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United States Court of Appeals for the Ninth Circuit
Attn: Molly C. Dwyer, Clerk of the Court
James R. Browning Courthouse
95 Seventh Street
San Francisco, CA 94103

Re: *Johnmohammadi v. Bloomingdale's, Inc.*
Case No. 12-55578, Appellant's Response to Appellee's Notice of Supplemental Authority

Dear Ms. Dwyer:

Appellant Fatemeh Johnmohamaddi's Response to Appellee's FRAP 28(j) Supplement

American Express v. Italian Colors Restaurant 133 S.Ct. 2304 (2013) does not overrule the decades of NLRB and judicial precedent finding that class actions are a form of concerted activity protected by the NLRA and the NLGA. The case at issue is distinguishable from *American Express* because the arbitration agreement here precludes employees from exercising their 28 U.S.C. § 157 substantive rights to engage in the concerted litigation activity to pursue workplace grievances. *Eastex, Inc. v. NLRB,* 437 U.S. 556, 565-566. No such rights were implicated in *American Express.* The Plaintiffs in *American Express* could point to no Federal substantive law that protected a non-employee right to engage in *concerted activity* for mutual aid and protection through litigation.

Richards v. Ernst & Young 2013WL4437601 (9th Cir. 2013); *Owen v. Bristol* 702 F.3d 1050,and *Sutherland v. Ernst & Young* (2d Cir. 2013) fail to engage in a rigorous review of the decades of precedent that acknowledge class litigation as a form of concerted activity protected by Congressional command.

In *Richards,* the issue was not even briefed before the 9th circuit. *Owen* seems to argue that reenactment of the FAA after the NLRA effectively repeals the NLGA's and NLRA's bar on contracts that proscribe concerted activity. This argument does not stand up to scrutiny because the reenactment did not create an exception to 9 U.S.C. § 2's acknowledgement that arbitration contracts are subject to revocation on account of laws, such as the NLGA, applicable to all contracts.

Sutherland simply fails to acknowledge the NLRB's right and authority to interpret and apply the NLRA. The NLRB has focused on its obligation to interpret and apply the NLRA in finding, consistent with the Supreme Court in *Eastex, supra* that class litigation over workplace issues is a form of protected concerted activity. In doing so, the NLRB has not read any language out of the FAA, or

otherwise repudiated the FAA.

Defendant properly acknowledged that the *Bloomingdale's* NLRB ALJ decision is now before the full NLRB. As such it is not final.

Very truly yours,

/s/ Dennis F. Moss