UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 20

24 HOUR FITNESS USA, INC.

Case 20-CA-35419

and

ALTON SANDERS, an individual

COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS

Submitted by
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I. INTRODUCTION

On November 6, 2012, Administrative Law Judge William L. Schmidt[1] correctly found 24 Hour Fitness USA, Inc., (Respondent) in violation of Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining and enforcing provisions in its arbitration policy that require employees to forego any rights to resolve employment-related disputes by collective or class action.[2] Respondent's exceptions and arguments in support of its exceptions are completely without merit. Respondent's arguments fail to affect the ALJ's rationale and reliance on controlling Board Law, especially *D.R. Horton*, 357 NLRB No. 184 (2012), which controls the outcome of this case.[3] Further, Respondent's exceptions erroneously challenge the findings that the arbitration policy is a mandatory condition of employment, that the activity barred by the

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[1] Hereafter referred to as the ALJ or the Judge. All references to the Administrative Law Judge's Decision are noted as "ALJD" followed by the page number(s). All references to the transcript are noted by "Tr." followed by the page number(s). All referenced to stipulations are noted as "Stip." followed by the stipulation number(s). All references to Joint Exhibits are noted as "Joint Exh." followed by the exhibit number. All references to the General Counsel's exhibits are noted as "GC Exh." followed by the exhibit number. All references to Respondent's exhibits are noted as "R. Exh." followed by the exhibit number. All references to Respondent's Exceptions are noted as "R. Exc." followed by the exception number(s). All references to Respondent's Brief in Support of Exceptions are noted as "R. Br." followed by the page number(s).

[2] The ALJ also found that Respondent violated Section 8(a)(1) of the Act by maintaining a provision in its Arbitration Policy that forbids the disclosure of information regarding any arbitration.

[3] NLRB Rules and Regs. Section 102.46(c)(2) states that "(c) Any brief in support of exceptions shall contain no matter not included within the scope of the exceptions and shall contain, in the order indicated, the following: . . . (2) A specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate." To the extent Respondent has failed to follow Section 102.46(c)(2), Respondent's Brief in Support of Exceptions should be disregarded.

Policy has long been protected by the Act, the appropriateness of the remedy sought, the timeliness of the allegations under Section 10(b), and that *D.R .Horton* is controlling Board law. For these reasons, furthered below, the Board should uphold the ALJ's decision.

Lastly, Counsel for the Acting General Counsel (AGC) has no opposition to Respondent's motion for administrative notice of the documents and facts raised in Respondent's Motion for Limited Reopening of the Record or, Alternatively, for Administrative Notice. However, Counsel for the Acting General Counsel opposes any reopening of the record as unnecessary and likely to cause undue delay. Any relevant documents and facts can be offered to the Board and thereupon the Board may decide to take administrative notice.

I FACTS

A Background

Respondent operates fitness clubs servicing over three million members in more than 400 clubs across 17 different states. (Joint Exh. 1, Stip. 21.)[4] Respondent maintains various types of fitness clubs offering different amenities and experiences to customers. *Id*. Between January 1, 2010, and December 31, 2011, Respondent hired 23,195 "employees" as defined by Section 2(3) of the Act. (Joint Exh. 1, Stip. 23.) As of June 22, 2012, Respondent employed 20,563 employees, 19,614 of which are admitted to be employees within the meaning of Section 2(3) of the Act. (Joint Exh. 1, Stip. 22.)

[4] A large portion of the facts relevant to the instant matter were introduced into the record via a comprehensive set of stipulations (Joint Exh. 1) and related Joint Exhibits. Thus, the pertinent facts were almost entirely without dispute.

B Respondent's Arbitration Policy

Since 2005, Respondent has maintained various versions of "Employee" or "Team Member" handbooks. (Joint Exh. 1, Stip. 3.) Since 2005, Respondent has maintained the following arbitration policy (Arbitration Policy) in the Team Member Handbook:[5]

> This Policy applies to any employment-related dispute between an employee and 24 Hour Fitness or any of 24 Hour Fitness' agents or employees, whether initiated by an employee or by 24 Hour Fitness. This Policy requires all such disputes to be resolved only by an arbitrator through final and binding arbitration.
> ….
> In arbitration, the parties will have the right to conduct civil discovery and bring motions, as provided by the Federal Rules of Civil Procedure. However, there will be no right or authority for any dispute to be brought, heard or arbitrated as a class action, private attorney general, or in any representative capacity on behalf of any person.

(Joint Exh. 2A; Joint Exh. 3A, page 14-15.)[6]

Respondent's Arbitration Provision further provides: "except as may be required by law, neither a party nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties." (nondisclosure provision) (Joint Exh. 2A.)

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[5] The most recent version of Respondent's Team Member Handbook appears in the record as Joint Exh. 3E. (See e.g., Joint Exh. 1, Stip. 3.) The most recent version does not contain the Arbitration Policy.

[6] The 2007 Team Member Handbook contains an updated Arbitration Policy which still requires all employment related disputes to be resolved by arbitration and to bar class and collective arbitral claims concerning employment disputes. (Joint Exh. 2B; Joint Exh. 3B, page 18-19) This version makes clear that the Policy is not intended to preclude the filing or maintenance of EEOC or NLRB charges. (Joint Exh. 2B; Joint Exh. 3B, page 18-19.) The 2008 Team Member Handbook was an identical reissuance of the 2007 version, containing an Arbitration Policy identical to the 2007 version. (Joint Exh. 3C, page 18-19; Tr. 86.)

From 2005 until at least January 1, 2007, Respondent's Employee Handbook contained an Employee Handbook Receipt Acknowledgment form (2005-2007 Acknowledgment) in which the employee commits to all of the policies contained in the Employee Handbook, including the Arbitration Policy. (Joint Exh. 3A, page 47; Joint Exh. 4; see also Joint Exh. 1, Stip. 4.) The 2005-2007 Acknowledgment was provided to all employees for them to sign at the time of hire. (Joint Exh. 1, Stip. 4; Joint Exh. 4.) Any employee who did not sign the Acknowledgment would be informed that after their employment started the conditions and policies to the Employee Handbook would nonetheless apply to them, including the Arbitration Policy. (Joint Exh. 1, Stip. 4) Thus, employees hired before January 1, 2007, were never given the opportunity to opt out of the Arbitration Policy. (Tr. 92.) Of Respondent's 19,614 Section 2(3) employees, 3,605 were hired before January 1, 2007. (Joint Exh. 1, Stip. 22.)

Beginning on or about January 1, 2007, Respondent provided employees at the time of hire an updated copy of the Acknowledgment form. (Joint Exh. 1, Stip. 5; Joint Exh. 5.) The Acknowledgment form provided between 2007 and 2008 contains a provision allowing employees to opt out of the Employer's Arbitration Policy by signing the Arbitration Policy Opt-Out Form (Opt-Out Form) and returning it through interoffice mail to the CAC/HR File Room no later than 30 calendar days after the date the employee received the Employee Handbook, as determined by the Company's records. (Joint Exh. 5.)[7] The Opt-Out Form was obtained by calling an employee hotline (Employee Hotline). (*Id.*) If employees did not opt out, disputes related to employment would be resolved under the Arbitration Policy. (*Id.*) As before, however,

[7] The Acknowledgment form provided beginning in September 2007, reflected the employees' receipt of and commitment to comply with the 2007 Team Member Handbook. (Joint Exh. 6.)

all terms of the Employee Handbook would apply to employees even without return of the Acknowledgment form. (Joint Exh. 1, Stip. 5.)

The Opt-Out Form that employees could obtain upon request beginning in January 2007 states that employees who opt out will not participate or be bound by the Arbitration Policy. (Joint Exh. 1, Stip. 11; Joint Exh. 14A.) Like the Acknowledgment form, the Opt-Out Form required employees to sign and return it to Respondent's CAC/HR File Room via interoffice mail no later than 30 calendar days after the employee received the Employee Handbook as determined by company records. (Joint Exh. 14A.) [8]

Since at least 2009, Respondent began maintaining an electronic version of the updated Acknowledgment (Electronic Acknowledgment), and provided the Electronic Acknowledgment for employees to sign digitally at their time of hire. (Joint Exh. 1, Stip. 7; Joint Exh. 8.) The Electronic Acknowledgment requires employees to commit to all of the policies contained in the Team Member Handbook received, including the Arbitration Policy. (Joint Exh. 8.) The 2008 Team Member Handbook appears to have remained in effect until the 2010 version was adopted. (Joint Exh. 3D.) The Arbitration Policy included in the 2010 Team Member Handbook is, in all material respects, identical to the prior versions. (*Id.* at 4; Joint Exh. 2C.) The Team Member Handbook continued to apply to all employees even absent a signed Electronic Acknowledgment. (Joint Exh. 1, Stip 7.)

The Electronic Acknowledgment does not contain information regarding an Arbitration Policy opt-out process. (Joint Exh. 8.) Instead, since at least 2009, Respondent has maintained electronically, and provided to employees upon their hire, an Arbitration Policy Opt-Out

[8] The 2008 version on the Opt-out form varies slightly in that it requires return of the form no later than 30 calendar days from the time of hire. (Joint Exh. 14C.)

Information form. (Joint Exh. 1, Stip 9; Joint Exh. 10A & B; see also GC Exh. 3, page 35.) Beginning around the same time, Respondent began to maintain its Arbitration Policy online for employee review or for printing. (Joint Exh. 1, Stip. 8; Joint Exh. 9; see also GC Exh. 3, page 30.) As with its prior policies, this version mandates that employment-related disputes be brought in arbitration and precludes class and collective arbitration. (Joint Exh. 9.) New hires were provided the Arbitration Policy Opt-Out Information form to sign digitally, thus committing to the Arbitration Policy absent an opt-out. (Joint Exh. 1, Stip 9; Joint Exh. 10 A & B.) Respondent continued to require employees to request the Opt-Out Form by phone. (Joint Exh. 10 A & B; Joint Exh. 14D, E & F.) Signed Opt-Out Forms were returnable to the legal department through interoffice mail or by fax, no later than 30 calendar days after the date of hire or, in the latest version, no later than 30 calendar days after the date of acknowledgment of receipt of the Policy. (Joint Exh. 1, Stip 11; Joint Exh. 14D, E & F.)

Out of an extensive and voluminous search of records regarding inquiries made to Respondent's Employee Hotline for the period January 1, 2010, through December 31, 2011, Respondent uncovered only two incidents of employee inquiries regarding the Opt-Out procedure.[9] (Tr. 54-55, GC Exh. 4, 5.) Out of approximately 70,000 personnel files, not more than 70 employees, or 1/10 of one percent, have opted out of Respondent's Arbitration Policy. (Joint Exh. 1, Stip 24.)

Charging Party Alton J. Sanders worked for Respondent from 2008 to 2010. (Tr. 38.) Sanders was made to review and fill out "quite a bit" of paperwork when he was first hired. (Tr.

[9] Both of the inquiry incidents identified by Respondent involved situations in which the employee wanting the Opt-Out Form had difficulty obtaining it via the Hotline process. (See GC Exh. 4(a); 5(g).) Respondent had no explanation for this apparent failure. (Tr. 70-71.)

39.) Amongst the documents he received was the 2007 Team Member Handbook, after which he was required to sign and return the Acknowledgment form. (Tr. 39-40; GC Exh. 2.) Thereafter, Sanders became aware of employment-related class litigation filed against Respondent in the *Fulcher* case. (Tr. 40; see also Joint Exh. 1, Stip 12; Joint Exh. 15.) Having phoned the attorneys representing the class plaintiff, Sanders was informed that he was a potential class member. (Tr. 40.) Later, however, Sanders was informed that he would have to pursue his case as an individual rather than as part of a class.[10] (*Id*.) Thus, he did not participate in the action.

C Respondent's Attempts to Enforce Its Arbitration Policy

Since its first implementation in 2005, Respondent has relied on its Arbitration Policy to compel or to attempt to compel individual arbitration when employees have filed or attempted to file class actions against Respondent. (Joint Exh. 1, Stip. 12-20.) Indeed, since the Arbitration Policy was implemented, Respondent has attempted to enforce its Arbitration Policy on at least eleven (11) separate occasions.[11] (Joint Exh.1, Stip. 12-20.)

II ARGUMENT

A Respondent's Arbitration Policy Violates Section 8(a)(1) of the Act. (R. Exc. 3, 4, 7, and 8)

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[10] As Stipulation 12 makes clear, and as summarized above, Respondent's motion in the *Fulcher* case to compel individual arbitration was granted in part on March 29, 2011. The court required the class members to each submit individual claims for monetary relief to binding arbitration under Respondent's Arbitration Policy. (Joint Exh. 1, Stip. 12.)

[11] The charge was filed on February 15, 2011; accordingly, the Section 10(b) period dates from August 15, 2010.

Section 8(a)(1) of the Act makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in" Section 7. 29 U.S.C. §158(a)(1). The Board in *D.R. Horton* affirmed that "employees who join together to bring employment-related claims on a classwide or collective basis in court or before an arbitrator are exercising rights protected by Section 7 of the NLRA." *Id.*, slip. op. at 3.[12] The Board made clear that to determine whether a workplace policy is unlawful "the applicable test is that set forth in *Lutheran Heritage Village*, and under that test, a policy such as Respondent's violates Section 8(a)(1) because it expressly restricts Section 7 activity or, alternatively, because

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[12] Respondent excepts to the ALJ's failure to find and conclude that the National Labor Relations Board lacked a quorum when it issued its decision in *D.R. Horton*, 357 NLRB No. 184 (2012). (R. Exc. 31) This argument ignores that the Board applies the well-settled "presumption of regularity support[ing] the official acts of public officers in the absence of clear evidence to the contrary." *Lutheran Home at Moorestown*, 334 NLRB 340, 341 (2001), citing *U.S. v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926). In *Entergy Mississippi, Inc.*, 358 NLRB No. 99 (2012), the Board found that Member Becker's term ended by operation of law at noon on January 3, 2012, when the first session of the 112th Congress ended and the second session began. Thus, Member Becker lawfully participated in the resolution of *D.R. Horton.*

Furthermore, it is not an infirmity that in *D.R. Horton* the three-member Board issued the decision with two-members participating and one member recused. See, e.g., *Plaza Healthcare and Rehabilitation LLC*, 2011 WL 6950504, at *1 n.1 (2011) ("In *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010), the Supreme Court left undisturbed the Board's practice of deciding cases with a two-member quorum of a panel when one of the panel members has recused himself. Under the Court's reading of the Act, 'the group quorum provision [of Sec. 3(b)] still operates to allow any panel to issue a decision by only two members if one member is disqualified.' . . . The same is true here, where one of the three Members of the full Board deciding the case is recused."). In other words, where the Board has only three members, it may follow the delegation to a panel practice noted with approval in *New Process*. See, e.g., *Route 22 West Operating Co*., 357 NLRB No. 153, slip op. at 1 fn. 1 (Dec. 30, 2011), petition for review pending (3d Cir. Nos. 12-1031 & 12-1505); *G. Heileman Brewing Co.*, 290 NLRB 991, 991 & n.1 (1988), enfd. 879 F.2d 1526 (7th Cir. 1989). But, as in the past, the full Board may also decide the case with two Board members where the third Board member is recused. See, e.g., *Wisconsin Bell, Inc*., 346 NLRB 62, 62 n.2 (2005); *Iron Workers Local 1 (Advance Cast Stone Co.)*, 338 NLRB 43, 43 fn .2 (2002); *Carpenters Local 20 (A. F. Underhill, Inc.)*, 323 NLRB 521, 521 fn. 1 (1997).

employees would reasonably read it as restricting such activity."[13] In sum, the Board definitively held in *D.R. Horton* that an employer violates Section 8(a)(1) "by requiring employees to waive their right to collectively pursue employment-related claims in all forums, arbitral and judicial."

Here, Respondent has utilized a number of slightly altered versions of its Arbitration Policy over the years. All versions, however, explicitly prohibit employees from pursuing employment-related claims as a class or collective action in any forum, arbitral or judicial. The Policy thus explicitly restricts Section 7 activity under *Lutheran Heritage Village-Livonia*. Like the agreement in *D.R. Horton*, Respondent's Arbitration Policy plainly limits Section 7 activity and, as a term or condition of employment, violates Section 8(a)(1).

Moreover, under the *Lutheran Heritage Village-Livonia* test, even if the Arbitration Policy did not on its face constitute a violation of the Act, it has been applied to restrict the exercise of Section 7 activity. If the challenged rule does not expressly restrict Section 7 activity, the rule will nevertheless violate the Act if it "has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage Village-Livonia,* 343 NLRB at 647. The record clearly demonstrates that Respondent has repeatedly used the Arbitration Policy to compel individual arbitration when employees have attempted to bring employment-related class actions against Respondent. (See Joint Exh. 1, Stip. 12-20.) Thus, for both reasons, Respondent's Arbitration Policy violates the Act as alleged.[14]

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[13] *D.R. Horton*, 357 NLRB No. 184, slip op. at 7, citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

[14] Respondent excepts to the ALJ's finding that Respondent took action to enforce the class action ban in *Beauperthuy v. 24 Hour Fitness USA, Inc.*, No. 06-715 S.C. (N.D. Cal.). Presumably this exception is based on Respondent opting not to file a motion to compel arbitration in that case, but instead filing a motion to dismiss. (Jt. Exh. 17 at 3-4.) Nevertheless,

The ALJ correctly found that an arbitration policy such as Respondent's is an unequivocal class action ban. Respondent's Arbitration Policy mandates that employment-related disputes be resolved in arbitration and then forbids that any dispute be "brought, heard of arbitrated as a class action." (Joint Exh. 2A; Joint Exh. 3A, page 14-15.) A policy which only leaves one avenue for the resolution of employment-related disputes, and then further restricts that avenue so that disputes may only be heard individually, is clearly a ban on concerted activity. The maintenance of such a foreclosure on protected-concerted activity is clearly a violation of Section 8(a)(1) of the Act.

1 Just as in *D.R. Horton*, Respondent's Class Action Waiver is Imposed as a Mandatory Condition of Employment and Thus Violates the Act (R. Exc. 1, 2, 3, and 6)

The Board in *D.R. Horton* found that "employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in *all* forums, arbitral and judicial." 357 NLRB No. 184, slip op. at 12 (2012) (emphasis in original). In *D.R. Horton*, the employer required each new and current employee to execute a mutual arbitration agreement (MAA) as a condition of employment. *Id*., slip op. at 1. The MAA required employees to agree, as a condition of employment, that they would not pursue class or collective litigation in arbitration or court. *Id*. The Board reasoned that the MAA clearly and expressly barred employees "from exercising substantive rights that have long been held protected by Section 7 of

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Respondent's intent was the same: to enforce its arbitration policy to preclude employees' collective legal activity. Indeed, Respondent specifically asserted before the District Court that "arbitration on a collective basis is expressly disallowed by the Arbitration Agreement." *Id*. at 4. As such, the ALJ was right to conclude that Respondent took action to enforce its class action ban.

the Act," and "implicate[d] prohibitions that predate the NLRA," on which modern Federal labor policy is based. *Id*., slip op. at 4, 6.

Just as in *D.R. Horton*, Respondent has violated the Act by imposing a class action waiver as a mandatory condition of employment. Respondent's Arbitration Policy is a mandatory condition of employment because employees are bound by the policy upon their hire. At the very start of their relationship with Respondent, employees are required to waive their right to bring any employment-related dispute as a class action. The record establishes that, of Respondent's 19,614 current employees, 3,605 were hired before January 1, 2007. (Joint Exh. 1, Stip. 22.) These employees were never given the opportunity to opt out of the Arbitration Policy. (Tr. 92.) Moreover, although Respondent has instituted various processes and procedures by which its employees were to signal their acknowledgement of, and agreement to, the Policy, Respondent admits that, acknowledgment or not, its Handbooks and other policies were binding on its employees. (Joint Exh. 1, Stip. 4.)

For these 3,605 employees, there can be no doubt that Respondent's Arbitration Policy was imposed upon them as a condition of employment. Inasmuch as the Arbitration Policy remains in effect, thus continuing to preclude these employees from engaging in rights protected by Section 7 of the Act, the violation is complete. In this regard, Respondent's maintenance of the Policy as applicable to these employees has violated—and continues currently to violate—Section 8(a)(1) of the Act as alleged, under the rationale of *D.R. Horton*.

2 Respondent's Arbitration Policy is not a Voluntary, Bilateral Agreement

a The Arbitration Policy is a Mandatory Condition of Employment for Employees Hired Since January 1, 2007, Because Employees Must Opt-out to Regain Their Section 7 Rights (R. Exc. 6, 14, 15, 16, 17, 18, 27, and 28)

Respondent argues that its Arbitration Policy is not a mandatory condition of employment for employees hired since January 1, 2007, because these employees have been presented with an "opt-out choice." (Resp. Br. 19)[15] However, Respondent's Arbitration Policy is a mandatory condition of employment because it is a term of employment to which all employees are bound at the onset of their employment with Respondent. Giving employees a limited opportunity to opt out of the Arbitration Policy during their first 30 days of employment does not adequately protect employees' Section 7 rights. Respondent's Arbitration Policy cannot be "voluntary" where it is imposed on employees as a condition of employment except if employees affirmatively act to opt out immediately on commencing their employment.[16] Indeed, the record demonstrates that the Arbitration Policy binds employees even in the absence of their acknowledgment thereof. Moreover, the Arbitration Policy imposes a waiver at a time employees

[15] Respondent excepts to the ALJ's failure to find and conclude that since 2007, Respondent's Arbitration Policy has not covered newly hired Team Members within their first thirty days of employment. (R. Exc. 27) The record is devoid of any proof of Respondent's position. In fact, the record demonstrates otherwise. (See, e.g., Tr. 44 [Respondent counsel admitting that employees who decline to sign the Acknowledgment form are nevertheless bound by the Arbitration Policy].) Moreover, apart from being self-serving, the position does not make the Arbitration Policy lawful. The standard in reviewing unlawful rules is an objective one, and thus requires an analysis of what an employee would understand the rule to mean. As described above, Respondent's Arbitration Policy fails under the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), because, on its face, the Policy explicitly prohibits employees from exercising their Section 7 right to bring an employment-related collective or class action.

[16] Cf., e.g., *Williams v. Securitas Sec. Servs*., 2011 WL 2713741, at *2 (E.D. Pa. 2011) ("[the employer] intends to bind its employees unless they opt out by calling a phone number deeply embedded in the "agreement" within 30 days even though the employee never signs the document. Quite simply, this Agreement stands the concept of fair dealing on its head").

are unlikely to have any awareness of employment issues that may be resolved most effectively by collective legal action, or of any other employees' efforts to act concertedly to redress issues of common concern. And, perhaps most significantly, the Arbitration Policy imposes a waiver in circumstances where employees have no notice of their Section 7 right to engage in class and collective legal activity or that a prohibition of such activity violates Section 8(a)(1) of the Act. As the ALJ pointed out, "[r]espondent's arbitration policy unlawfully requires its employees to surrender core Section 7 rights by imposing significant restraints on concerted action regardless of whether the employee opts to be covered by it or not." (ALJD 16.)

Moreover, Respondent's Arbitration Policy impacts not only employees' rights at the onset, but any future rights. For those employees who do not act to opt out upon commencing their employment, the Arbitration Policy unlawfully interferes with their Section 7 right to engage in collective legal activity by establishing an irrevocable waiver of their *future* Section 7 rights. In analogous circumstances, the Board has found unlawful and unenforceable agreements that condition employment on the employee's waiver of prospective Section 7 rights, concluding that "future rights of employees as well as the rights of the public may not be traded away in this manner."[17]

Similarly, the requirement here that employees affirmatively preserve their Section 7 rights by opting *out* of Respondent's Arbitration Policy is clearly an unlawful burdening of the

[17] *Ishikawa Gasket American, Inc.*, 337 NLRB 175, 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004) (finding unlawful a separation agreement prohibiting the departing employee from engaging in union and other protected activities for a 1-year period); *Mandel Security Bureau, Inc.*, 202 NLRB 117, 119 (1973) (finding unlawful an employer's conditioning reinstatement on the employee's refraining from future concerted activities and unfair labor charges, in addition to requesting withdrawal of pending charges).

employees' right to engage in collective litigation.[18] Just as it would be unlawful for an employer to require employees affirmatively to preserve their Section 7 rights to discuss terms and conditions of employment amongst themselves, to strike, or to engage in other union or concerted activities, an employer cannot be permitted to restrict the right to engage in collective and class legal actions unless employees affirmatively preserve that right.[19] By placing the burden on employees to take immediate steps in order to retain their Section 7 rights, or lose them forever, Respondent necessarily interferes with its employees' exercise of those statutory rights. As the ALJ correctly found, [t]he requirement that employees must affirmatively act to preserve rights already protected by Section 7 . . . through the op-out process is . . . an unlawful burden on the right of employees to engage in collective litigation that may arise in the future." (ALJD 16.)

It must also be stressed that the Arbitration Policy not only prohibits employees *who do not* act within the 30-day opt-out window from exercising their own Section 7 rights to file and join collective and class legal actions, but also interferes with the collective action rights of employees *who have* opted out. Thus, those employees who declined or failed to opt out – an

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[18] Cases addressing the separate issue of whether an arbitration agreement is procedurally or substantively unconscionable, such as *Circuit City v. Mantor*, 335 F.3d 1101 (9th Cir. 2003) and *Davis v. O'Melveny & Meyers*, 485 F.3d 1066 (9th Cir. 2007), are not dispositive of the lawfulness of such agreements under the Act. Such cases do not address employees' Section 7 right to act concertedly, including their substantive statutory right to bring collective or class claims, or whether that right can be irrevocably waived with respect to all future claims.

[19] See, e.g., *D.R. Horton*, 357 NLRB No. 184, slip op. at 3: "These forms of collective efforts to redress workplace wrongs or improve workplace conditions are at the core of what Congress intended to protect by adopting the broad language of Section 7. Such conduct is not peripheral but central to the Act's purposes. After all, if the Respondent's employees struck in order to induce the Respondent to comply with the FLSA, that form of concerted activity would clearly have been protected."

overwhelming majority of 99.9 percent of Respondent's employees, as shown above – are expressly prohibited from acting concertedly with employees who timely completed the requisite opt-out procedure. Thus, the restrictions imposed by Respondent's Arbitration Policy clearly prevents concerted activity, in violation of Section 8(a)(1) of the Act.

The federal court decisions cited by Respondent, apart from not controlling the instant case, do not address the issue presented by this case: whether an employer may prohibit employees from bringing class or collective actions in any forum. (R. Br. 25-26) Thus, they provide no guidance for the instant case. None of the cases provide for employees who are denied the substantive rights allotted to them by Section 7, the right to engage in collective activity.

Respondent contends that because 35 of the 20,563 employees have chosen to opt out, the Arbitration Policy is truly voluntary. (R. Br. 24) However, this assertion is unsupported by the facts and belied by the attempts numerous employees have made to join together to pursue class actions, only to be thwarted by Respondent's efforts to compel individual arbitration. (Joint Exh. 1, Stip. 12, 14, 18, 19.)[20]

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[20] We note that, even if these agreements in fact were voluntary, they would still be unlawful. The Board has long held, with court approval, that employers cannot avoid NLRA obligations, or obviate employees' rights under the Act, through agreements with individual employees. See, e.g., *J.I. Case Co. v. NLRB*, 321 U.S. 332, 337, 339 (1944), affirming, as modified 134 F.2d 70 (7th Cir. 1943), enfg., as modified 42 NLRB 85 (1942). As the Supreme Court explained shortly after the statute's enactment, "employers cannot set at naught the [NLRA] by inducing their workmen to agree not to demand performance of the duties which [the statute] imposes." *National Licorice Co. v. NLRB*, 309 U.S. at 364. Consistent with this principle, individual agreements requiring employees to adjust their grievances with their employer individually, rather than concertedly, "constitute[] a violation of the [NLRA] per se," even when they are "entered into without coercion," as they are a "restraint upon collective action." *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942), enfg. 33 NLRB 1014 (1941), quoted in *D.R. Horton*, 357 NLRB No. 184, slip op. at 5. Thus, an irrevocable waiver of employees'

Nor is Respondent's Arbitration Policy the situation alluded to by the Board in *D.R. Horton*, footnote 28. The *D.R. Horton* Board stated there that it did not reach the "more difficult questions" of:

> (1) whether an employer can require employees, as a condition of employment, to waive their right to pursue class or collective action in court so long as the employees retain the right to pursue class claims in arbitration and (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 non-class arbitration rather than litigation in court.

357 NLRB No. 184, slip op. at 13. Respondent's Arbitration Policy here presents neither scenario. As to the first question, under Respondent's Arbitration Policy, employees are not allowed to bring class or collective actions in any forum, arbitral or judicial. As to the second question, as shown above, the Arbitration Policy here constitutes a condition of employment.

Employees are expected to sign their commitment to the Arbitration Policy at the start of their employment. Prior to 2009, employees were presented with the Team Member Handbook Receipt Acknowledgment or similar document (Joint Exh. 4-6), and they were required to sign the document with their new hire paperwork. The process was later accomplished electronically. (Joint Exh. 1, Stip. 7-9.) Upon signing the document, employees committed to the policies in the Employee Handbook, including the Arbitration Policy. The Policy is clearly presented to employees as a condition of employment. As the *D.R. Horton* Board pointed out:

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prospective Section 7 rights eliminates employees' choice as to whether to engage in protected conduct or not, and an employer's solicitation and maintenance of such a waiver, even if on an ostensibly "voluntary" basis, necessarily interferes with employees' exercise of their statutory rights and violates Section 8(a)(1) of the Act.

> That this restriction on the exercise of Section 7 rights is imposed in the form of an agreement between the employee and the employer makes no difference. From its earliest days, the Board, again with uniform judicial approval, has found unlawful employer-imposed, individual agreements that purport to restrict Section 7 rights – including, notably, agreements that employees will pursue claims against their employer only individually.

357 NLRB No. 184, slip op. at 4.

In any event, even if employees did not sign the Acknowledgment, employees were still bound by the Arbitration Policy upon their hire, thus making the Arbitration Policy a condition of employment. (See Joint Exh. 1, Stip. 4-7.) Further, even with the Opt-out provision available since 2007, the Arbitration Policy has been a condition of employment, because employees were bound to this policy whether they expressed a desire to bound by it or not. As such, as the ALJ pointed out, "the opt-out process designed by Respondent is an illusion." (ALJD 16)

In short, as Respondent's Policy incorporates an acknowledgment step but binds employees upon hire, with or without acknowledgment, the instant case concerns an Arbitration Policy presented to employees as a condition of employment. Thus, this case does not present the circumstances alluded to by the *D.R. Horton* Board in footnote 28.

It should be stressed that nothing herein, or in the Board's decision in *D.R. Horton*, should be read to preclude employers and employees from lawfully agreeing to individually arbitrate a particular claim in dispute, or otherwise to forego bringing such a claim to a judicial forum or arbitration on a collective basis. Rather, it is Respondent's interference with employees' prospective right to choose to act individually or concertedly in *future* labor disputes that unlawfully interferes with their Section 7 rights here.

b The Possibility of Joint Litigation Pursuant to Fed. R. Civ. P. Rule 20 Does Not Detract from the Illegality of the Arbitration Policy (R. Exc. 22)

Respondent argues that its Arbitration Policy allows an arbitrator to join claims pursuant to Fed. R. Civ. P. Rule 20, thus providing a sufficient substitute for class claims. However, under *D.R. Horton*, such an "allowance" is insufficient to protect the full scope of employees' Section 7 right to pursue collective action.[21] First, Rule 20 joinder procedures are available only to employees who have already filed their own individual claims and individually moved for joinder. Joined claims continue to proceed in the names of the individual claimants. Thus, this option excludes all actions that would present a common claim through a common representative – a procedure that is expressly protected by Section 7 of the Act.[22]

Second, because Fed.R.Civ.P. Rule 20 requires each claimant to move for joinder, claimants must be aware of each others' legal proceedings before the collective action can occur, and this is certainly not always the case. Indeed, Respondent's inclusion of language in the Arbitration Policy precluding the "disclosure [of] the existence, content, or results of any arbitration hereunder without the prior written consent of both parties," (see, e.g., Joint Exh. 2A;

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[21] See, for example, *D.R. Horton*, 357 NLRB No. 184, slip op. at 6, where the Board stated, "if the Act makes it unlawful for employers to require employees to waive their right to engage in one form of activity, it is no defense that employees remain able to engage in *other* concerted activities."

[22] See, e.g., *J.H. Stone & Sons*, 33 NLRB 1014, 1023 (1941), enfd. in relevant part 125 F.2d 752 (7th Cir. 1942) ("The effect of this restriction [which precluded an employee from dealing with the employer through a representative until after the employee has attempted to settle the dispute by directly dealing with the employer as an unrepresented individual] is that, at the earliest and most crucial stages of adjustment of any dispute, the employee is denied the right to act through a representative and is compelled to pit his individual bargaining strength against the superior bargaining power of the employer.")

Joint Exh. 3A at page 15) tends to impede the information exchange necessary to allow for joinder.

Lastly, joinder is not practicable with respect to some collective claims because claimants are very numerous. Indeed, by definition, class actions encompass claims that cannot be pursued on a joint basis; under Fed.R.Civ.P. 23(a)(1), a required element for class certification is proof that "the class is so numerous that joinder of all members is impracticable."

Therefore, limiting employees' collective claims to those which can be encompassed by Rule 20 joinder impermissibly limits employees' ability to act concertedly, and the Arbitration Policy is unlawful under *D.R. Horton*.

c The ALJ Appropriately Followed a Long History of Case Law Which Dictates Finding Respondent's Arbitration Policy Unlawful (R. Exc. 9 and 13)

Respondent argues that its Arbitration Policy is not unlawful because the right to participate in class or collective action is not protected under Section 7 of the Act. However, the Board in *D.R. Horton* specifically reaffirmed that the right to engage in a class or collective action is protected concerted activity under Section 7 of the NLRA. But more importantly, as the ALJ pointed out, even if *D.R. Horton* were not the controlling case law, its "statutory declarations and case precedent . . . date back seven decades" thus binding the ALJ's decision until such case precedent is overruled. [23] (ALJD 14.) Agreements such as Respondent's

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[23] See *Spandsco Oil & Royalty Co.*, 42 NLRB 942 (1942) in which three employees filing a complaint with the FLSA was deemed protected activity; See also *Salt River Valley Water Users Ass'n*, 99 NLRB 849, 853-854 (1952), enfd. 206 F.2d 325 (9th Cir. 1953) circulation of employee petition to represent others for FLSA claim found deemed protected-concerted activity.

Arbitration Policy are essentially "yellow dog" contracts as they require employees to "promise" not to engage in protected activity. *Barrow Utilities & Electric*, 308 NLRB 4, fn. 5 (1992). "Employer devised agreements that seek to restrict employees from acting in concert with each other are the *raison d'être* for both the Norris-LaGuardia Act and Section 7 of the NLRA." (ALJD 15.) The Board has long found that an employer violates Section 8(a)(1) by soliciting such agreements,[24] as this conduct "has an inherent and direct tendency to interfere with, restrain, and coerce employees in the exercise of their rights under Section 7 of the Act . . ."[25] This being the case, the ALJ appropriately found the Arbitration Policy unlawful because it prohibits employees from engaging in protected-concerted activity.

B This Case Does Not Present a Conflict Between the FAA and the NLRA (R. Exc. 10, 11, and 29)

The instant case, like *D.R. Horton*, does not present a conflict between the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, et seq., and the NLRA. As the Board in *D.R. Horton*

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[24] *Hecks, Inc.*, 293 NLRB 1111, 1121 (1989) ("[b]y requesting . . . employees to promise to be bound by the Respondent's written policy that it does not want its employees to be represented by a union and that there is no need for a union or other paid intermediary to stand between the employees and the Company, the Respondent . . . has interfered with, restrained, and coerced [its] employees in the exercise of their rights under Section 7 of the Act, in violation of Section 8(a)(1) of the Act"); *Western Cartridge Co.*, 44 NLRB at 6-8, n.5, 19 (invalidating individual employment contracts that purportedly gave employer right to fire any employee who "participated in a strike or any other concerted activity regarded as interfering with his 'faithfully' fulfilling 'all his obligations,'" because they effectively restricted employees' right to engage in concerted activity); *Superior Tanning Co.*, 14 NLRB 942, 951 (1939), enfd. 117 F.2d 881, 888-91 (7th Cir. 1941) (individual contracts, which were part of the employer's plan to discourage unionization, were unlawful; the Board noted that, "[e]ven if no explicit compulsion of [employees'] signatures had taken place, it is clear that the contracts were presented with the full weight and authority of the respondent's approval behind them").

[25] *Hecks, Inc.*, 293 NLRB at 1120.

explained: "holding that an employer violates the NLRA by requiring employees, as a condition of employment, to waive their right to pursue collective legal redress in both judicial and arbitral forums accommodates the policies underlying both the NLRA and the FAA to the greatest extent possible." 357 NLRB No. 184, slip. op. at 12. This is because Section 2 of the FAA "provides that arbitration agreements may be invalidated in whole or in part" for the same reasons any contract may be invalid, including that it is unlawful or contrary to public policy. *Id*., slip. op. at 11. Inasmuch as the Arbitration Policy is inconsistent with the NLRA, it is not enforceable under the FAA.

The Board also emphasized that finding an arbitration policy such as the one presented here unlawful does not conflict with the FAA because "the intent of the FAA was to leave substantive rights undisturbed." *Id*. Although Respondent argues that the waiver is not of substantive rights but, rather, of procedural rights, the Arbitration Policy clearly requires employees to forego substantive rights under the NLRA—namely, employees' right to pursue employment-related claims in a collective or class action—and the Board has so held. Thus, the Arbitration Policy is unlawful not because it involves arbitration or specifies particular litigation procedures, but instead because it prohibits employees from exercising their Section 7 right to engage in collective legal activity in any forum.

1 Finding the Arbitration Policy Unlawful Accommodates both the NLRA and the FAA

Respondent argues that the accommodation between the FAA and the NLRA arrived at in *D.R. Horton* does not apply to the instant case. However, just as in *D.R. Horton*, and as explained above, the Respondent's Arbitration Policy is a mandatory condition of employment because it applies to employees who were never given the opportunity to opt-out, and equally to

those who were presented with the opt-out, but were bound by the policy unless they opted to retrieve their Section 7 rights. Further, just as in *D.R. Horton*, Respondent's Arbitration Policy requires employees to forgo substantive rights, namely, their right to engage in concerted activity. The Policy forbids class or collective action in *any* forum by both limiting the forum to arbitration and stripping away the right to bring collective disputes in arbitration. The FAA makes clear that an arbitration agreement may be set aside on "grounds that exist at law or in equity for the revocation of any contract." 9 USC § 2. Schemes such as Respondent's are clearly against public policy as they require employees to waive the rights guaranteed under the Act as a condition of employment. Accordingly, barring the creation or enforcement of such agreements pursuant to the NLRA does not offend the FAA.

2 The Supreme Court's Post-D.R. Horton Decisions Regarding Enforcement of Arbitration Agreements Do Not Override Substantive Rights Guaranteed by the NLRA

Respondent argues that post-*D.R. Horton* Supreme Court authority confirms that the agreement is enforceable under the FAA, citing *CompuCredit v. Greenwood*, 132 S.Ct. 665 (2012) and *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011), for the proposition that even involuntary arbitration agreements are enforceable under the FAA (R.Br. 30-31). Initially, this proposition is startling on its face, inasmuch as the entire thrust of jurisprudence under the FAA depends on the agreement to arbitrate having been freely entered into by the parties. *Stolt-Nielsen S.A. v AnimalFeeds Int'l Corp.*, 130 S.Ct 1758, 1773 (2010); *Carey v. 24 Hour Fitness USA, Inc.*, 669 F.3d 202, 205 (5th Cir. 2012). Moreover, as the ALJ found, the cases upon which Respondent relies "do not address the fundamental question of whether, and to what degree, the FAA may be used as a tool to alter, by way of private 'agreements' that are in large measure

imposed unilaterally by employers, the fundamental substantive rights of workers established by decades old congressional legislation." (ALJD 15.)

Neither *CompuCredit* nor *AT& T Mobility* addressed substantive rights conferred on employees by an act of Congress. In *AT&T Mobility*, the issue posed was whether California state law, deeming unconscionable (and therefore void) any waiver of class arbitration of common-law claims under a consumer contract, was preempted by the FAA. 132 S.Ct. at 1745. There the Court held that the California state law was preempted by the FAA because the basis on which California found unconscionability was one that is available only to agreements to arbitrate, as opposed to contracts generally. *Id*. at 1746. In *CompuCredit*, the issue presented was whether the Credit Repair Organization Act's (CROA) civil liability and nonwaiver provisions together constitute a "congressional command" sufficient to override the FAA's mandate that courts enforce arbitration agreements thereunder. 132 S. Ct. at 669. The Court held that because Congress, in drafting CROA, did not prohibit or restrict the use of arbitration, the FAA required the Court to enforce the arbitration agreement at issue on its terms.[26] Id. at 673. Thus, neither

[26] As Justices Sotomayor and Kagan point out in their concurrence, however, Congress need not explicitly state within a statute that arbitration of statutory claims are disallowed in order to find that a statute trumps the FAA. "We have never said as much, and on numerous occasions have held that proof of Congress' intent may also be discovered in the history or purpose of the statue in question . . . ('If such an intention exists, it will be discoverable in the text of the [statute], its legislative history, or an 'inherent conflict' between arbitration and the [statute's] underlying purposes'); *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987) ("If Congress did intend to limit or prohibit 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 purposes."** (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)." (emphasis added) The *CompuCredit* Court, neither explicitly nor by necessary implication, purported to narrow the basis on which a statutory conflict would be assessed. In the instant case, Respondent's mandatory class action waiver creates an inherent conflict between

case purports to decide the question whether employees can be required, as a condition of employment, to waive their substantive right under the NLRA to engage in collective resort to workplace dispute resolution. Nor is the Court likely to make such a leap, given that Section 2 of the FAA recognizes the possibility that arbitration agreements may be invalidated "upon such grounds as exist in law." 9 U.S.C. § 2. Indeed, as the Board discussed in *D.R. Horton*, the Supreme Court has made clear that arbitration may substitute for a judicial forum only so long as the litigant can effectively vindicate his or her statutory rights through arbitration. 357 NLRB No. 184, slip op. at 9, citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 28 (1991); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 628, 637.

Respondent argues that under *CompuCredit*, the Arbitration Policy's class waiver should be enforced in accordance with its terms, absent explicit contrary congressional command. (Resp. Br. 27) However, *CompuCredit* and its antecedents apply the "contrary congressional command" test *not* to the class-versus-individual issue, but to the separate question of whether the parties have agreed to forego arbitration entirely. See, e.g., *Shearson/American Express, Inc.*, 482 US at 226. The AGC does not here, and indeed never has, taken the position that employees cannot be required to commit to arbitration of their employment-related disputes. Indeed, such a proposition would be contrary to longstanding policy under the NLRA to *encourage* arbitration of labor disputes. Here, in contrast, Respondent's Arbitration Policy prevents employees from exercising the core NLRA right to engage in *collective* arbitration or, failing that, *collective* judicial action. The illegality of the provision rests on the prohibition of *collective* action, not the requirement that claims be heard in an arbitral forum. Accordingly, the ALJ was correct in

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arbitration and Section 7 of the Act -- not because the Respondent's Arbitration Policy compels arbitration, but because it compels *individual* arbitration and prohibits collective actions.

concluding that *AT&T Mobility LLC v. Concepcion*, and *Compucredit v. Greenwood* "have little, if anything, to do with arbitration in the context of the employer-employee relationship." But even further, these cases have nothing to do with whether the Section 7 right to act collectively may be waived by committing to an arbitration policy that requires individual arbitration.[27]

Finally, Respondent's contention, that no "contrary Congressional command" in the NLRA compels employers to allow classwide adjudication of workplace claims (Br. 32), is simply fanciful. As the Board made more than clear in *D.R. Horton*, NLRB No. 184, slip op. at 2-6, the right of employees to engage in collective resort to adjudicative forums has been a core NLRA precept since its enactment. It is only in recent years, since employers have sought to import judicial suspicion of class-based commercial arbitration into the workplace arena, that this core principle of labor law has been called into question.

3 The ALJ's Decision Does Not Compel Class Arbitration, but Merely Preserves Employee Choice to Engage in Concerted Activity in Some Forum.

Respondent also argues that finding the Arbitration Policy unlawful would compel class arbitration absent agreement of the parties, thus running afoul of the Supreme Court's decisions in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. ____, 130 S.Ct. 1758 (2010), and *AT&T Mobility v. Concepcion*, 131 S.Ct. 1740 (2011). To the contrary, adherence to *D.R. Horton* does not *compel* class arbitration, as Respondent remains entirely free to limit its arbitration program to individual arbitration, *so long as employees retain the right to engage in collective*

[27] Respondent also cites various federal court case decisions that have upheld class action waivers in mandatory arbitration policies. However, the interpretation and enforcement of the substantive rights protected by the NLRA is, in the first instance, accorded to the Board—not to the federal courts.

legal activity in court.[28] Any such policy would be entirely permissible under the FAA and would not run afoul of either *Stolt-Nielsen* or *AT&T*. While *Stolt-Nielsen* and *AT&T* make clear that bilateral arbitration is *favored* under the FAA, neither of these decisions suggests that it is *compelled*. Indeed, *Stolt-Nielsen* makes explicit that an agreement to arbitrate on a class basis is enforceable under the FAA. 130 S.Ct. at 1774-75. Thus, any claimed infringement on the FAA by protecting employees' Section 7 right to collective activity in these circumstances is entirely illusory. As the ALJ emphasized, "the most important beginning point in the analysis of the issues presented here is to recognize that this case does not place in question an employer's right to require employees to arbitrate employment-related disputes." (ALJD 14.)

In contrast, permitting an employer to require employees to limit their legal claims to individual arbitration vitiates the right to collective action that lies at the heart of the NLRA. It is axiomatic that an employer cannot force employees to forego that right. It therefore follows that prohibiting employers from doing so protects the values inherent in the NLRA, without offending those inherent in the FAA. Put another way, requiring an employer to adhere to the NLRA is consistent with the FAA.

Finally, as the *D.R. Horton* Board made clear, even if, contrary to the foregoing, there were an irreconcilable conflict between the NLRA and the FAA, "the Supreme Court has held that when two federal statutes conflict, the later enacted statute, here the NLRA, must be understood to have impliedly repealed inconsistent provisions in the earlier enacted statute." 357 NLRB No. 184, slip. op. at 12, fn 26, citing *Radzanower v. Touche Ross & Co.*, 426 U.S. 148,

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[28] This case does not present the question, and the Board need not decide, whether an employer can require employees to engage in individual arbitration in disputes for which class-based judicial relief is not available.

154 (1976); *Chicago & N. W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 582 fn. 18 (1971); *Posadas v. Nat'l City Bank*, 296 U.S. 497, 503 (1936); see also *Tug Allie-B, Inc. v. United States*, 273 F.3d 936, 948 (11th Cir. 2001).[29] For the reasons stated here, and for those iterated by the Board in *D.R. Horton*, finding Respondent's Arbitration Policy unlawful under the Act will not pose a conflict with the FAA.

C The Rules Enabling Act (REA) Deals with Procedural Rights and Not with Substantive Rights (R. Exc. 30)

Respondent argues that the ALJ has somehow "expanded the procedural class action mechanism set forth in Fed. R. Civ. P. Rule 23 to constitute a substantive right," and thus "run afoul" of the Rules Enabling Act, 28 U.S.C. § 2072(b) (R. Br. 36.). Respondent argues that Rule 23 "cannot be interpreted as providing a substantive right to participate in class actions under the National Labor Relations Act." However, Respondent's arguments fail to acknowledge the fact that the right to participate in collective action is founded in Section 7 of the NLRA, not through the REA. Respondent has purposefully ignored the Board's central holding in *D.R. Horton* that the right of employees under the NLRA to bring class and collective claims is itself a *substantive* right. This being the case, the REA cannot be interpreted to forbid the Section 7 right to engage in protected concerted activity manifested by way of a class action.

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[29] While the FAA was reenacted and codified as Title 9 of the United States Code in 1947, the legislative history and the Supreme Court make clear that the relevant date of enactment is in 1925. See, e.g., H.R. Rep. No. 80-251 (1947), *reprinted in* 1947 U.S.C.C.A.N. 1511 (expressly stating that the 1947 bill made "no attempt" to amend the existing law); H.R. Rep. No. 80-255 (1947), *reprinted in* 1947 U.S.C.C.A.N. 1515 (same); *Compucredit Corp. v. Greenwood*, 132 S.Ct. at 668 ("the Federal Arbitration Act (FAA), enacted in 1925"); *AT&T Mobility v. Concepcion*, 131 S.Ct. at 1745, 1751 ("[t]he FAA was enacted in 1925," "class arbitration was not even envisioned by Congress when it passed the FAA in 1925"); *Vaden v. Discover Bank*, 556 U.S. 49, 58, 129 S.Ct. 1262, 1271 (2009) ("[i]n 1925, Congress enacted the FAA").

Also contrary to Respondent's argument, the Board in *D.R. Horton* made clear that the Act guarantees "employees' opportunity to pursue without employer coercion, restraint or interference such claims of a class or collective nature as may be available to them under Federal, State or local law." 357 NLRB No. 184, slip op. at 10 fn. 24. It is certainly true that Section 7 does not guarantee class certification if the requirements for certification under Rule 23 are not met (i.e., the putative class lacks sufficient numerosity, commonality, etc.) -- as the Board stated in *D.R. Horton,* "[w]hether a class is certified depends on whether the requisites for certification under Rule 23 have been met." Id., slip op. at 10. It is equally true, however, that employees have the Section 7 right to be free from employer interference with their right to engage in collective legal activity. Such interference could not be more manifest than where, as here, an employer seeks to dismiss legal action precisely because it is collective.

Further, Respondent's arguments erroneously presume that only federal courts will be hearing cases absent arbitration. However, workplace disputes are also brought under state law. e.g. *Gentry v. Superior Court*, 42 Cal.4th 443 (2007); *Iskanian v. CLS Transportation*, 142 Cal.Rptr.3d 372 (2012); *Franco v. Arakelian Enterprises, Inc.*, 211 Cal.App.4th 314 (2012). In such circumstances, the REA would more emphatically not apply. In any case, Respondent's reliance on the REA in misguided.

D If the Nondisclosure Provision was Fully and Fairly Litigated, the ALJ Correctly Found it to be Unlawful (R. Exc. 5, 12, 19, and 20)

In addition to finding the maintenance and enforcement of Respondent's Arbitration Policy to be unlawful because it interferes with employees' right to engage in collective legal activity, the ALJ also found that Respondent violated Section 8(a)(1) of the Act by maintaining a provision in its Arbitration Policy that forbids the disclosure of information regarding any

arbitration. Respondent argues that the ALJ's ruling on this issue was improper as the AGC did not assert in the complaint that this provision was unlawful. Respondent also argues that neither the AGC nor the Charging Party briefed the issue. We note, however, that the repercussions of the nondisclosure provision were set forth in the AGC's brief. In any case, an allegation need not be pled in order for an ALJ or the Board to find a violation.

> It is well settled that the Board may find and remedy a violation even in the absence of a specific allegation in the complaint if the issue is closely connected to the subject matter of the complaint and has been fully litigated . . . [w] hether a matter has been fully litigated rests in part on "whether the respondent would have altered the conduct of its case at the hearing, had a specific allegation been made."

In re Piggly Wiggly Midwest, LLC, 357 NLRB No. 191 (2012), citing *Pergament United Sales, Inc.*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990). Given this standard, the ALJ concluded that:

> Any claims that the nondisclosure provision in Respondent's arbitration policy was not properly plead nor fully litigated lack merit. In defending the class action ban in its arbitration policy, Respondent's arguments encompassed the entirety of its arbitration policy . . . In as much as Respondent has chosen to cherry-pick provisions throughout its arbitration policy, whether explicitly stated or not, in support its defense, it cannot properly be heard to complain about the scrutiny of its entire policy on the ground that it has not been fully litigated.

(ALJD 18, fn. 10.)

If the Board finds that the issue of the Nondisclosure Provision was fully and fairly litigated, then it should further find that the ALJ correctly found the nondisclosure provision unlawful. Under *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), such a rule is unlawful because it expressly restricts Section 7 activity and because an employee would

reasonably read it as restricting such activity. Respondent argues that the nondisclosure rule's legality is saved by prefacing it with the phrase "except as may be required by law." Nevertheless, a layperson or the average employee would not understand the exemption to privilege protected activity. To make the rule noncoercive with respect to protected activity, Respondent would have to expressly state that the rule does not apply to conduct protected under the National Labor Relations Act. (See *Lutheran Heritage Village*, 343 NLRB 646, 653 n.7 (2004), "if the prohibited conduct is of a kind so general as to imply that protected activity may be encompassed, an employer can easily eliminate the ambiguity by adding a statement to its rule that the prohibition does not apply to conduct that is protected under the National Labor Relations Act." Member Liebman dissenting in part.) Such wording would tip off the employee to the fact that there are specific laws which protect the discussion of terms and conditions of employment. With Respondent's nondisclosure provision, employees are left with vague language that can only be interpreted by employees as allowing the disclosure of information regarding arbitration if they are forced to by the law. The layperson's interpretation of the "as required by law" would not bring to an employee's mind the right to discuss terms and conditions of employment under the NLRA, particularly in nonunion employment settings.

The Board has recently held employer rules unlawful where they are so broad that employees could not conceivably interpret them to exclude protected activity. See *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012), "there is nothing in the rule that even arguably suggests that protected communications are excluded from the broad parameters of the rule. In these circumstances, employees would reasonably conclude that the rule requires them to refrain from engaging in certain protected communications." Again, Respondent's nondisclosure

provision along with its exemption are so broad that employees would not be able to glean their right to engage in protected activity to be encompassed in "as may be required by law."

Further, this rule undercuts the promotion of arbitration as the sole means of resolving workplace disputes by forbidding employees from preparing adequately to use the arbitral forum. (See Section A.2.b. above) As the ALJ pointed out, "[r]espondent's arbitration policy serves to restore the imbalance between the individual worker and the corporate employer by prohibiting employees from pursuing the resolution of work place disputes with concerted legal actions and by imposing broad nondisclosure requirements." For all these reasons, if the Board finds that the issue of the Nondisclosure Provision was fully and fairly litigated, then it should further find that the ALJ correctly found the nondisclosure provision unlawful.

E Section 10(b) Is No Bar to Finding the Arbitration Policy Unlawful Because It Has Been Maintained and Enforced Within the 10(b) Period (R. Exc. 21 and 26)

Respondent argues that the ALJ's remedy exceeds the statute of limitations under 10(b) of the NLRA. (R. Br. 40.) As already noted above with regard to the seeking of a remedy relating to the 3,605 employees hired prior to 2007, however, Section 10(b) does not preclude the pursuit of a complaint allegation based on the maintenance and/or enforcement of an unlawful rule within the 10(b) period, even if the rule was promulgated earlier. See Control Services, 305 NLRB 435, 435 fn. 2, 442 (1991), enfd. mem. 961 F.2d 1568 (3d Cir. 1992); see also *The Guard Publishing Co.*, 351 NLRB 1110, 1110, fn.2 (2007). Here, although the unlawful Arbitration Policy has been promulgated since at least 2005, the ramifications of the Policy continue into the 10(b) period as amply evidenced by Respondent's recent enforcement of its Policy in various forums. All Respondent's employees, covered by the Arbitration Policy from August 2005 through the present, have had their Section 7 right infringed upon. At any time, the Policy may

be enforced against them. As such, the maintenance of Respondent's unlawful Arbitration Policy within the 10(b) period was unlawful even though the rule was promulgated before then.

F The Remedy Sought in this Case is Appropriate Based on Controlling Board Law (R. Exc. 23, 24, 25, and 32)

Respondent argues that the remedy issued by the ALJ is impermissible because it "effectively seeks to undo earlier rulings by Article III courts" and deprives Respondent of the right to make arguments. (R. Br. 41.) However, this argument fails under Board case law and as a matter of fact.

As part of the remedy sought in this matter, the GC seeks an order precluding Respondent from maintaining that portion of its Arbitration Policy found to be unlawful. This would include not only cease-and-desist relief, but also notification to employees that it is rescinding the unlawful provisions.

Additionally, the GC seeks an order precluding Respondent from enforcing that portion of its Arbitration Policy found to be unlawful. This would include not only cease-and-desist relief, but also an order requiring Respondent to notify all judicial and arbitral forums wherein the Policy has been enforced that it "no longer opposes the seeking of collective or class action type relief." (GC. Exh. 1(d):5.) In particular, to remedy the legal consequences of the employer's unlawful motion, and return employees to the *status quo ante*, Respondent should be required to withdraw the motion for individual arbitration, if pending, or to move the appropriate court to vacate its order for individual arbitration, if Respondent's motion has already been granted and a

motion to vacate can still be timely filed.[30] Any such motion to vacate should be made jointly with the affected employees, if they so request.[31] We note that nothing in our requested order would preclude Respondent from amending its motion to seek lawful collective or class arbitration rather than a class or collective lawsuit, as long as employees were able to exercise their collective legal rights in some forum.[32]

Under Board law, such remedies are appropriate. Specifically, the Board has frequently sought remedies requiring a respondent to take affirmative steps in disavowing positions that are antithetical to the Act. Thus, in *Loehmann's Plaza*, 305 NLRB 663, 671 (1991, the Board ordered the respondent to seek to have the injunction granted against the union withdrawn. In *Federal Security, Inc.*, 336 NLRB 703 (2001), remanded on other grounds, 2002 WL 31234984 (D.C. Cir. 2002), the Board ordered the respondent to take affirmative steps to file a motion with

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[30] We note that, depending on the jurisdiction, a motion for relief from judgment or order due to legal error, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, may be timely filed for a short period beyond the entry of final judgment (see, e.g., *Steinhoff v. Harris*, 698 F.2d 270, 275 (6th Cir. 1983) ("the vast majority of courts that have concluded that legal error comes within the meaning of Rule 60(b)(1) have also determined that. . . the moving party must make his or her motion within the time limits for appeal"), and even beyond the expiration of the period for filing an appeal (see, e.g., *Lairsey v. Advance Abrasives Co.*, 542 F. 2d 928, 930-932 (5th Cir. 1976) (permitting a Rule 60(b) motion after the time limit for appeal had expired, but within one year of the judgment, where there had been a change in the underlying law).

[31] In this regard, we note that the Board has in the past ordered such a joint motion or petition where an employer has unlawfully used the legal system to interfere with an employee's Section 7 rights. See, e.g., *Baptist Memorial Hospital*, 229 NLRB 45, 46 (1977) ("[w]e shall also require Respondent to rectify the effects of its unlawful conduct by joining with [the employee] in petitioning the Memphis Municipal Court and Police Department to expunge any record of [the employee's] arrest and conviction").

[32] This would be consistent with the General Counsel's long-standing position that employers may lawfully require employees to bring their claims in arbitration, rather than in court, as long as all of their substantive rights are preserved (including their statutory right to engage in collective legal activity). See, e.g., *O'Charley's Inc.*, Case 26-CA-19974, Advice Memorandum dated April 16, 2001, at 5-7 ("Section 7 does not provide a right to select any particular forum to concertedly engage in activities for mutual aid or protection").

the court to withdraw its lawsuit and file a motion to vacate the default orders entered and those still operative.[33]

Additionally, consistent with the Board's usual practice in cases involving unlawful legal actions, Respondent should be ordered to reimburse employees for any attorney's fees and litigation expenses directly related to opposing the employer's unlawful motions to compel individual arbitration. See *Bill Johnson's Restaurants*, 461 U.S. at 747 ("If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorney's fees and other expenses" and "any other proper relief that would effectuate the policies of the Act"), on remand, 290 NLRB 29, 30 (1988); *Phoenix Newspapers*, 294 NLRB 47, 51 (1989); *Summitville Tiles, Inc.*, 300 NLRB 64, 67, 77 (1990).

Indeed, in *J.A. Croson Company*, the Board recently reaffirmed that the reimbursement of legal fees and expenses to parties defending against unlawful legal actions is "a presumptively appropriate remedy." 359 NLRB No. 2, slip op. at 10 (2012). Though a presumptively appropriate remedy, the Board decided not to award litigation fees and expenses in *Croson* because the lawsuit at issue in that case was not unlawful at its inception and because the charging parties did not file a charge with the Board until long after they were aware that were grounds to do so.[34] The Board determined that the award of attorney's fees and costs, in the

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[33] As those cases were based on federal-law preemption, rather than an "illegal objective" under fn. 5 of *Bill Johnson's Restaurants v NLRB*, 461 U.S. 731, 737 n.5 (1983), the timing of the preemption was considered in applying the remedy. Here, of course, there is no point of preemption to consider and, as noted above, Respondent's motions were unlawful *ab initio*.

[34] It was not until after the lawsuit at issue in *Croson* was filed that the Act's protection "attached," by virtue of the Board's decision in *Manno Electric*, 321 NLRB 278, 298 (1996), enfd. mem. 127 F.3d 34 (5th Cir.1997) to the union's utilization of the job targeting program. *J.A. Croson Co.*, 359 NLRB No. 2, slip op. at 4.

particular circumstances of that case, were "not necessary to discourage parties from instituting or maintaining preempted lawsuits against conduct protected from the Act." *Id*., slip op. at 10.

Contrary to the circumstances in *Croson*, Respondent's attempts to compel individual arbitration as detailed in the Complaint were unlawful at their inception because Respondent was seeking to prohibit the employees' collective legal action concerning employment-related matters -- activity that has long been protected by the Act. See, e.g., *Spandsco Oil & Royalty Co.*, 42 NLRB 942 (1942). Moreover, there is no record evidence whatsoever that Charging Party or the employee plaintiffs in the underlying lawsuits detailed in the Complaint had demonstrable awareness that Respondent's conduct was unlawful under the Act at an earlier point in those underlying legal proceedings. Most importantly, unlike in *Croson*, a cease and desist order alone would be insufficient to discourage parties from filing unlawful motions to compel individual arbitration of employment-related disputes, given the current widespread nature of such conduct.[35]

To remedy the legal consequences of Respondent's unlawful motions, and return the employees to the *status quo ante*, Respondent should be required to reimburse employees for any attorney's fees and litigation expenses directly related to opposing Respondent's unlawful attempts to compel individual arbitration.

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[35] See *Carey v. 24 Hour Fitness USA, Inc.*, 2012 WL 4857562 (S.D.Tex.); *Jasso v. Money Mart Express, Inc.*, 879 F.Supp.2d 1038 (N.D. Cal. 2012); *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F.Supp.2d 831, 844 (N.D.Cal.2012); *Delock v. Securitas Security Services USA, Inc.*, 2012 WL 3150391 (E.D.Ark.); *Spears v. Waffle House*, 2012 WL 1677428 (D.Kan.); *De Oliveira v. Citicorp North America, Inc.*, 2012 WL 1831230 (M.D.Fla.); *LaVoice v. UBS Fin. Servs., Inc.*, 2012 WL 124590 (S.D.N.Y.); *Cohen v. UBS Fin. Servs.*, 2012 WL 6041634 (S.D.N.Y.); *Palmer v. Convergys Corp.*, 2012 WL 425256 (M.D.Ga.); *Nelsen v. Legacy Partners Residential, Inc.*, 207 Cal. App. 4th 1115 (2012); *Iskanian v. CLS Transportation Los Angeles LLC*, 206 Cal. App. 4th 949 (2012); *Truly Nolen of America v. Superior Court*, 208 Cal.App.4th 487 (2012).

1 The Remedy Sought in this Case is Not Retroactive

Respondent argues that the retroactive application of a ruling is not warranted when the Board issues a decision that is a "significant departure from preexisting Board law." (R. Br. 44, citing *Dana Corp.,* 351 NLRB 434 (2007).) Respondent cites *John Deklewa & Sons,* 282 NLRB 1375 (1987), as setting forth the analysis in determining the appropriateness of retroactive application.

The remedy sought here is not retroactive in nature, as *D.R. Horton* applies longstanding Board precedent upholding employees' right to join together concerning workplace grievances, including through litigation. 357 NLRB No. 184, slip op. at 2, fn 4 (2012) (citing multiple Board cases standing for this proposition). Rather, the Complaint merely seeks to have Respondent inform all pertinent judicial and arbitral forums that it "no longer opposes the seeking of collective or class type relief." (GC. Exh. 1(d):5.) What action follows is for the individual forums to determine.

At any rate, were the remedy to be interpreted as retroactive in nature, the remedy would pass muster because it does not impose "manifest injustice" on Respondent. In determining whether a responding party would suffer a manifest injustice in the retroactive application of new policies or standards, the Board applies a three-factor test. *Kentucky River Medical Center*, 356 NLRB No. 8, slip op. at 4-5 (2010) . The factors are (1) the reliance of the parties on existing law; (2) the effect of retroactivity on the purposes of the Act; and (3) any particular injustice to the losing party under retroactive application of the change of law. *Wal-Mart Stores, Inc.*, 351 NLRB 130, 134 (2007); *SNE Enterprises, Inc.*, 344 NLRB 673, 673 (2005); see also *DTG Operations, Inc.*, 357 NLRB No. 175, slip op. at 7, fn.19 (Dec. 30, 2011 (applying the 3-part test).

The first issue under the "manifest injustice" test is whether Respondent relied on preexisting Board law. In *Loehmann's Plaza*, referenced above, the Board determined that it saw "no injustice to any of the parties here in retroactive application of our rulings because the current state of the law governing lawsuits against trespassers exercising Section 7 rights can fairly be described as unsettled." 305 NLRB 663, 672 (1991. Similarly, in *Pattern Makers*, 310 NLRB 929 (1993), the Board found that the retroactive application of a new rule on fining members was proper because "the union did not enjoy complete certainty as to how it would fare under Board law."[36] In *SNE Enterprises, Inc.*, 344 NLRB at 673-74, the Board emphasized both that the employer presented no evidence of its supervisors' reliance on prior precedent and that the complained-of change did not represent a significant departure from well-settled law. See also *DTG Operations, Inc.*, 357 NLRB No. 175, slip op. at 7, fn.19 (noting that the employer supplied no evidence that it had relied on Board precedent to guide its actions).

Here, Respondent could not have relied on Board law when it established its Arbitration Policy in about 2005. Since its earliest days, the Board has held that an employer cannot require employees to waive rights guaranteed under the Act. *D.R. Horton*, 357 NLRB No. 184, slip op. at 4, and cases cited at fn.7. Further, the Board has long held that the "NLRA protects employees' ability to join together to pursue workplace grievances, including through litigation."[37] *Id.*, slip op. at 2. Respondent cites no Board decision that supports the use of its Arbitration Policy in different court actions to stifle collective action.[38]

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[36] Cf. *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), where the Board was deciding a remedial issue.

[37] Thus, this matter is easily distinguished from the court's decision in *Epilepsy Foundation of Northeast Ohio v. NLRB*, 268 F.3d 1095 (D.C. Cir. 2001), enfg. in part 331 NLRB

The second issue to be addressed—the effect of retroactivity on the purposes of the Act—also supports retroactive application in this case. The effect of retroactivity in this case would further the purposes of the underlying law, i.e., an employer cannot require employees to waive their Section 7 rights, which the decision in *D.R. Horton* refined. Ordering Respondent to return to the judicial forums in which it has asserted its Arbitration Policy as an impediment to a class action in order to disavow its position may allow those and other employees the opportunity to exercise their right to bring a collective or class action—a right "at the core of what Congress intended to protect by adopting the broad language of Section 7." *Id.*, slip op at 3. Respondent argues that interests such as "employee free choice" and "labor relations stability" are not enhanced by retroactive application of the remedy as they were in *Deklewa*. (Resp. Br. 46.) However, employee free choice is specifically what a retroactive application of the remedy would preserve since employees would then be free to join together to bring collective claims.

The third and last issue to be addressed, whether retroactive application of Board law in this case would cause a particular injustice to Respondent, does not prohibit retroactive application here. The Board has found that reliance on existing Board law alone is insufficient to

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676 (2000). In the underlying ULP case, the Board held that employees in the non-union setting would be afforded *Weingarten* rights. In rejecting the retroactive application of this new rule of law, the court relied heavily on the finding that, "[a]t the time when this case arose, the Board's policy on the application of *Weingarten* rights was absolutely clear - employees not represented by a union could not invoke *Weingarten*." *Id.* at 1102. Thus, unlike the instant matter, the *Epilepsy* case did not present "'new applications of [existing] law, clarifications, and additions,'" that are appropriate for retroactive application. *Id.* (quoting *Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993)).

[38] To further its argument, Respondent raised the previous issuance of the General Counsel's Memo 10-06. (Tr. 9.) Of course, that Memo was not binding Board law. *D.R. Horton*, 357 NLRB No. 184, slip op. at 6, fn.15.

establish a particular injustice.[39] Further, the Board typically does not find a particular injustice where there is limited monetary liability associated with the corresponding unfair labor practice or when the accompanying remedy is for a limited duration.[40] Here, applying the remedy retroactively, i.e., to any pending proceedings, does not impose any particular injustice on Respondent. Respondent relied on no Board law—which, in any event, would be insufficient to evidence an injustice. Nor can Respondent point to any monetary liability in notifying the judicial forums, where actions are pending, that it will not seek to enforce its Arbitration Policy. Respondent may have some degree of potential liability relating to the reimbursement of attorney's fees and litigation expenses incurred in opposing the employer's unlawful motions to compel individual arbitration. However, such liability will necessarily be restricted solely to those expenses incurred directly as a result of those particular motions. As such, the liability will be relatively minor and limited, and Respondent cannot point to any cognizable particular injustice it will undergo in complying with the remedy the AGC is seeking.

Moreover, Respondent's reliance on the Supreme Court decision in *Christopher v. SmithKline Beecham Corp.*, ____ U.S. ____, 132 S.Ct. 2156 (June 18, 2012), is misplaced. In *SmithKline*, the Supreme Court, in interpreting the Department of Labor's definition of an outside salesman, did not give deference to the agency's interpretation, stating:

> It is one thing to expect regulated parties to conform their conduct to an agency's interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency's

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[39] See *John Deklewa & Sons*, 282 NLRB 1375, 1389 (1987; see also *Wal-Mart Stores, Inc.*, 351 NLRB at 134-36 (conducting separate and distinct analyses of the "reliance on preexisting law" and "particular injustice" prongs).

[40] *John Deklewa & Sons*, 282 NLRB at 1389, where the Board found liability "must be borne only for the duration of the contract involved."

> interpretations in advance or else be held liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.

Id. at 2168. In *SmithKline,* the DOL's interpretation had a long history, and parties' reliance on that interpretation would lead to massive liability. *Id*. at 2167. The Court considered whether an Agency's determination would result in "unfair surprise" or "fines or damages" caused by "good faith reliance on [agency] pronouncements." *Id.* (citing *Long Island Care at Home v. Coke*, 551 U.S. 158 (2007) ; *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974)). However, the instant case is readily distinguishable because there is no unfair surprise here in that the remedy sought does not invoke fines or damages caused by good faith reliance on contrary Board precedent. Indeed, as explained above, Board precedent has long been clear that an employer may not require its employees to waive away their Section 7 rights as a condition of employment, which Respondent did not take into account in promulgating, maintaining and enforcing its Arbitration Policy. As such, the Supreme Court's *SmithKline* decision is inapposite. Therefore, for the reasons stated above, the Respondent will not suffer a manifest injustice if the remedy sought by the GC is granted.

2 Providing Employees Hired Before 2007 With the Opt-out Will Not Remedy the 8(a)(1) Violation

Respondent argues that the appropriate remedy with respect to those employees hired before 2007 is to provide those employees with the opportunity to opt out. (R. Br. 47.) However, as explained above, opting out does not save the lawfulness of the Arbitration Policy. (See Section A.2.a.) As such, the only appropriate remedy would be a cease and desist remedy, in addition to the restoration of the *status quo ante* with respect to employee rights under the Act.

III CONCLUSION

It is respectfully submitted that the ALJ's findings of fact and conclusions of law were fully supported by the record evidence. Respondent's exceptions to the ALJ's findings and conclusions of law and arguments in support of its exceptions are completely without merit. (R. Exc. 33) Accordingly, the Decision and Recommended Order should be adopted by the Board.

DATED AT San Francisco, California, this 7th day of February, 2013.

Respectfully submitted,

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