From: [redacted]
To: Choe, Iva Y.; McGinley, Nora; Bordelois, Melanie R.; Monroe, Jessica S.
Cc: Compton, Kayce R.; Lussier, Richard; Dodds, Amy L.; Walters, Kimberly; Belin, Jeremy S.; Shorter, LaDonna
Subject: Biotricity, Inc., Cases 08-CA-326334, 08-CA-326335, 08-CA-367971, & 08-CA-367972 (case-closing email) - REVISED
Date: Tuesday, May 5, 2026 11:18:50 AM

Please see this revised case-closing email and disregard the original. The original version mistakenly omitted the footnote text.

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Good morning,

The Region submitted these cases for advice pursuant to Memorandum GC 25-05, *Rescission of Certain General Counsel Memoranda* (Feb. 14, 2025), as to whether: (1) a noncompete agreement violated Section 8(a)(1) of the Act, and (2) a state-court lawsuit and related arbitration, premised in part on the noncompete agreement, violated Section 8(a)(1). We conclude that (1) the noncompete agreement's noncompete and confidentiality provisions do not violate Section 8(a)(1) and it would not effectuate the purposes and policies of the Act to issue complaint regarding the non-solicitation, inducement-of-third-parties, and non-disparagement provisions, and (2) the lawsuit and arbitration do not violate Section 8(a)(1) because they are not retaliatory, lack an illegal objective, and are not preempted.

Biotricity, Inc. ("Employer") is a medical-technology company specializing in remote patient monitoring. Charging Party [redacted] worked for the Employer from [redacted] through [redacted] resignation on or about [redacted] 2023. Charging Party [redacted] worked for the Employer from about [redacted] through [redacted] 2023. After leaving the Employer, both Charging Parties began working for its competitor, [redacted]). According to the Charging Parties, they did not quit the Employer or seek employment with [redacted] concertedly.

During their employment with the Employer, both Charging Parties agreed to a Non-Compete Agreement prohibiting former employees from working for the Employer's competitors or using the employee's knowledge of the Employer's confidential information for a period of six months after termination. The Non-Compete Agreement defines confidential information as "all information not generally known to the public, in spoken, printed, electronic, or any other form or medium, relating directly or indirectly" to dozens of categories of information that unambiguously relate solely to the Employer's business interests but which also includes "payroll information, … personnel information, [and] employee lists." The Non-Compete Agreement also prohibits:

- "soliciting, hiring, recruiting, or attempting to hire or recruit anyone who was employed by [the Employer] in the last 12 months of the employee's employment . . . for a period of eighteen months beginning six months prior to the last day the employee works for [the Employer]."
- "[I]nducing third parties to purchase products and services similar to those offered by the Employer from a Competitor" for a period of eighteen months, beginning six months prior to termination of employment.
- "[D]efamatory or disparaging" remarks concerning the Employer to any other person or

in a public forum.

The Employer also maintains a separate Confidentiality Agreement—not alleged here as unlawful—that applies solely to employees during their employment. It defines confidential information as "all information concerning the [Employer's] past, present and future business affairs," but only includes examples regarding customer, financial, and business information.

On [redacted], 2023, the Employer filed a lawsuit against the Charging Parties and [redacted] in the Court [redacted], [redacted] The suit's first amended complaint alleges, among other things, that the Charging Parties: i) breached their Non-Compete Agreements,[1] ii) breached their confidentiality agreements by failing to return the Employer's company computers, iii) misappropriated trade secrets, iv) tortiously interfered with the Employer's business, v) breached their duty of loyalty to the Employer by destroying or stealing the Employer's confidential business information, and vi) engaged in a civil conspiracy. The lawsuit also seeks to enjoin the Charging Parties from soliciting the Employer's employees to terminate their employment and compete with the Employer or otherwise interfering with the relationship between the Employer and its employees. On [redacted], 2025, after an interlocutory appeal, the Court [redacted] stayed the lawsuit pending completion of arbitration over the Employer's first amended complaint. The arbitration is scheduled to commence in [redacted].

We conclude that the charge allegations should be dismissed, absent withdrawal.

(1) Non-Compete Agreement

Under current law, an employer does not violate the Act by maintaining non-compete provisions covered by Memorandum GC 23-08, which was rescinded in Memorandum GC 25-05. The General Counsel is of the view that non-compete agreements do not as a general matter impact employees' rights under Section 7. Accordingly, the non-compete language within the Non-Compete Agreement does not violate Section 8(a)(1).

The confidential-information clause within the Non-Compete Agreement is also lawful. Although it broadly states that "all information not generally known to the public" is considered confidential, and lists examples including "payroll information, … personnel information, [and] employee lists," this provision is part of the Non-Compete Agreement, which clearly explains the Employer's strong confidentiality interests in the highly competitive medical-technology industry. Viewed through this lens, employees would reasonably understand that the confidentiality provision restricts them from sharing confidential information with competitors, not Section 7-protected communications with fellow employees. This conclusion is bolstered by the facts that the confidential-information clause lists dozens of other examples of purely business-related types of information, and that the Employer's separate Confidentiality Agreement only includes examples regarding customer, financial, and business information.

The allegations regarding the other provisions within the Non-Compete Agreement should be dismissed on noneffectuation grounds. Although portions of the non-solicitation, inducement-of-third-parties, and non-disparagement clauses are arguably unlawful, issuing complaint would not effectuate the purposes and policies of the Act because the Employer has not enforced these provisions against the Charging Parties, in the lawsuit or otherwise. Moreover, the non-solicitation and inducement-of-third-parties provisions have lapsed as to the Charging

Parties.

(2) Lawsuit/Arbitration

Applying *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), and *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002), we conclude that the Employer's lawsuit and the related arbitration did not violate the Act. First, there is no evidence that the Employer filed the lawsuit or demand for arbitration in retaliation for any protected concerted activity in which the Charging Parties may have engaged. Therefore, there is no need to assess whether the lawsuit and arbitration are objectively baseless. *Id.* Additionally, the Employer's lawsuit and arbitration do not seek an "illegal objective," *Bill Johnson's*, 461 U.S. at 737 n.5, because they are premised on the Non-Compete Agreement's noncompete language—which is lawful under extant law. And, to the extent the lawsuit seeks injunctive relief restricting the Charging Parties' solicitation of employees, this would only apply after the employment relationship had ended. *See Northeastern Supply, Inc.*, Case 04-CA-351328, Advice Closing Email dated June 30, 2025 (finding that non-solicitation provisions effective after termination do not generally restrict Section 7 rights). Finally, the suit and arbitration are not preempted under *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959), where the Supreme Court held that a presumption of preemption applies when activity that a state seeks to regulate is "arguably" protected or prohibited by the Act. *Id.* at 245. Here, there is no aspect underlying the Employer's lawsuit or arbitration over which the Board must, in the first instance, exercise its primary jurisdiction. This case does not involve any arguably protected activity, and there will be no arguably prohibited conduct for the Board to adjudicate.

Accordingly, the Region should dismiss the charges, absent withdrawal.

Please contact us with any questions.

Regards,

[redacted]
National Labor Relations Board
Division of Advice
[redacted]

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[1] The suit alleges the Charging Parties breached the Non-Compete Agreement's noncompete language, but does not allege breaches of the non-solicitation, inducement-of-third-parties, or non-disparagement provisions.