamental principle that arbitration is a matter of contract.” *Rent-A-Center, West, Inc. v. Jackson*, 130 S.Ct. 2772, 2776 (2010). As such, courts are first and foremost charged with the responsibility to enforce arbitration agreements in accordance with their terms so as to give effect to the bargain of the parties. See, e.g., *CompuCredit*, 132 S.Ct. at 669 (The FAA “requires courts to enforce agreements to arbitrate according to their terms”); *Marmet*, 132 S.Ct. at 1203 (citation omitted) (The FAA “requires courts to enforce the bargain of the parties to arbitrate”). As arbitration is a matter of contract, the parties to an arbitration agreement can agree to waive class arbitration. *Stolt-Nielsen S. A. v. AnimalFeeds Int’l Corp.*, 130 S.Ct. 1758, 1774 (2010) (The parties to an arbitration “may agree to limit the issues they choose to arbitrate,” “may agree on rules under which any arbitration will proceed,” and “may specify *with whom* they choose to arbitrate their disputes”). Indeed, as the Supreme Court recently observed, a state law requiring parties, in contravention of their arbitration agreement, to “shift from bilateral arbitration to class-action arbitration” results in a “fundamental” change to their bargain and is “inconsistent with the FAA.” *Concepcion*, 131 S.Ct. at 1748-1751.
- Arbitration agreements involving federal statutory rights, including those containing class action waivers, are enforceable “unless Congress itself has

evinced an intention,” when enacting the statute, to “override” the FAA mandate by a clear “contrary congressional command.” *Mitsubishi*, 105 S.Ct. at 3354-3355; *American Express*, 133 S.Ct. at 2309. The Supreme Court has consistently held that parties may agree to arbitrate claims arising under federal statutes. See, e.g., *Mitsubishi*, *supra*, 105 S.Ct. 3346. Provided the arbitral forum affords the parties the opportunity to vindicate the statutory rights forming the basis of their claims, the parties will be held to their bargain to arbitrate. *CompuCredit*, 132 S.Ct. at 671 (“So long as the *guarantee* [of a federal statute’s civil liability provision]—*the guarantee of the legal power to impose liability*—is preserved,” the parties remain free to enter into an arbitration agreement requiring the arbitration of their statutory rights). However, if, when enacting a federal statute, “Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue,” then such statutory rights are not amenable to arbitration and the FAA’s mandate to enforce arbitration agreements according to their terms is thereby overridden by a contrary congressional command. *Mitsubishi*, 105 S.Ct. at 3354-3355; *American Express*, 133 S.Ct. at 2309. “If Congress did intend to limit or prohibit [the] waiver of a judicial forum for a particular claim, such an intent ‘will be deducible from [the statute’s] text or legislative history’” or “from an inherent conflict between arbitration and the statute’s underlying purpose.” *Shearson/American Express, Inc. v. McMahon*, 107 S.Ct. 2332, 2337 (1987), quoting *Mitsubishi*, 105 S.Ct. at 3356-3359. Nevertheless, any expression of congressional intent in this regard must be clear and unequivocal. See, e.g., *CompuCredit*, 132 S.Ct. at 597 (If a statute “is silent

on whether claims under [it] can proceed in an arbitr[al] forum, the FAA requires the arbitration agreement to be enforced according to its terms”).

- Employment arbitration agreements fall within the ambit of the FAA and are enforceable on the same terms as other arbitration agreements. The FAA extends to employment arbitration agreements, including those containing class action waivers. *Circuit City Stores, Inc. v. Adams*, 121 S.Ct. 1302, 1311 (2001). As the U.S. Supreme Court affirmed in *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S.Ct. 1647, 1655 (1991), where it enforced an arbitration agreement involving the arbitration of a claim arising under the Age Discrimination in Employment Act, the FAA requires such a result even if there may be “unequal bargaining power between employers and employees” and even if “the arbitration could not go forward as a class action.” As to this latter point, the Supreme Court recognized that a class action, as set forth in the Federal Rules of Civil Procedure, is simply a procedural device—a procedural device which, as the Rules Enabling Act, 28 U.S.C. § 2072(b), makes clear, cannot “abridge, enlarge or modify any substantive right”—and can be, like the choice of a judicial forum, waived.

As these principles attest, the FAA recognizes the rights of parties, be they employers or employees, to enter into arbitration agreements—including the right to fashion the procedures under which an arbitration is to proceed—and mandates the enforcement of all such agreements. Indeed, there is nothing in the NLRA itself or its legislative history that even suggests Congress sought to “override” the FAA’s mandate to preclude an employee from waiving his or her procedural right to file a class action when agreeing to arbitrate employment-related claims. Just as a union acting on behalf of its members can voluntarily agree to waive a judicial forum and to

require its members to arbitrate their individual employment claims, there is no reason why Respondent's employees cannot voluntarily do so as well on their own behalf. *14 Penn Plaza, LLC v. Pyett*, 129 S.Ct. 1456, 1465 (2009) (“Nothing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative”).

B. The Fifth Circuit Has Set Aside the Board's *D.R. Horton* Decision and Order

On December 3, 2013, the Fifth Circuit Court of Appeals granted the petition for review filed by Petitioner/Cross-Respondent D.R. Horton, Incorporated in the *D.R. Horton* case and set aside the Board's decision invalidating the company's arbitration agreement. *D.R. Horton, Incorporated v. NLRB*, 737 F.3d 344 (5th Cir. 2013).³ The court held that “the Board's decision did not give proper weight to the [FAA].” *D.R. Horton, Incorporated v. NLRB*, 737 F.3d at 348. In a detailed opinion, the court examined the Board's *D.R. Horton* decision in light of applicable Supreme Court precedent and rejected all of the Board's arguments. First, the court held that the Board could not rely on the FAA's “saving clause” to justify its invalidation of arbitration agreements: “A detailed analysis of *Concepcion* leads to the conclusion that the Board's rule does not fit within the FAA's saving clause.” *Id.* at 359. The court also determined that the Board's prohibition of class action waivers disfavors arbitration: “While the Board's interpretation is facially neutral – requiring only that employees have access to collective procedures in an arbitral or judicial forum – the effect of this interpretation is to disfavor arbitration.” *Id.* at 360. Next, the court concluded that the NLRA does not contain a congressional command to override the FAA. Relying on *Gilmer*, the court stated: “When considering whether a contrary congressional command is present, courts must remember ‘that

³ The Board has petitioned for a rehearing or a rehearing *en banc*. *D.R. Horton, Incorporated v. NLRB*, No. 12-60031 (5th Cir. Mar. 13, 2014).

questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.” *Id.* (citations omitted). The court found: “Thus, there is no basis on which to find that the text of the NLRA supports a congressional command to override the FAA.” *Id.* Moreover, the court found that neither the legislative history of the NLRA nor any policy consideration would permit the NLRA to override the FAA. *Id.* at 360-361. The court also noted that it was of some importance that “the NLRA was enacted and reenacted prior to the advent in 1966 of modern class action practice.” *Id.* at 362. Thus, the court reached the conclusion that “[t]he NLRA should not be understood to contain a congressional command overriding application of the FAA,” noting that “[e]very one of our sister circuits to consider the issue has either suggested or expressly stated that they would not defer to the NLRB’s rationale, and held arbitration agreements containing class action waivers enforceable.” *Id.*

One such “sister circuit” is the Eighth Circuit, which came to the same conclusion regarding the invalidity of *D.R. Horton* in *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir. 2013). See also *Richards v. Ernst & Young, LLP*, No. 11-17530, 2013 U.S.App.LEXIS 24562 (9th Cir., Dec. 9, 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297-298, n. 8 (2d Cir. 2013).

C. Given the U.S. Supreme Court Decisions Interpreting the FAA, and the Appellate Court Decisions Repudiating the Board’s Decision in *D.R. Horton*, There Are No Credible Grounds for Finding Merit in the General Counsel’s Complaint

Given the U.S. Supreme Court’s recent decisions in *Concepcion*, *CompuCredit*, *Marmet* and *American Express*, there is no longer room to argue that *D.R. Horton*’s holding that arbitration agreements with class or collective action waivers violate Sections 7 and 8(a)(1) of the NLRA is good law. This is especially so in light of *American Express*, which held that arbitration agreements with class action waivers are enforceable under the FAA notwithstanding

any policy arguments to the contrary contained in other state and federal statutes. *American Express*, 133 S.Ct. at 2337. Only a “contrary congressional command” in a particular statute can override the FAA’s mandate that arbitration agreements be enforced according to their terms. *Id.*

Instructive in this regard is the November 8, 2013 decision by Administrative Law Judge Bruce D. Rosenstein in *Chesapeake Energy Corporation*, which recommended dismissal of the Section 8(a)(1) allegations in the General Counsel’s complaint in that case based on the Board’s *D.R. Horton* decision. The respondents in that case maintained a dispute resolution policy which included an arbitration agreement with a class or collective action waiver. After reviewing *American Express* and other Supreme Court decisions interpreting the FAA, Administrative Law Judge Rosenstein, reached the following conclusions:

The Supreme Court noted in the *American Express* decision that no contrary congressional command required us to reject the waiver of class arbitration here and the Sherman and Clayton Acts make no mention of class actions. In fact, they were enacted decades before the advent of *Federal Rule of Civil Procedure 23*, which was “designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.” As it concerns the subject case, the principles expressed by the Supreme Court equally apply to the Board since the Act does not mention class actions, and was enacted long before the advent of *Rule 23*.

For all of the above reasons, and principally relying on the decision of the Supreme Court in *American Express* discussed above, I find in agreement with the Respondents that the Board’s position that class and collective action waivers in arbitration agreements violate *Section 8(a)(1)* of the Act cannot be sustained. Accordingly, I recommend that paragraph 4(a) of the complaint be dismissed.

Chesapeake Energy Corporation, No. 14-CA-100530, 2013 NLRB LEXIS 693 (Nov. 8, 2013) at *23-24.

While Administrative Law Judge Rosenstein’s decision is not the decision of the Board (and while *Chesapeake Energy Corporation* currently is pending before the Board on exceptions and cross-exceptions filed by the parties), the decision is nevertheless persuasive on the point that the FAA preempts the Board’s decision in *D.R. Horton*. Moreover, as noted by the Fifth Circuit in its decision setting aside *D.R. Horton*, “no court decision prior to the Board’s ruling under review today had held that the Section 7 right to engage in ‘concerted activities for the purpose of . . . other mutual aid or protection’ prohibited class action waivers in arbitration agreements.” *D.R. Horton, Incorporated v. NLRB*, 737 F.3d at 356 (citation omitted).

VII

THE PREEMPTIVE EFFECT OF THE FAA INVALIDATES THE REMEDIES SOUGHT BY THE GENERAL COUNSEL

The General Counsel’s Complaint in this case seeks broad remedies, including ordering Respondent to: (a) “rescind the unlawful provisions of the Mandatory Arbitration Program, and notify all employees subject to the Program of the rescission”; (b) “cease and desist from requiring employees to be bound to the unlawful provisions of its Mandatory Arbitration Program”; (c) “cease and desist from attempting to enforce those provisions of its Mandatory Arbitration Program prohibiting collective and class actions”; (d) cease and desist from maintaining and/or attempting to enforce a mandatory arbitration agreement that employees reasonably could believe bars or restricts their right to file charges with the National Labor Relations Board”; and (e) “reimburse employees for any litigation expenses expended since the commencement of the Section 10(b) period directly related to opposing Respondent’s unlawful motion to compel individual arbitration or any other legal action taken to enforce its Mandatory Arbitration Program.” (GC Ex. 1(g), pp. 6-7) Respondent has raised affirmative defenses to the

General Counsel’s proposed remedial scheme in its Tenth, Eleventh, Twelfth and Thirteenth Affirmative Defenses. (See GC Ex. 1(tt), p. 9)

As discussed above, the U.S. Supreme Court’s recent decisions demonstrate that the FAA has a very broad preemptive effect, and that all state and federal laws and public policies interfering with the enforcement of arbitration agreements according to their terms must give way. Thus, in *Marmet*, the Supreme Court vacated a decision by the Supreme Court of Appeals of West Virginia which held that West Virginia’s public policy against arbitration of personal injury or wrongful death claims against nursing homes was not preempted by the FAA. The Supreme Court stressed that West Virginia’s policy was “a categorical rule prohibiting arbitration of a particular type of claim, and that rule is contrary to the terms and coverage of the FAA.” *Marmet*, 132 S.Ct. at 1204. In *Concepcion*, the Supreme Court found that a rule that stands as an “obstacle” to the accomplishment of Congress’ objectives under the FAA cannot stand. *Concepcion*, 131 S. Ct. at 1753.

Here, the relief sought by the General Counsel clearly creates obstacles to the enforcement of arbitration agreements according to their terms and conflicts with the FAA. The requested relief would require Respondent to stop using and enforcing its arbitration agreement, and would penalize Respondent for enforcing the agreement by requiring Respondent to reimburse litigation expenses incurred by employees who opposed enforcement of the agreement.⁴ Such relief is completely contrary to the Supreme Court’s mandate that arbitration agreements be enforced according to their terms.

⁴ Requiring Respondent to reimburse litigation expenses would also interfere with the authority of the Superior Court in the pending civil case. Whether litigation expenses should be reimbursed is a decision for the Superior Court to be made at an appropriate point in the case, not a decision to be made by a federal agency which is not a party to the litigation.

Clearly, the remedies requested by the General Counsel would discourage the use of arbitration, contrary to federal policy under the FAA.

VIII

EVEN IF THE BOARD'S *D.R. HORTON* DECISION IS STILL GOOD LAW, RESPONDENT DID NOT VIOLATE CHARGING PARTY'S SECTION 7 RIGHTS AS ALLEGED IN THE COMPLAINT

A. This Case Falls Within the "Voluntariness" Carve-Out in Footnote 28 of the *D.R. Horton* Decision

Respondent's Fourteenth Affirmative Defense alleges:

The Complaint is barred because Charging Party, by accepting employment with Respondent after having been fully informed regarding Respondent's arbitration agreement, voluntarily agreed to arbitrate her employment disputes with Respondent.

(GC Ex. 1(tt), p. 10) Here, there is no dispute that Respondent's arbitration agreement was already in place when Charging Party applied for employment on or about October 15, 2009.

(Jt Ex. 4, at Compendium of Evidence, Ex. 1, Kern Decl., ¶ 9, Ex. D & Ex. 2, Lee Decl., ¶ 14, Ex. C) There is also no dispute that at the time Charging Party filled out her application for employment, she was specifically informed that if she was offered and accepted employment with Respondent, she would be bound by the arbitration agreement. Thus, the application stated:

I understand that NMG has implemented a mandatory arbitration plan whereby arbitration is the exclusive means of resolving any and all disputes or claims employees or the Company may have against each other in lieu of a judge or jury trial. I understand that if I accept or continue employment with NMG, I will automatically be deemed to have (1) accepted the terms of the mandatory Arbitration Agreement, (2) agreed to arbitrate all such disputes, and (3) waived all rights to a judge or jury trial for all such disputes.

(GC Ex. 1(g), at Appendix A; Jt Ex. 4 at Compendium of Evidence, Ex. 1, Kern Decl., ¶ 9, Ex. D, & Ex. 2, Lee Decl., ¶ 14, Ex. C, p. 5)

Charging Party's situation is unlike that of the charging party in the *D.R. Horton* decision who was already an employee when the company rolled out its arbitration program. Here, Charging Party made a *choice* to accept employment with Respondent having full knowledge she would be agreeing to settle any disputes with Respondent by arbitration and not in court. Clearly, any applicant has to make a number of choices at the time he or she applies for a job: a choice to accept or reject the position offered, the rate of pay, the hours, the vacation program, the benefits package, and so forth. A dispute resolution procedure with an arbitration agreement is just one more choice. The applicant does not have to accept the job if he or she does not want to be covered by the arbitration agreement. The choice is up to him or her.

Here, Charging Party assented to arbitration by electing to accept an offer of employment with Respondent. Neither Charging Party nor Respondent was required to sign the arbitration agreement for it to be valid and enforceable. Under the FAA, arbitration agreements need only be in writing and do not have to be signed by either party. *Seawright v. Am. Gen. Fin., Inc.*, 507 F.3d 967, 978 (6th Cir. 2007); *Caley v. Gulfstream Aero Corp.*, 428 F.3d 1359, 1368-1370 (11th Cir. 2005); *Tinder v. Pinkerton Sec.*, 305 F.3d 728, 736 (7th Cir. 2002); *Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 846 (2d Cir. 1987); *McAllister Bros., Inc. v. A&S Transp. Co.*, 621 F.2d 519, 523-524 (2d Cir. 1980); *Valero Refining, Inc. v. M/T Lauberhorn*, 813 F.2d 60, 63-64 (5th Cir. 1987); *Medical Dev. Corp. v. Industrial Molding Corp.*, 479 F.2d 345, 348 (10th Cir. 1973).

Footnote 28 to the *D.R. Horton* decision states as follows:

Moreover, we do not reach the more difficult questions of . . .
(2) whether, if arbitration is a mutually beneficial means of dispute resolution, an employer can enter into an agreement that is not a condition of employment with an individual employee to resolve

either a particular dispute, or all potential employment disputes through a non-class arbitration rather than litigation in court.

D.R. Horton, 357 NLRB at p. 13, n. 28. This language clearly limits the reach of the Board's decision to situations where the employee has no meaningful choice to accept or reject an arbitration agreement, such as when an arbitration agreement is implemented for existing employees. This was not the case with respect to Charging Party. She could have declined to accept employment with Respondent and pursued opportunities with employers who did not have arbitration agreements.

B. The General Counsel Cannot Establish That Charging Party Was Engaged in “Protected Concerted Activity”

1. The Standards for Determining Protected Concerted Activity

The basic principles defining “protected concerted activity” emerge from the Board's decisions in *Meyers Industries, Inc. and Prill*, 268 NLRB 493 (1984) (“*Meyers I*”) and *Meyers Industries, Inc. and Prill*, 281 NLRB 882 (1986) (“*Meyers II*”). Thus, in *Meyers I*, the Board defined concerted activity under Section 7 of the Act as an activity that is “engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.” *Meyers I*, 268 NLRB at 497. This definition was refined in *Meyers II* to make clear that concerted activity occurs when “individual employees seek to initiate or to induce or to prepare for group action.” *Meyers II*, 281 NLRB at 887. Importantly, in *Meyers I*, the Board overturned the doctrine of “constructive concerted activity,” which had been articulated in the Board's earlier decision in *Alleluia Cushion Co.*, 221 NLRB 999 (1975). This doctrine allowed concerted activity to be established by a presumption that other employees supported an individual employee's complaint. Since the decisions in *Meyers I* and *Meyers II*, it has been clear that concerted activity cannot be presumed, and must be established by *evidence* of group

activity, or an individual seeking to initiate or invoke group activity, or an individual raising a group, rather than an individual, complaint.

The application of these principles to class action litigation was carefully analyzed by then General Counsel Ronald Meisburg in Memorandum GC 10-06. While the Board in *D.R. Horton* rejected the “reasoning in GC Memo 10-06,” it did not purport to overrule the well-established principles defining “protected concerted activity” set forth in *Meyers I* and *Meyers II*, nor did it purport to overrule *Meyers I*’s rejection of the doctrine of “constructive concerted activity.” As pointed out by the former General Counsel:

. . . an individual’s pursuing class action litigation for purely personal reasons is not protected by Section 7 merely because of the incidental involvement of other employees as a result of normal class action procedures. Similarly, an individual employee’s agreement not to utilize class action procedures in pursuit of purely personal individual claims does not involve a waiver of any Section 7 right. To conclude otherwise would be a return to the concept of “constructive concerted activity” that the Board rejected in *Meyers Industries (Meyers I)*, 268 NLRB 493, 495-496 (1984), remanded 755 F.2d 941, 957 (D.C. Cir. 1985), reaffirmed, *Meyers Industries (Meyers II)*, 281 NLRB 882, n.11 (1986), affd. 835 F.2d 1481 (D.C. Cir. 1987) (overruling the holding in *Alleluia Cushion Co.*, 221 NLRB 999, 1000 (1975) that a single employee’s seeking to enforce statutory provisions “designed for the benefit of all employees” is concerted activity “in the absence of any evidence that fellow employees disavow such representation”).

(Jt Ex. 6, at Supplemental Request for Judicial Notice, Ex. A at p. 6)

D.R. Horton notwithstanding, it is clear that the General Counsel in this case has the burden of establishing the twin factors necessary to prove protected concerted activity, that is (a) group activity, which (b) is engaged in for mutual aid or protection. The General Counsel cannot simply presume that because Charging Party filed a putative class action, she was engaged in *protected concerted activity* within the meaning of *Meyers I* and *Meyers II*.

2. There Is No Evidence That Charging Party Engaged in Protected Concerted Activity by Filing a Putative Class Action

As stated in *Meyers II*, “the question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence.” *Meyers II*, 281 NLRB at 886. Here, there is simply no evidence of concerted activity. While Charging Party filed a putative class action, she had no co-plaintiff, and there is no evidence that anyone—other than plaintiff and her counsel—was involved in the initiation or prosecution of the case. Indeed, the mere fact that Charging Party filed a putative class action, which if certified would result in a class of present and former employees, does not result in a presumption of concerted activity. See *id.* at 887-889; *Krispy Kreme Doughnut Corp. v. NLRB*, 635 F.2d 304, 309 (4th Cir. 1980).

Two other factors suggest that Charging Party was not engaged in protected concerted activity when she filed her lawsuit. First, Charging Party was no longer an employee of Respondent, having been terminated approximately seven months before she filed suit. Second, it is hard to see how Charging Party’s action in filing a putative class action was for the purpose of “mutual aid or protection,” given that she no longer had any stake in the working conditions of employees at Respondent’s Beverly Hills retail store.

IX

**THE ALJ ERRED BY FINDING THAT RESPONDENT’S
ARBITRATION AGREEMENT WOULD REASONABLY BE
INTERPRETED AS PREVENTING EMPLOYEES FROM
FILING CHARGES WITH THE BOARD**

The General Counsel’s Complaint does not allege that Respondent violated the Act by maintaining an arbitration agreement that would reasonably be interpreted as preventing employees from filing charges with the Board. It does, however, seek as a remedy that “Respondent cease and desist from maintaining and/or attempting to enforce a mandatory

arbitration agreement that employees reasonably could believe bars or restricts their right to file charges with the Board.” (GC Ex. 1(g), p. 6) The ALJ, however, excused the absence of any allegation in the Complaint and determined that the remedy “put the Respondent on sufficient notice.” (ALJ Dec., 12:5) Then, the ALJ proceeded to conclude that the agreement “would cause employees to reasonably believe that they would need to arbitrate employment-related claims covered by the section rather than file charge[s] with the Board.” (ALJ Dec., 13:21-23)

Once again, a problem is created by the ALJ’s failure to distinguish between the initial version of Respondent’s arbitration agreement and the revised version which resulted from protracted negotiations between Respondent and the General Counsel’s Office. These negotiations resulted in Respondent revising its agreement and various documents explaining the agreement, and notifying the employees in various ways that the agreement did not restrict their right to file charges with the Board. In this regard, as noted above, the revised agreement was in effect during the limitations period in this case (commencing August 7, 2011). The old agreement, which Charging Party had entered into, was superseded by the revised agreement upon settlement of the Tayler Bayer unfair labor practice charges in 2010.

The pertinent documents are all part of the stipulated record in the case. They can be found at General Counsel’s Exhibit 1(cc), which is Respondent’s Motion to Dismiss Due to Settlement Bar and Estoppel. Attached to the Motion are 32 separate exhibits, numbered Exhibit 1 through Exhibit 32. These exhibits document the settlement of two unfair labor practice charges filed by Tayler Bayer. One of these unfair labor practice charges dealt with the issue of the alleged inadequacy of Respondent’s explanatory materials about the arbitration

agreement to make clear to employees that they were not foreclosed from filing charges with the Board. The key documents are the following:

Case No. 20-CA-33613

- Exhibit 28 is Charging Party's charge from 2007 alleging Respondent's materials about the arbitration agreement do not make clear that employees are not restricted from filing charges with the Board.
- Exhibit 29 is Respondent's response to the 2007 charge.
- Exhibit 30 is Respondent's agreement to give all employees a special Notice making clear employees can file charges with the Board. This notice was put in employees' paycheck envelopes, posted in places where notices to employees are customarily posted, and placed on the Intranet. Respondent also agreed to amend its Frequently Asked Questions to make clear employees can file charges with the Board.
- Exhibit 31 is Region 20's conditional approval of the withdrawal of the charge.
- Exhibit 32 is a collection of the various amended documents to ensure employees were aware of their right to file charges with the Board.

It is apparent from the ALJ's Decision that she concluded Respondent's arbitration agreement and explanatory materials violated the Act by referring to the old agreement, not the revised agreement (see, e.g., ALJ Dec., p. 3, which reproduces the cover page from the old agreement). Moreover, it seems clear that the ALJ did not even consider any of the changes that were made to Respondent's explanatory materials as a result of Case No. 20-CA-33613. Indeed, that case and the changes to the agreement are not even mentioned in the ALJ's Decision.

As a consequence, the ALJ's Decision is based on the wrong facts and conflicts with the resolution of Case No. 20-CA-33613.

In this regard, it is also Respondent's position that the FAA does not permit the Board to dictate the contents or language of an arbitration agreement, or materials explaining that agreement. This is because, under the FAA, arbitration agreements must be enforced according

to their terms, a mandate which does not permit agencies such as the Board to regulate the contents of the agreements, unless the statute (here, the NLRA) expressly permits the agency to do so. Just as the Board cannot insist that class action waivers be removed from arbitration agreements (see *American Express*), it cannot insist that language about employee rights to file Board charges be added to arbitration agreements. If every federal and state agency insisted that language about employee rights to pursue charges be added to arbitration agreements, the agreements would become completely unwieldy. Arbitration agreements are to be enforced according to *their* terms, not terms set by government agencies. See *Concepcion*, 131 S.Ct. at 1748.

X

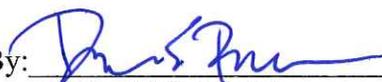
CONCLUSION

The Complaint should be dismissed in its entirety.

Respectfully submitted,

Dated: March 19, 2014

JACKSON LEWIS P.C.

By: 
David S. Bradshaw

801 K Street, Suite 2300
Sacramento, CA 95814
Telephone: (916) 341-0404
Facsimile: (916) 341-0141
E-mail: bradshawd@jackonlewis.com

Attorneys for Respondent
THE NEIMAN MARCUS GROUP, INC.

CERTIFICATE OF SERVICE

I hereby certify:

I am employed in the County of Sacramento, State of California. I am over the age of eighteen years and not a party to the within action; my business address is Jackson Lewis LLP, 801 K Street, Suite 2300, Sacramento, California 95814.

On March 19, 2014, I served the within:

**BRIEF IN SUPPORT OF RESPONDENT THE NEIMAN MARCUS GROUP,
INC.'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW
JUDGE AND TO THE RULINGS ON RESPONDENT'S PRE-TRIAL MOTIONS**

on the parties and interested persons in said proceeding:

X	by forwarding a true and correct copy thereof electronically from e-mail address baumg@jacksonlewis.com between approximately 1:15 p.m. and 1:45 p.m. to the persons at the e-mail addresses set forth below.
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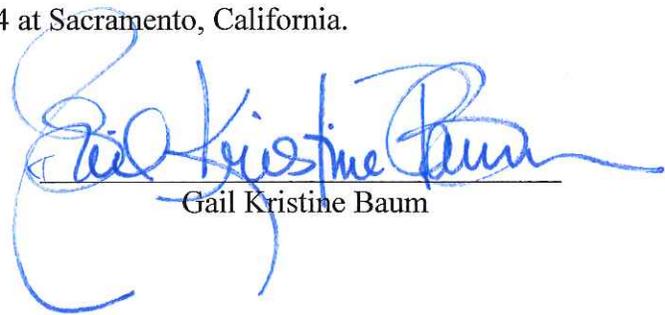
Raul Perez Glenn A. Danas Alexandria Witte Capstone Law APC 1840 Century Park East, Suite 450 Los Angeles, CA 90067 Sheila Monjazez c/o Raul Perez Glenn A. Danas Alexandria Witte Capstone Law APC 1840 Century Park East, Suite 450 Los Angeles, CA 90067 Michelle Scannell National Labor Relations Board Region 31 11150 West Olympic Boulevard Suite 700 Los Angeles, CA 90064	Attorneys for Charging Party Sheila Monjazez Telephone: (310) 556-4811 Facsimile: (310) 943-0396 E-mail: raul.perez@capstonelawyers.com E-mail: glenn.danas@capstonelawyers.com E-mail: alexandria.witte@capstonelawyers.com Charging Party Telephone: (310) 556-4811 Facsimile: (310) 943-0396 E-mail: raul.perez@capstonelawyers.com E-mail: glenn.danas@capstonelawyers.com E-mail: alexandria.witte@capstonelawyers.com Counsel for the General Counsel Telephone: (310) 235-7351 Facsimile: (310) 235-7420 E-mail: michelle.scannell@nlrb.gov
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Mori Pam Rubin Regional Director National Labor Relations Board Region 31 11150 West Olympic Boulevard Suite 700 Los Angeles, CA 90064	Regional Director Telephone: (310) 235-7351 Facsimile: (310) 235-7420 <i>(electronically served via NLRB website at time of filing)</i>
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Additionally, on March 19, 2014, I will electronically file the above-mentioned document with the Office of the Executive Secretary.

I declare under penalty of perjury pursuant to the laws of the United States that the foregoing is true and correct.

Executed on this 19th day of March, 2014 at Sacramento, California.



Gail Kristine Baum