

**UNITED STATES OF AMERICA**  
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**  
**Washington, D.C.**

ALTON SANDERS, an individual, Charging  
Party,

vs.

Case 20-CA-35419

24 HOUR FITNESS USA, INC., Charged Party.

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**EMPLOYER'S COMBINED ANSWERING BRIEF TO ACTING GENERAL  
COUNSEL'S AND CHARGING PARTY'S CROSS-EXCEPTIONS**

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Pursuant to 29 C.F.R. 102.46(f)(1), Respondent 24 Hour Fitness USA, Inc. (“Company,” “Respondent,” or “24 Hour Fitness”) hereby submits its combined answers to the Acting General Counsel’s (“AGC”) and Charging Party’s (“Sanders”) cross-exceptions to the Administrative Law Judge’s Decision in this case.

## **I. INTRODUCTION**

The Decision issued by Administrative Law Judge (ALJ) William Schmidt was erroneous with respect to virtually every conclusion of law set forth therein. Notwithstanding the fact that each of these errors were to the benefit of the Acting General Counsel (AGC) and Charging Party, both the AGC and the Charging Party filed cross-exceptions, none of which have a basis either in the record evidence or applicable law.

First, the AGC improperly requests that the Board expressly find the nondisclosure provision of the Arbitration Agreement unlawful, despite the fact that this issue was not fully and fairly litigated, nor included in the Complaint. This cross-exception must be denied, and Respondent’s exception on this subject granted, because holding otherwise would deprive Respondent of its right to procedural due process.

The AGC also requests that the Board order Respondent to file motions to vacate, jointly with the plaintiffs, in all cases in the record in which courts found the class action waiver to be enforceable, regardless of the current posture of those cases. This cross-exception must be denied for three reasons: (1) the enforceability of the Arbitration Agreement was not litigated in several of the cases; (2) the cases are fully resolved and dismissed; and/or (3) the plaintiffs in those cases had the opportunity to raise arguments based on *D.R. Horton* and failed to do so. At least one of these reasons applies to the eleven cases addressed in the ALJ’s decision.

The AGC's third cross exception requests the retroactive remedy, not requested in the Complaint, of requiring that Respondent pay attorneys' fees and litigation costs to the plaintiffs incurred in opposing Respondent's efforts to enforce its Arbitration Agreement. This exception should be summarily denied. Apart from the fact that this extraordinary remedy was not sought by the Complaint, and contrary to the AGC's representation that restraint of collective litigation has been prohibited by the Act since the 1940's, the issue decided in *D.R. Horton*, and for that matter in the instant case, are novel legal issues. That the Board has only recently held class action waivers violate the Act is best illustrated by the fact that the prior General Counsel for the NLRB, Ronald Meisburg, on June 16, 2010, issued an advice memorandum that would allow employers to enforce such waivers in court. (General Counsel Memorandum GC 10-06.) Accordingly, under the circumstances, a retroactive remedy so extreme as an award of attorneys' fees in cases litigated in forums far removed from the NLRB's jurisdiction is grossly inappropriate.

The Charging Party takes exception to the ALJ's factual finding that there was no evidence of interference, restraint or coercion by Respondent with respect to any individual's decision to forego class or collective action. This cross-exception must be denied for the simple reason that the Charging Party cannot and did not point to a single piece of evidence suggesting otherwise. Because the AGC and Charging Party bear the burden of proof, the ALJ's factual finding must stand.

## **II. THE ACTING GENERAL COUNSEL'S CROSS-EXCEPTIONS TO THE ALJ'S REMEDY SHOULD BE DENIED**

The Acting General Counsel asserts three separate cross-exceptions, each relating to the remedy ordered by ALJ Schmidt: (1) the ALJ "inadvertently" failed to include in the Conclusions of Law, Order or Notice to Employees anything related to the non-disclosure

provision set forth in the Arbitration Agreement; (2) the ALJ “inadvertently” failed to include in the Order or Notice to Employees that Respondent be required to file motions to vacate any award compelling arbitration pursuant to Respondent’s Arbitration Agreement pursuant to FRCP Rule 60(b); and (3) the ALJ “inadvertently” failed to award attorneys’ fees and costs to the plaintiffs in those cases in which courts enforced the class action waiver of the Arbitration Agreement.<sup>1</sup> All three of these cross-exceptions lack merit and should be overruled.

**A. The Board Has No Authority To Order *Any* Remedy In This Case.**

In the recent *Noel Canning* decision, the D.C. Circuit Court of Appeals ruled that President Obama’s January 4, 2012 recess appointments were invalid and unconstitutional because they were not made during a recess between Senate sessions. *Noel Canning*, 2013 U.S. App. LEXIS 1659 at \*45, \*60-\*65. Under the reasoning set forth in *Noel Canning*, the Board—currently comprised of the same appointees found improper by the D.C. Circuit—lacks a quorum. For that reason, it also lacks the authority to order any remedy in this case or, for that matter, issue a decision with respect to the AGC’s or Charging Party’s cross-exceptions.<sup>2</sup>

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<sup>1</sup> That these omissions could have been “inadvertent” is implausible, at best. The ALJ submitted an Errata to the Decision three days after the initial Decision was issued to correct the “inadvertent” mistakes set forth therein, which establishes that he reviewed and considered necessary and appropriate corrections to the Decision.

<sup>2</sup> While *Noel Canning* specifically concluded that President Obama’s January 4, 2012 recess appointments were invalid because they did not arise during a recess between Senate sessions, its application also extends to the appointment of Member Craig Becker, who was purportedly one of the three Board Members at the time *D.R. Horton* was issued. *Id.* at \*68. Member Becker’s recess appointment to the Board commenced on March 27, 2010. *See* Press Release, White House, President Obama Announces Recess Appointments to Key Administrative Positions (Mar. 27, 2010), available at <http://www.whitehouse.gov/the-press-office/president-obama-announces-recess-appointments-key-administration-positions> (last visited February 14, 2013). Member Becker’s appointment did not arise while the Senate was in recess between sessions; rather, it arose during a break in the Senate’s business. Because Member Becker’s appointment was an intrasession recess appointment, it was invalid under *Noel Channing*. Given the impropriety of Member Becker’s recess appointment, the Board was left with only two members when it issued *D.R. Horton*. Because the Board lacked a quorum when the decision was issued,

Respondent therefore requests that any decision with respect to Respondent's exceptions or the AGC's or Charging Party's cross-exceptions be delayed until such time as the Board consists of appointees placed in accordance with the Constitution and Supreme Court precedent.

**B. The Nondisclosure Provision Is Properly Excluded From The Conclusions Of Law, Order And Notice To Employees Since That Issue Was Not Fully And Fairly Litigated.**

The AGC's first cross-exception is to the ALJ's alleged "inadvertent failure" to include in the Conclusions of Law, Order and Notice to Employees any reference to the fact that the non-disclosure provision of the Arbitration Agreement is unlawful.

The AGC recognizes that its cross-exception should be sustained only "[i]f the Board finds that the nondisclosure provision was fully and fairly litigated[.]" (AGC X-Except. Brief at 5.) In fact, the AGC's cross-exception should be overruled for the same reason that Respondent's exception to the ALJ's finding that the nondisclosure provision is unlawful should be sustained: 24 Hour Fitness has been deprived of its right to procedural due process to fully litigate this issue.

In the Decision, the ALJ improperly determined that Respondent's Arbitration Agreement is unlawful because it contains the following nondisclosure language: "[e]xcept 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." (Dec. at 5:32-34.) The ALJ opined that the provision "muzzles the employee who did not opt out and who invoked the arbitration process from providing a useful critique of the process, the outcome,

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*D.R. Horton*—the case on which the ALJ bases his Decision—is invalid and entitled to no weight. *See New Process Steel*, 130 S. Ct. at 2642 (holding that Board must maintain a quorum of three members in order to exercise its authority). As also described in Respondent's Brief in Support of Exceptions, regardless of whether Member Becker's intrasession recess appointment was permissible, the Board nevertheless lacked a quorum when it issued *D.R. Horton* because Member Becker's term had expired before then.

or any other worthwhile advice to any fellow worker with a similar dispute whether that employee had opted out or not.” (Dec. 18:9-21.)

The ALJ made these findings despite the fact that the Acting General Counsel never asserted in the Complaint thereto that this provision was unlawful. Neither the Acting General Counsel nor the Charging Party asserted in their post-hearing briefing that the provision violated the Act. At no time during the hearing (or afterward) did the Acting General Counsel move to conform the pleadings.

The Acting General Counsel also did not introduce any testimony or any other evidence of how the provision was enforced, including any possible misapplication of the nondisclosure provision to the Charging Party or any other Team Member. In sum, the Acting General Counsel has *never* asserted that the nondisclosure language violates the Act.

The non-disclosure provision was raised during the course of the hearing on two occasions: once by counsel for the Charging Party in opening remarks (Tr. 19:4-11, 32:11-33:6) and once by counsel for the Charging Party in a line of questioning that was effectively shut down by the ALJ (Tr. 82:16-84:3).

*No* evidence was offered by *either* party with respect to whether the provision was intended to prevent employees from disclosing the grievance or working conditions underlying the arbitration, and there was no evidence presented which indicates that provision was ever enforced by Respondent, and if so, how it was enforced.

Had 24 Hour Fitness been provided notice that the legality of the nondisclosure provision was at issue, the Company would have expanded its presentation of evidence at the hearing to address such an allegation. Specifically, 24 Hour Fitness would have proffered testimony and evidence regarding (1) how the Company interpreted the provision, including what

communications were and were not considered prohibited, (2) whether the Company ever enforced the provision, and (3) if so, what communications it sought to prohibit and how. *See Piggly Wiggly Midwest, LLC*, 357 NLRB No. 191, slip op. at p. 2 (2012) (“Whether 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.’”)

Simply put, the Company was provided no notice that the lawfulness of the “nondisclosure” provision was at issue. The issue was not litigated. Accordingly, as a matter of law, the ALJ’s decision regarding the nondisclosure provision must be reversed. *Golden State Foods Corp.*, 340 NLRB 382, 382-383 (2003) (Board reversed ALJ finding of unlawful interrogation as not fully litigated where, even assuming allegations of interrogation were closely related to allegation in Complaint, violation not alleged in Complaint, finding based solely on Charging Party’s vague testimony with respect to alleged interrogatory, and no opportunity for employer’s witnesses to testify regarding same); *Smithfield Foods, Inc.*, 347 NLRB 1225, 1229 (2006) (Board reversed ALJ finding of unlawful threat where General Counsel failed to raise this specific allegation in Complaint nor attempted to amend the Complaint, and no witnesses were called with respect to alleged threat); *see also J.C. Penny Co. v. NLRB*, 384 F.2d 479, 483 (10th Cir. 1967) (finding that trial examiner’s failure to amend the Complaint to encompass allegations regarding matters first raised at the hearing mandated reversal of unfair labor practice with respect to those allegations because the “[f]ailure to clearly define the issues and advise an employer charged with a violation of the law of the specific complaint he must meet and provide a full hearing upon the issue presented is, of course, to deny procedural due process of law”); *Siracusa Moving & Storage Service Co.*, 290 NLRB 143, 143 (1988) (dismissing Section 8(a)(1) allegation on the basis that the conduct alleged was not identified in the Complaint and the

General Counsel failed to identify the conduct as a separate and distinct basis for a charge).

Because the ALJ's finding regarding the non-disclosure provision was improper, the AGC's cross-exception seeking to apply the ALJ's remedy to the nondisclosure provision should be denied.

**C. The AGC's Cross-Exception To The ALJ's "Inadvertent" Failure To Order That Respondent File FRCP Joint Rule 60(b) Is Flawed And Must Be Denied.**

The AGC's second cross-exception seeks to improperly expand the ALJ's remedy to require Respondent to file, jointly with affected employees, a motion to vacate pursuant to Federal Rule of Civil Procedure Rule 60(b) "in any arbitral or judicial tribunal in which it has pursued enforcement of the class action ban." (AGC X-Except. Brief at 6.)

Federal Rule of Civil Procedure Rule 60(b) allows a party to move to vacate "a final judgment, order, or proceeding" based on certain specified grounds, including mistake of law or other justifiable grounds. Fed. R. Civ. Proc. Rule 60(b). Any such motion must be made within a "reasonable time" after the entry of the judgment or order in question. Fed. R. Civ. Proc. Rule 60(c). For motions based on "legal error," the applicable ground here, the moving party must make his or her motion within the time limits for appeal: 60 days.<sup>3</sup> *Steinhoff*, 698 F.2d 270, 275 (1983).

By its cross-exception, the AGC does not seek an order requiring Respondent to file a motion to vacate in those cases in which it has pursued enforcement, but been denied. In the

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<sup>3</sup> The *Lairsey* case cited by the AGC in support of this cross-exception describes the narrow exception by which a Rule 60(b) motion may be brought after the time to appeal: when there has been a change in **governing** law. However, there has been no change in the governing law of any of the jurisdictions in which these matters are or were pending, as *D.R. Horton* has been almost universally disfavored. Even if that were not the case, it is the AGC's position that attorneys' fees are an appropriate remedy precisely because *D.R. Horton* did not constitute a change in the law. (AGC X-Except. Brief at 9.) Therefore, the exception to the 60-day limit described in *Lairsey* does not apply here.

matter of *Carey v. 24 Hour Fitness USA, Inc.*, the Company’s motion to compel arbitration based on the Agreement was denied by the Southern District of Texas, and the Fifth Circuit Court of Appeals affirmed the district court’s denial of the motion to compel arbitration.<sup>4</sup> (Jt. Exh. 1, ¶ 16.) Similarly, in both *Rosenloev v. 24 Hour Fitness USA, Inc.* (and its companion case, *Suppa*) and *Burton v. 24 Hour Fitness USA, Inc.*, the Orange County Superior Court denied the Company’s motion to compel arbitration. (Jt. Exh. 1, ¶ 20.) The Company appealed the rulings in both *Rosenloev/Suppa* and *Burton*, but in each case, the California Court of Appeal affirmed the trial court’s ruling on the matter. *Id.*

The AGC’s cross-exception would also not apply to the matter of *Beauperthuy v. 24 Hour Fitness USA, Inc.*, where the Company did not seek to compel individual employee arbitration pursuant to the Agreement.<sup>5</sup> (Jt. Exh. 1, ¶ 19; Jt. Exhs. 1, 16, 17, 18, and 19.)

Of the remaining cases (*Fulcher* (Jt. Exh. 1, ¶ 12), *Lee* (Jt. Exh. 1, ¶ 14), *Constanza* (Jt. Exh. 1, ¶ 15), *Lewis* (Jt. Exh. 1, ¶ 17), *Dominguez* (Jt. Exh. 1, ¶ 18), *Martinez* (Jt. Exh. 1, ¶ 19), and *Lawler* (Jt. Exh. 1, ¶ 20(c))), five of these lawsuits—*Dominguez*, *Martinez*, *Lawler*, *Lee*, *Constanza*—were resolved by the parties and dismissed with prejudice more than 60 days ago

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<sup>4</sup> Subsequently, the Company issued new arbitration agreements complying with the Fifth Circuit’s decision. All employees were given opt-out rights during the first 30 days of the new agreement. This procedure was objected to by plaintiff’s counsel and litigated before the District Court. The District Court issued a full decision addressing *D.R. Horton*, as well as affirming the overall adequacy of the notice provided by the Company. See Respondent’s Motion For Limited Reopening Of The Record Or, Alternatively, For Administrative Notice. This case has since been settled and the lawsuit dismissed.

<sup>5</sup> The AGC incorrectly contends that Respondent attempted to enforce the class action waiver in *Beauperthuy*. (AGC Exceptions Brief at n. 14.) Respondent did file a motion to dismiss or alternatively for a more definite statement based on the existence of the Arbitration Agreement, but only to test the sufficiency of Plaintiffs’ claims, not to compel enforcement of the class action waiver. (Jt. Exh. 1 at ¶ 13; Jt. Exh. 16.) Respondent expressly declined to compel arbitration as part of that motion, and the court later found Respondent waived its right to compel arbitration. (Jt. Exh. 16; Jt. Exh. 18.) Therefore, there is no order Respondent could move to vacate pursuant to Rule 60(b).

and are no longer under the continuing jurisdiction of the respective courts. *See* Respondent's Motion For Limited Reopening Of The Record Or, Alternatively, For Administrative Notice. Even if a motion to vacate were timely in any of these cases, which it would not be, it is inappropriate for the Board to interject itself into settled lawsuits and disturb matters that have been resolved to the litigants' satisfaction. Indeed, the AGC provides no authority to suggest the Board should order this remedy in lawsuits that have been completely settled and resolved.

That leaves only *Fulcher* and *Lewis*, both of which are in state court, where Rule 60(b) does not apply. Moreover, in both of these cases, the California Superior Court's order to enforce the class action waiver was rendered over a year ago, well beyond the time period for appealing those courts' orders. (Jt. Exh. 1, ¶ 12); (Jt. Exh. 1, ¶ 14); Cal. R. Ct. Rule 8.104. Filing any motion to vacate so long after an Article III court has ruled on the issue of the enforceability of the Arbitration Agreement, apart from the fact that any such motion would be untimely, could expose 24 Hour Fitness to the risk of sanctions for filing an unwarranted and untimely motion that re-raises an issue previously decided by the court.

Finally, in both *Fulcher* and *Lewis*, it was the responsibility of the plaintiffs' counsel to raise the argument that the Arbitration Agreement violated Section 7 of the Act and was unenforceable under *D.R. Horton*. Indeed, the Superior Court judge presiding over *Fulcher*, the one class action Sanders alleges he could have joined, expressly instructed the plaintiffs to seek leave to file a motion to consider *D.R. Horton* if they wished. (Jt. Exh. 15, 12:22-13:13.) They declined to do so.

The AGC cites *Baptist Memorial Hospital*, 229 NLRB 45 (1977) for the proposition that the Board may validly require an employer to join with the affected plaintiffs to vacate a court's enforcement of the Arbitration Agreement. Factually distinct from the circumstances at issue

here, in that case, the Board ordered an employer to join with the charging party to petition a court to expunge ***an arrest and criminal conviction*** resulting from the employer's enforcement of its unlawful no-access policy. 229 NLRB at 45. In ordering such an extraordinary remedy, the Board recognized that “[i]n so doing, we realize that in the final analysis it is for the local court to determine whether or not [the employee's] conviction should be reversed and the record expunged. ***By our action herein, we are not seeking to usurp the authority of the court but merely to effectuate the policies and purposes of the Act.***” 229 NLRB at n. 13 (emphasis added). In *Fulcher* and *Lewis*, unlike in *Baptist Memorial*, the courts entered orders enforcing the Arbitration Agreement after full briefing and argument by the parties involved, including the opportunity to consider *D.R. Horton*. If the Board orders Respondent to file motions to vacate where the courts had the opportunity to consider the legality of the Arbitration Agreement under *D.R. Horton*, it will result in exactly the sort of interference with the judicial process the Board in *Baptist Memorial* was determined to avoid. Indeed, the authority cited by the AGC serves only to reinforce the conclusion that persuading these Article III courts to reconsider is improper.<sup>6</sup> Therefore, the AGC's second cross-exception seeking to expand the ALJ's remedy to require Respondent to file motions to vacate any court order enforcing the class action waiver should be denied.

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<sup>6</sup> The Board cases cited by the AGC in support of its position that the Board may compel the Employer to disavow legal contentions that were accepted by a court of law are inapposite. Both *Loehmann's Plaza*, 305 NLRB 663 (1991), and *Federal Security, Inc.*, 336 NLRB 703 (2001) involved the Board ordering an employer to take affirmative steps in pending litigation that was preempted by the NLRA. *Loehmann's Plaza*, 305 NLRB at 669-71; *Federal Security, Inc.*, 336 NLRB at 703, n. 1. As the AGC concedes, such a situation is not present here: none of the lawsuits in the record involve legal claims that are even arguably preempted by the NLRA.

**D. The AGC's Third Cross-Exception Seeking An Order That Respondent Reimburse Employees Attorneys' Fees For Opposing Respondent's Arbitration Motions Is Meritless.**

The AGC's third cross-exception seeks to dramatically broaden the remedy ordered by the ALJ. In requesting that Respondent be ordered to retroactively reimburse employees attorneys' fees and litigation costs for opposing Respondent's motions to compel arbitration, the AGC would have the Board penalize 24 Hour Fitness for taking a legal position that was not unlawful under Board law until, at the earliest, *D.R. Horton* was issued in January 2012. Requiring Respondent to nonetheless reimburse employees for costs incurred in litigating this issue—even in cases where a court decided Respondent was correct—is unprecedented.<sup>7</sup> Such a remedy, which was not requested by the AGC in the Complaint or during the hearing, is wholly improper here.

A retroactive remedy, such as requiring reimbursement of attorneys' fees, is not warranted when the Board issues a decision that “marks a significant departure from preexisting law.” *Dana Corp.*, 351 NLRB 434, 443-44 (2007), overruled on other grounds by *Lamons Gasket Co.*, 357 NLRB No. 72 (2011). The reasoning for not retroactively applying new policies and standards in cases such as this is sound. It is unfair to penalize a party for its past actions if the party could not have reasonably understood at the time of the activity at issue that such activity violated the Act. *Id.* It is also inequitable to punish a party for past actions that were undertaken in reliance on the law at the time the action was taken. *Id.*

Even if the Board determines that *D.R. Horton* controls this case, it is important to note that *D.R. Horton* was a case of first impression before the Board. Prior to *D.R. Horton*, there

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<sup>7</sup> The *Croson* case cited by the AGC is instructive. There, as acknowledged by the AGC, the Board did not require reimbursement of legal fees and expenses because the legal action taken by the employer “was not unlawful” at the time it was taken. (AGC X-Except. Brief at 8.)

was no precedent finding class action waivers invalid under the Act.

The AGC argues, citing a NLRB decision from 1942, that prohibiting employees’ “collective legal action” has long been protected by the Act. (AGC X-Except. Brief at 9.) However, the *Spandsco* case cited by the AGC for this proposition suggests only that employees’ right to access a legal forum to redress workplace grievances is protected, not that any specific manner of litigation is protected. *See Spandsco Oil & Royalty Co.*, 42 NLRB 942, 950 (1942) (employer violated Act by terminating three employees for instituting an overtime lawsuit and participating in union organizational activities). Moreover, if it is the case that the right to engage in collective litigation is a long-protected right under the Act, the previous General Counsel of the Board was unaware of it. He issued a memorandum stating that employers may require individual employees to sign a waiver of their right to file a class or collective claim as part of an agreement to arbitrate all claims without per se violating the Act. (General Counsel Memorandum GC 10-06.)

In that memorandum, the former General Counsel opined that “[s]o long as the wording of these agreements makes clear to employees that their right to act concertedly to challenge these agreements by pursuing class and collective claims will not be subject to discipline or retaliation by the employer, and that those rights—consistent with Section 7—are preserved, no violation of the Act will be found.” *Id.* at p. 7.

As such, prior to January 3, 2012, the date the Board issued *D.R. Horton*, there was no authority holding that class action waivers violated the Act *per se*. Moreover, there is still no NLRB precedent suggesting **voluntary, bilateral** arbitration agreements in which an employer and employee agree to resolve all claims through individual arbitration are unlawful, as the Board expressly declined to reach that question in *D.R. Horton*, 357 NLRB No. 184, slip op. at p.

13, n. 28.

Even in *D.R. Horton*, the Board made no reference whatsoever to retroactive application of its ruling. Indeed, there is nothing in the case that suggests that the Board intended to enforce *D.R. Horton* retroactively. Rather, in *D.R. Horton*, the Board directed the employer to: (1) cease and desist from enforcing the MAA; (2) rescind or revise the MAA; (3) notify its employees of the rescission or revision of the MAA; and (4) post a notice. *D.R. Horton*, 357 NLRB No. 184, slip op. at pp. 13-14. The Board did not require D.R. Horton to notify all judicial and arbitral forums in which D.R. Horton had enforced the MAA that the company “no longer oppose[d] the seeking of collective or class action type relief.”

In this case, retroactive application of any remedy is improper. As explained by the Supreme Court in its recent decision, *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012), “where . . . an agency's announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute.” *Id.* at 2168. The Court further noted, “while it may be ‘possible for an entire industry to be in violation of the [law] for a long time without the [governmental enforcement agency] noticing,’ the ‘more plausible hypothesis’ is that the [agency] did not think the industry’s practice was unlawful.” *Id.*, quoting *Yi v. Sterling Collision Centers, Inc.*, 480 F.3d 505, 510-511 (7th Cir. 2007). Here, the Board did not take its current position with respect to class action waivers until January of 2012. It is manifestly unjust to penalize Respondent based on the Board’s novel and recent *D.R. Horton* ruling, especially in the form a remedy not sought by the AGC in the Complaint. *See Alan Ritchey*, 359 NLRB No. 40, slip op. at p. 11 (2012) (holding that retroactive application of NLRB’s change in the law did not warrant retroactive application because it would not have been unreasonable for the charged party to believe its conduct was permissible under existing

Board precedent at the time).

### **III. THE CHARGING PARTY’S CROSS-EXCEPTION IS NOT SUPPORTED BY THE FACTUAL RECORD AND MUST BE DENIED**

#### **A. The ALJ Properly Found No Evidence Of Interference, Restraint Or Coercion With Respect To Anyone’s Decision About Whether To Forego Class Or Collective Litigation.**

The Charging Party’s lone cross-exception is to the ALJ’s finding that “Respondent correctly argues that there is no evidence of interference, restraint, or coercion that brought about the Charging Party’s or any other employee’s voluntary decision at the beginning of their employment to forego participation in class or collective actions.” (CP Brief at 35.) This cross-exception, notably not filed by the AGC, must be denied because the ALJ’s statement is factually correct. Neither the AGC nor the Charging Party produced a scintilla of evidence of interference, restraint or coercion with respect to any employee’s decision to forego class or collective actions under the Arbitration Agreement. It was the Charging Party’s or AGC’s burden to produce this evidence. *NLRB v. Fluor Daniel*, 161 F.3d 953, 965 (6th Cir. 1998); 29 U.S.C. § 160(c) (violations of the Act can be adjudicated only “upon the preponderance of the testimony” taken by NLRB); *see also* Section 7(c) of the Administrative Procedure Act, 5 U.S.C. § 556 (“Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.”) They failed to do so.

Instead, the record evidence establishes the following. The Charging Party was given a voluntary choice to have disputes decided through arbitration and forgo participation in a class or collective action. Sanders had seventy-two days to make his decision. (Tr. 39:2-16, 42:18-43:6; Resp. Exh. 1.) He was informed that his choice would not in any way affect his employment relationship with 24 Hour Fitness, his decision could be made without fear of retaliation, and he could opt out without even having to inform his immediate manager. (Tr. 39:17-40:4; G.C. Exh.

2; Jt. Exh. 2(B).) Sanders acknowledged that he received his opt-out notice including the non-retaliation statement. (G.C. Exh. 1(d), Appendix B.) Even more important, perhaps, is what is absent from Sanders's testimony. He at no time even suggested that anyone tried to influence him regarding his choice. (Tr. 38:12-44:2.) There is no evidence that Sanders sought an opt-out form or even failed to understand the opt-out procedure. The record reflects that the Company did not interfere with, restrain, or coerce Sanders or anyone else in making their choice whether to forego the opportunity to participate in class or collective actions as part of the Arbitration Agreement.

Regardless of whether the class action waiver in the Arbitration Agreement constitutes an improper prospective waiver of Section 7 rights (which Respondent vehemently denies), there is no evidence that any 24 Hour Fitness representative tried to persuade a single Team Member hired since January 1, 2007 against opting out of the Agreement. The ALJ was obligated to make his decision based on the evidence in the record, and he did so. *See, e.g., Willamette Industries, Inc.*, 306 NLRB 1010, 1010, n. 3 (improper for ALJ to order that employer reinstate employee, where Complaint did not allege employee was discharged and record contained no evidence of discharge). If there is any inconsistency in the ALJ's decision, it is his finding of a Section 8(a)(1) violation without any evidence of "interference, coercion, or restraint" under the Act. The Charging Party's cross-exception must therefore be denied.

#### IV. CONCLUSION

For the foregoing reasons and based on the record evidence, 24 Hour Fitness respectfully requests that the Board deny the AGC's and Charging Party's cross-exceptions to the ALJ's decision.

Respectfully submitted,

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## STATEMENT OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 650 California Street, 20th Floor, San Francisco, California 94108.2693. On February 21, 2013, I served the within document(s):

1. EMPLOYER'S COMBINED ANSWERING BRIEF TO ACTING GENERAL COUNSEL'S AND CHARGING PARTY'S CROSS-EXCEPTIONS;
2. EMPLOYER'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND IN RESPONSE TO THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF; and
3. EMPLOYER'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND IN RESPONSE TO CHARGING PARTY ALTON SANDERS'S AND AMICUS SEIU'S ANSWERING BRIEF.



Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses on the attached service list on the dates and at the times stated thereon. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. The electronic notification address of the person making the service is [ntorres@littler.com](mailto:ntorres@littler.com).

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STATEMENT OF SERVICE

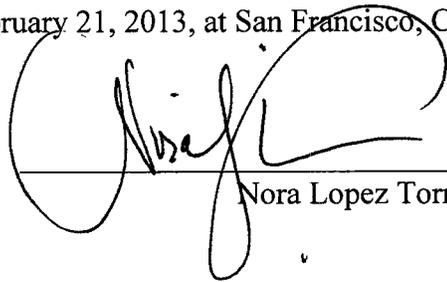
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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on February 21, 2013, at San Francisco, California.



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