IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SERVICE EMPLOYEES INTERNATIONAL UNION, Plaintiff, v. NATIONAL LABOR RELATIONS BOARD, *et al.*, Defendants, and CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, and INTERNATIONAL FRANCHISE ASSOCIATION, Proposed Defendant-Intervenors.	)	Civil Action No. 21-2443 (RC)

PROPOSED DEFENDANT-INTERVENORS' RESPONSE TO PLAINTIFF'S COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Proposed Defendant-Intervenors the Chamber of Commerce of the United States of America ("the Chamber") and the International Franchise Association ("IFA") hereby respond to the Complaint for Declaratory Judgment and Injunctive Relief ("Complaint") filed by Service Employees International Union ("SEIU" or "Plaintiff") against the National Labor Relations Board ("NLRB"), Lauren McFerran, John Ring, Marvin Kaplan, Gwynne Wilcox, and David Prouty (collectively, "Defendants") as follows:

I. THE CHAMBER AND THE IFA ARE NOT REQUIRED TO ANSWER PLAINTIFF'S COMPLAINT

The Complaint challenges a rule adopted by the NLRB. *See Joint Employer Status Under the National Labor Relations Act*, 85 Fed. Reg. 11184 (Feb. 26, 2020) (codified at 29 C.F.R. § 103.40) ("Joint Employer Rule"). Plaintiff asserts causes of action only under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A). *See* Compl. ¶¶ 82, 87.

Federal Rule of Civil Procedure ("FRCP") 24(c)—similar to Local Rule 7(j)—states that a motion to intervene "must . . . be accompanied by a pleading that sets out the claim or defense for which intervention is sought." However, this "pleading" requirement does not necessarily require the filing of an answer, and it is significant that "courts in [the D.C.] Circuit have not applied [Rule 24] particularly rigidly" and that "[t]he D.C. Circuit has explicitly noted its 'willingness to adopt flexible interpretations of Rule 24 in special circumstances.'" *MGM Glob. Resorts Dev., LLC v. U.S. Dep't of Interior*, No. 19-2377, 2020 WL 5545496, at *6 (D.D.C. Sept. 16, 2020) (Contreras, J.) (citation omitted).

This is such a circumstance. The normal requirement of an answer does not apply to lawsuits challenging agency action under the APA because the district court in these types of cases does not function as a factfinding tribunal. Rather, the district court presented with an APA complaint functions like an appellate court, reviewing the agency's decision-making based on the administrative record. Significantly, in six different challenges to NLRB rulemaking that have been litigated during the past ten years, *no answer was filed by any party*. Each of the six cases was resolved based on cross motions for summary judgment (which, in some cases, were combined with partial motions to dismiss). *See AFL-CIO v. NLRB*, No. 20-cv-0675, 2020 WL 3041384 (D.D.C. June 7, 2020), *supplemented*, 471 F. Supp. 3d 228 (D.D.C. 2020) (challenge to NLRB's 2019 election rule); *Associated Builders & Contractors of Tex., Inc. v. NLRB*, No. 15-cv-026, 2015

WL 3609116 (W.D. Tex. June 1, 2015) (challenge to NLRB's 2014 election rule); *Chamber of Com. of U.S. v. NLRB*, 118 F. Supp. 3d 171 (D.D.C. 2015) (challenge to NLRB's 2014 election rule); *Chamber of Com. of U.S. v. NLRB*, 879 F. Supp. 2d 18 (D.D.C. 2012) (challenge to NLRB's 2011 election rule); *Nat'l Ass'n of Mfrs. v. NLRB*, No. 11-1629, 2012 WL 1929889 (D.D.C. Mar. 7, 2012), *reversed in part*, 717 F.3d 947 (D.C. Cir. 2013) (challenge to NLRB's 2011 notice-posting rule); *Chamber of Com. of U.S. v. NLRB*, 856 F. Supp. 2d 778 (D.S.C. 2012), *aff'd*, 721 F.3d 152 (4th Cir. 2013) (challenge to NLRB's 2011 notice-posting rule).

This principle has also been recognized in other cases involving claims brought against agencies under the APA. *See, e.g.*, *James Madison Ltd. by Hecht v. Ludwig*, 82 F.3d 1085, 1096 (D.C. Cir. 1996) ("Generally speaking, district courts reviewing agency action under the APA's arbitrary and capricious standard do not resolve factual issues, but operate instead as appellate courts resolving legal questions."); *id*. at 1095 ("Ordinarily, courts confine their review [of agency action under the APA] to the 'administrative record.'" (citation omitted)); *see also Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 47 (D.C. Cir. 2013) ("[I]t is black-letter administrative law that in an APA case, a reviewing court 'should have before it neither more nor less information than did the agency when it made its decision.'" (citation omitted)). To the same effect, this Court's Local Rule 7(h) provides for the filing of summary judgment pleadings, without any required filing of a statement of undisputed material facts, where "judicial review is based solely on the administrative record." *See* LCvR 7(h).[1]

[1] *See also* Comment to LCvR 7(h) ("This provision recognizes that in cases where review is based on an administrative record the Court is not called upon to determine whether there is a genuine issue of material fact, but rather to test the agency action against the administrative record. As a result the normal summary judgment procedures requiring the filing of a statement of undisputed material facts is not applicable.).

Thus, a complaint alleging violations of the APA is better understood as a "petition for review of agency action" rather than as a "complaint" in a civil action. *See, e.g.*, *Forest Guardians v. U.S. Fish & Wildlife Serv.*, 611 F.3d 692, 702 n.12 (10th Cir. 2010) ("Even though this action was originally filed in the form of a complaint, the parties later agreed to proceed as if it properly had been filed as a petition for review of agency action."). It is, therefore, unsurprising that in challenges to NLRB rulemaking that have been litigated in this Court over the past decade, *all* were resolved on motions for summary judgment without any answer being filed. *See supra* pp. 2-3. Such summary judgment motions are the "functional equivalent of [filing] a pre-answer motion to dismiss, which temporarily relieves [the defendant] of its obligation to file an answer . . . ." *Jurdi v. United States*, 485 F. Supp. 3d 83, 99 (D.D.C. 2020) (Contreras, J.). Accordingly, given that no answer is likely to be required of Defendants in this case, there would be little logic to requiring one of the Proposed Defendant-Intervenors. *See, e.g.*, *Diné Citizens Against Ruining Our Env't v. Jewell*, No. 15-0209, 2015 WL 4997207, at *15 (D.N.M. Aug. 14, 2015), *aff'd*, 839 F.3d 1276 (10th Cir. 2016) (no answers filed by either the agency or defendant-intervenors in APA lawsuit); *San Diego Cattlemen's Coop. Ass'n v. Vilsack*, Nos. 14-cv-0818, 14-cv-0887, 2015 WL 12866452, at *5 (D.N.M. Apr. 20, 2015) (denying motion to require the filing of an answer).

The Complaint in this case consists of numerous statements that characterize case law, statutes, and regulations which are more typical of a legal brief than a civil action complaint. Plaintiff's assertions—which seek to characterize historical events rather than disputed facts—cannot, and do not, bear on the merits of Plaintiff's causes of action under the APA. In these circumstances, requiring the Chamber and the IFA to respond line-by-line to the Complaint would waste party and judicial resources and serve no practical purpose.

II. GENERAL DENIAL

If the Court nevertheless deems an answer necessary, the Chamber and the IFA—while reserving all rights—state as follows:

Pursuant to FRCP 8(b)(3), the Chamber and the IFA generally deny all allegations in the Complaint (including allegations as to which they lack knowledge or information sufficient to form a belief as to the truth of such allegations, which have the effect of a denial, and including statements of law which the Chamber and the IFA deny or, alternatively, have no duty to admit or deny), except for the following specific admissions:

- **Complaint Para. 1:** The Chamber and the IFA admit that Plaintiff purports to bring an action challenging the NLRB's Final Rule on *Joint Employer Status Under the National Labor Relations Act*, 85 Fed. Reg. 11184 (Feb. 26, 2020) (codified at 29 C.F.R. § 103.40).

- **Complaint Para. 3:** The Chamber and the IFA admit that Plaintiff purports to bring this action for declaratory and injunctive relief under the Administrative Procedure Act.

- **Complaint Para. 6:** The Chamber and the IFA admit that the NLRB is an agency headquartered in the District of Columbia.

- **Complaint Para. 9:** The Chamber and the IFA admit that Lauren McFerran is the current Chairman of the NLRB and that John Ring, Marvin Kaplan, Gwynne Wilcox, and David Prouty are current Members of the NLRB; that the NLRB's headquarters' offices are located at 1015 Half Street SE, Washington, D.C. 20570; and that Plaintiff purports to sue Chairman McFerran and Members Ring, Kaplan, Wilcox, and Prouty in their official capacities.

- **Complaint Para. 10:** The Chamber and the IFA admit that the NLRB is an independent agency of the United States government whose responsibilities include the administration and enforcement of the National Labor Relations Act ("NLRA"), which was enacted in 1935.

- **Complaint Para. 11:** The Chamber and the IFA admit that the NLRB at various times has decided cases or engaged in rulemaking that, among other things, address whether or when two or more entities have involvement in the determination of terms and conditions of employment for certain employees.

- **Complaint Para. 12:** The Chamber and the IFA admit that the NLRB at various times has decided cases or engaged in rulemaking that, among other things, address whether or when two or more entities constitute joint employers under the NLRA.

- **Complaint Paras. 17 to 22:** The Chamber and the IFA admit that certain aspects of joint employer status under the NLRA were addressed in the NLRB and court of appeals decisions in *Browning-Ferris Industries of California, Inc.*, 362 N.L.R.B. 1599 (2015) ("*BFI*"), *remanded*, 911 F.3d 1195 (D.C. Cir. 2018); and the Chamber and the IFA deny all other allegations in Complaint Paras. 17-22 except to the extent those allegations are reflected in the text of the aforementioned decisions.

- **Complaint Paras. 23 to 26:** The Chamber and the IFA admit that certain aspects of joint employer status under the NLRA were addressed by the NLRB in *Hy-Brand Industrial Contractors, Ltd.*, 365 N.L.R.B. No. 156 (2017) ("*Hy-Brand I*"), which overruled aspects of the NLRB decision in *BFI*; and that *Hy-Brand I* was vacated by the NLRB in *Hy-Brand Industrial Contractors, Ltd.*, 366 N.L.R.B. No. 26 (2018) ("*Hy-Brand II*"); and the Chamber and the IFA deny all other allegations in Complaint Paras. 23-26 except to the extent those allegations are reflected in the text of *Hy-Brand I* and *Hy-Brand II*, respectively.

- **Complaint Paras. 27 to 29:** The Chamber and the IFA admit that the NLRB published a notice of proposed rulemaking ("NPRM") addressing certain aspects of joint employer status under the NLRA in the Federal Register on September 14, 2018, as set forth in *The Standard for Determining Joint-Employer Status*, 83 Fed. Reg. 46681 (Sept. 14, 2018); and the Chamber and the IFA deny all other allegations in Complaint Paras. 27-29 except to the extent those allegations are reflected in the text of the NPRM.

- **Complaint Paras. 14 and 30 to 34:** The Chamber and the IFA admit that certain aspects of joint employer status under the NLRA were addressed by the Court of Appeals for the D.C. Circuit in *Browning-Ferris Industries of California, Inc. v. NLRB*, 911 F.3d 1195 (D.C. Cir. Dec. 28, 2018) ("*BFI* court decision"); and the Chamber and the IFA deny all other allegations in Complaint Paras. 14 and 30-34 except to the extent those allegations are reflected in the text of the *BFI* court decision.

- **Complaint Paras. 35 to 43:** The Chamber and the IFA admit that the NLRB published a Final Rule addressing certain aspects of joint employer status under the NLRA on February 26, 2020 ("Final Rule"), as set forth in *Joint Employer Status Under the National Labor Relations Act*, 85 Fed. Reg. 11184 (Feb. 26, 2020) (to be codified at 29 C.F.R. § 103.40); that the then-existing NLRB members included Chairman John Ring and Members Marvin Kaplan and William Emanuel, with two vacant Board member seats; and that the term of Board Member Lauren McFerran expired on December 16, 2019. The Chamber and the IFA deny all other allegations in Complaint Paras. 35-43 except to the extent those allegations are reflected in the text of the Final Rule.

- **Complaint Paras. 44 to 59:** The Chamber and the IFA deny that there is any "First Error Regarding the Right to Control" in the Final Rule as stated in Complaint Paras. 44-59; and the Chamber and the IFA deny all other allegations in Complaint Paras. 44-59 except to the extent those allegations are reflected in the text of the *BFI* court decision; the Restatement (Second) of Agency (1958); NLRA Section 1, 29 U.S.C. §151; or the Final Rule, respectively.

- **Complaint Paras. 60 to 74:** The Chamber and the IFA deny there is any "Second Error Regarding Health and Safety" in the Final Rule as stated in Complaint Paras. 60-74; and the Chamber and the IFA deny all other allegations in Complaint Paras. 44-59 except to the extent those allegations are reflected in the text of *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962), the NPRM, or the Final Rule, respectively.

As for the remaining allegations in the Complaint, including the parts of the Complaint paragraphs listed above but not specifically admitted, the Chamber and the IFA (1) deny such allegations; (2) state that no response is required to such allegations pursuant to FRCP 8(b)(6); (3) lack sufficient information to admit or deny such allegations pursuant to FRCP 8(b)(5); (4) deny such allegations to the extent that they are inconsistent with and/or do not accurately reflect or characterize the terms of the referenced written document, case, administrative or judicial opinion, regulation, and/or statute; (5) are unable to admit or deny such allegations because they are vague, ambiguous, and non-specific; (6) deny that there is any factual or legal basis for Plaintiff's action; and/or (7) deny that Plaintiff is entitled to the relief sought or any relief whatsoever. The Chamber and the IFA therefore generally deny, pursuant to FRCP 8(b)(3), any and all allegations not specifically admitted above.

Dated: December 6, 2021

Respectfully submitted,

/s/ *Noel J. Francisco*

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