JONES DAY

222 EAST 41ST STREET • NEW YORK, NEW YORK 10017-6702
TELEPHONE: 212-326-3939 • FACSIMILE: 212-755-7306

Direct Number: (212) 326-3488
sestreicher@jonesday.com

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VIA FEDERAL EXPRESS and FACSIMILE

Yvonne Dixon
Director, Office of Appeals
National Labor Relations Board
1099 14th Street, N.W.
Washington, DC 20570

Re: Neiman Marcus
Case No. 20-CA-33510

Dear Ms. Dixon:

We represent the Chamber of Commerce of the United States of America ("the Chamber"). The Chamber is the largest federation of business companies and associations in the world, with an underlying membership of more than three million organizations of every size, in every sector and region. An important function of the Chamber is to represent the interests of its members in court and before administrative agencies on labor and employment law issues of national concern to the business community.

We are in receipt of your letter dated May 18, 2009 regarding the pending appeal in the above matter, and thank you for the opportunity to present the Chamber's separate views as *amicus curiae* in this proceeding. As stated in our letter of January 23, 2008 to Barry J. Kearney and in our meetings with the General Counsel and his staff, the Chamber believes that the issuance of a complaint in this case not only would be unprecedented but would exceed the limits of the agency's authority under the National Labor Relations Act ("NLRA" or "the Act"), including the Act's protection in § 7 of the right of employees to engage in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection...."

Whatever the outer limits of the "concerted activities" language in the statute, it does not extend to any attempt by the National Labor Relations Board ("NLRB" or "the Board") or its General Counsel to regulate the conduct of arbitration proceedings involving employment disputes between an employer and its non-union employee. Such arbitration is governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, the rules of the applicable arbitration services organization, and, most centrally, the agreement of the parties. This is clear from *Gilmer v. Interstate /Johnson Lane Corp.*, 500 U.S. 20 (1991), and its progeny. As the Supreme Court has reminded the agency on several occasions, while the NLRB has an important role to

play in our national life, it must respect the limits of its authority and not trench on the province of other statutes and other agencies: "[T]he 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 (c)ongressional objectives." *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 143 (2002), *quoting Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942). Indeed, "the Board's remedial preferences" are not to be deferred to "where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA." *Hoffman Plastic*, 535 U.S. at 144.

One of the questions specifically put to the Chamber in your previous letter is whether the Chamber is "aware of any conflicts that would be created between Section 7, if construed to require class actions in either a judicial or arbitral forum, and other federal, state, or local laws?"* One such conflict is plainly with the FAA, which states a federal policy favoring enforcement of arbitration agreements -- whether those agreements cover disputes arising under common law or statutory law; whether they cover employment disputes or business-to-business disputes; or whether they are separately negotiated or imposed as a condition of employment or doing business. The FAA states expressly that such agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for revocation of any contract." 9 U.S.C. § 2. Thus, the only ground for challenging arbitration agreements recognized in the FAA is if enforcement would be barred by the generally applicable state law of contracts.

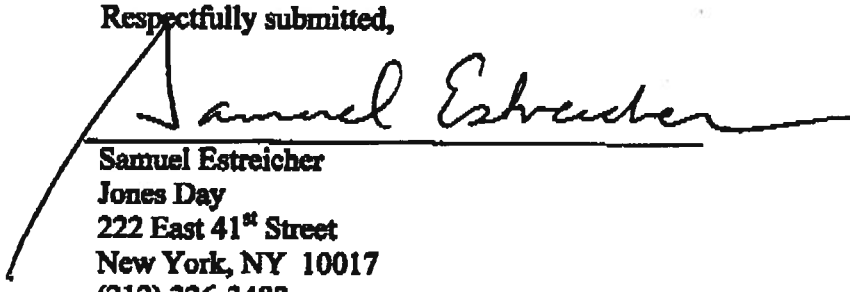
Even where a party asserts a conflict between the FAA and some other *federal* statute, the Court has held that the arbitration agreement must be enforced absent an unmistakable preclusion of arbitration in the other federal law: "[H]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude waiver of judicial remedies for the statutory right at issue." *Gilmer*, 500 U.S. at 26.

It is sufficient to dispose of the instant appeal that there is no evidence in the NLRA, express or otherwise, of a congressional intention to preclude or regulate arbitration of employment disputes in the non-union sector. Whether the arbitration proceeds on an individualized, joint-claim, or class-action basis is governed by the agreement of the parties. *See Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 454 (2003) (whether the class action device is available in arbitration is a matter of "enforcing the parties' arbitration agreement according to its terms").

* As for other question expressly put to the Chamber, the Chamber is not aware of any studies or published surveys "demonstrating the percentage or number of Gilmer agreements that permit class arbitration, or that prohibit class arbitrations as well as class actions in court."

Thank you again for this and prior opportunities to present the Chamber's concerns to the General Counsel and his staff.

Respectfully submitted,



Samuel Estreicher
Jones Day
222 East 41st Street
New York, NY 10017
(212) 326-3488

Robin S. Conrad
Shane Brennan Kawka
National Chamber Litigation Center, Inc.
1615 H Street, NW
Washington, DC 20062
(202) 463-5337

cc: Hon. Ronald Meisburg, General Counsel
John Ferguson, Associate General Counsel
Joseph P. Norelli, Regional Director – Region 20
Marshall Babson