

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**GAMESTOP CORP., GAMESTOP, INC.,
SUNRISE PUBLICATIONS, INC., AND
GAMESTOP TEXAS LTD. (L.P.)**

and

Case 20-CA-080497

MICHELLE KRECZ-GONDOR, an Individual

**RESPONDENTS' BRIEF IN SUPPORT OF THEIR EXCEPTIONS TO THE DECISION
OF THE ADMINISTRATIVE LAW JUDGE**

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I. INTRODUCTION

Respondents GameStop Corp., GameStop, Inc., GameStop Texas Ltd. (L.P.), and Sunrise Publications, Inc. (“Respondents” or “GameStop”) except to the ALJ’s decision finding that Respondents’ C.A.R.E.S. agreement violates the Act under *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), or in any other manner. The agreement that Charging Party Michelle Krecz-Gondor (“Krecz-Gondor”) voluntarily entered into with Respondents provided her with an opportunity to opt-out of the arbitration process entirely and specifically excluded all “[m]atters within the jurisdiction of the National Labor Relations Board.” Thus, the ALJ’s decision is based on two false premises: (1) that the Board’s *D.R. Horton* decision applies to arbitration agreements that provide employees an opportunity to opt-out; and (2) that an arbitration agreement that **explicitly excludes** claims under the Act could somehow restrain Section 7 activity.

First, *D.R. Horton* explicitly leaves open whether an arbitration agreement that is not a condition of employment violates Section 7 of the Act. The *D.R. Horton* analysis – which in and of itself was wrong – should not be extended to cover arbitration agreements that are not a condition of employment because the Supreme Court and the Board have long held that *voluntary* arbitration is a preferred and mutually beneficial means of resolving disputes. The Supreme Court and the Board have also long held that the Act does not forbid employers from entering into individual contracts with employees. Accordingly, the question left open in *D.R. Horton* must be answered in the affirmative: Employers and employees are permitted to enter into voluntary agreements to arbitrate claims on an individual basis.

Second, even if the C.A.R.E.S. agreement were not voluntary, it would still be distinguishable from the agreement in *D.R. Horton* because it explicitly excludes all NLRB claims. The C.A.R.E.S. agreement states that “[m]atters within the jurisdiction of the National Labor Relations Board” are not “Covered Claims,” and therefore obviously and explicitly

permits employees to access the Board. Accordingly, *D.R. Horton* does not compel the conclusion that the C.A.R.E.S. agreement violates the Act. Further, the ALJ erred by holding that the C.A.R.E.S. agreement would be read by a reasonable employee to forbid filing charges with the Board because no reasonable employee could possibly read the agreement in that way, given its explicit carve-out of NLRB claims. The ALJ's finding ignores large portions of the agreement while focusing on specific words and phrases out of context. The Board has forbidden this type of chicanery when determining whether a work place rule could chill Section 7 activity. Thus, the arbitration agreement in this case cannot reasonably be read to prohibit Section 7 activity.

The ALJ's decision is also erroneous because it relies almost entirely on the Board's *D.R. Horton* decision, and that decision is procedurally void and wrongly decided as a matter of law. The Board had only two members when it decided *D.R. Horton* because Member Becker's recess appointment was invalid, meaning that the Board had no power to issue decisions. Further, even if Member Becker's appointment had been valid, the Board issued *D.R. Horton* with only two members, and without having delegated its authority to a three-member panel as it has done in hundreds of prior cases, rendering the decision invalid for this independent reason.

More importantly, *D.R. Horton* was wrongly decided, and the Board should revisit its decision. The *Horton* Board (1) failed to apply appropriate deference to the Federal Arbitration Act ("FAA") and Supreme Court authority holding that mandatory arbitration agreements with class/collective action waivers are enforceable under the FAA; (2) incorrectly held that there is a right under Section 7 to litigate claims on a class or collective action basis; (3) failed to recognize that arbitration agreements do not seek to regulate or affect core Section 7 rights; and (4) based its decision on a flawed interpretation of a statute, the Norris-LaGuardia Act, that the

NLRB has no authority to interpret or enforce. Therefore, *D.R. Horton* is neither binding nor persuasive authority on the validity of arbitration agreements containing class/collective action waivers.

Finally, the ALJ also erred by finding that (1) the confidentiality provision in the C.A.R.E.S. agreement violates the Act when there was no such allegation in the Amended Complaint and the parties did not litigate this issue; and (2) the allegations in the Amended Complaint are not barred as untimely by Section 10(b) because they are based on the conditions present when the C.A.R.E.S program was rolled out in 2007 and when Krecz-Gondor entered into the C.A.R.E.S Agreement in 2010.

II. STATEMENT OF FACTS¹

Respondents are in the business of retailing video games and/or publishing print and online magazines. Krecz-Gondor is a Senior Game Advisor in a Sacramento, California GameStop retail store.

A. The C.A.R.E.S. Program

In 2007, GameStop introduced the “GameStop C.A.R.E.S. Rules of Dispute Resolution Including Arbitration.” The C.A.R.E.S. acronym stands for “Concerned Associates Reaching Equitable Solutions.” C.A.R.E.S. is a multi-step dispute resolution procedure, culminating in binding arbitration before the American Arbitration Association (“AAA”). C.A.R.E.S. expressly provides that it is a “mutual agreement” to arbitrate pursuant to the Federal Arbitration Act (“FAA”). Stip. 4; Ex. M. The agreement does not favor either party. Instead, it incorporates the AAA’s Employment Dispute Resolution Procedures, provides a neutral selection process for the arbitrator, allows either party to be represented by counsel, permits discovery in any form

¹ References to the parties’ Stipulation of Facts will appear as “Stip. ___”. References to the joint exhibits attached to the Stipulation of Facts will appear as “Ex. ___”.

allowed by the Federal Rules of Civil Procedure, permits motions allowed by the Federal Rules of Civil Procedure, and applies the state or federal substantive law which would be applied by a United States District Court sitting where the events giving rise to the claim took place. Ex. M.

C.A.R.E.S. uses the term “Covered Claims” and “Not Covered Claims” to define what claims are covered (and not covered) by the agreement. *Id.* The defined term “Covered Claim” is used throughout the C.A.R.E.S. agreement, including four times on page 1 of the agreement and five times on page 2 of the agreement. *Id.* For example, on page 1, the agreement says “[i]f your dispute is not resolved to your satisfaction in Step 2, and the issue is a Covered Claim, you must submit the Covered Claim to Step 3, Binding Arbitration, if you wish to pursue it further.” *Id.* at 1. On page 2, the agreement says “[t]he Rules are a mutual agreement to arbitrate Covered Claims (as defined below). *Id.* at 2. The Company and you agree that the procedures provided in these Rules will be the sole method used to resolve any Covered Claim.” *Id.*

“Covered Claims” are defined on page 3 of the C.A.R.E.S. agreement and they include discrimination or harassment claims based on race, sex, age, religion, etc.; retaliation for complaining about discrimination or harassment, and various other types of claims. *Id.* at 3. The “Covered Claims” section also states that a claim is covered “unless specifically excluded as noted in the ‘What is Not a Covered Claim’” section of the agreement.

Directly following the “WHAT IS A COVERED CLAIM” section is the “WHAT IS NOT A COVERED CLAIM” section of the C.A.R.E.S. agreement. *Id.* There are five bullet points listing the claims that are “Not a Covered Claim,” including a bullet point expressly stating: “**Matters within the jurisdiction of the National Labor Relations Board.**” *Id.* at 4 (emphasis added). The C.A.R.E.S. agreement also provides that it does “not preclude any employee from filing a charge with a state, local or federal administrative agency....” *Id.* at 2.

The C.A.R.E.S. agreement is “crystal clear” in the opinion of the U.S. District Court for the District of Massachusetts. *Ellerbee v. GameStop*, 604 F. Supp. 2d 349, 355 (D. Mass. 2009) (finding C.A.R.E.S. agreement enforceable).

B. Krecz-Gondor Had the Opportunity to Opt Out of the C.A.R.E.S. Program, But Did Not Do So.

Krecz-Gondor voluntarily agreed to participate in C.A.R.E.S. by executing an acknowledgment concerning the program on April 1, 2010. Stip. 6; Ex. O. Krecz-Gondor’s C.A.R.E.S. agreement also provided her with the opportunity to forgo and opt out of the benefits of the C.A.R.E.S. Arbitration Agreement by submitting an opt-out notice within sixty days of the program’s rollout (which is not applicable here) or within 60 days of the start of her employment. Ex. O. The C.A.R.E.S. agreement provided:

GameStop employees in California have the option to forgo the benefits of the GameStop C.A.R.E.S. Rules if they so choose. In order to opt out of the Rules, California employees must send notice to GameStop within sixty (60) days of the Effective Date of the program or, for employees hired after the Effective Date of the Rules, within sixty (60) days of the start of their employment, that they do not want to be covered by the Rules.

Ex. O at 14. It is undisputed that Krecz-Gondor did not choose to opt out of C.A.R.E.S., instead opting to continue to voluntarily participate in the program.

III. ARGUMENT

A. The C.A.R.E.S. Agreement Does Not Violate Section 8(a)(1) Because It Is Voluntary.

Krecz-Gondor’s C.A.R.E.S. Agreement does not unlawfully restrain Section 7 activity because it allowed her to opt out of C.A.R.E.S. and bring any lawsuit – including class or collective actions – in federal court. Krecz-Gondor chose not to opt out, and she cannot now complain of her choice to voluntarily participate in GameStop’s arbitration agreement.

Voluntary arbitration agreements that provide employees with an opportunity to opt out do not

violate Section 8(a)(1). *Bloomingtondale's, Inc.*, No. 31-CA-071281, slip op. at 9 (N.L.R.B. Div. of Judges Jun. 25, 2013).

In *D.R. Horton*, the Board stated that:

[W]e do not reach the more difficult questions of . . . (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, at 13, n.28. Board and Supreme Court precedent allow only one answer to this “difficult” question: such agreements obviously do not violate the Act.² More than fifty years of established Supreme Court law (as well as Board law) make clear that voluntary arbitration *is* a preferred and mutually beneficial means of resolving disputes. *See United Steelworkers v. American Mfg. Co.*, 363 U.S. 574 (1960); *Olin Corp.*, 268 NLRB 573, 574 (1984) (“It hardly needs repeating that national policy strongly favors the *voluntary* arbitration of disputes”) (emphasis added); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991); *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009) (holding that CBA clearly and unmistakably requiring union members to arbitrate discrimination claims is enforceable).

The second part of this question – whether employers can enter into individual arbitration agreements – must also be answered in the positive. It is axiomatic that the Act does not preclude employers from entering into individual contracts with non-union represented employees. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937). As long as individual contracts are not required as a condition of employment and are not used to prevent employees from organizing or to deny the benefits of a collective bargaining agreement (“CBA”)

² As set forth in section III.D, *infra*, the Board’s decision in *D.R. Horton* was both incorrect as a matter of law and void as a matter of procedure. Because the *D.R. Horton* decision explicitly excludes agreements to arbitrate that are not conditions of employment, however, dismissing the Complaint does not require a break with *D.R. Horton*.

to individual employees, they are permitted by the Act. *J.I. Case Co. v. NLRB*, 321 U.S. 332, 340-41 (1944) (“Care has been taken in the opinions of the Court to reserve a field for the individual contract, even in industries covered by the National Labor Relations Act.”).

Accordingly, the question left open in *D.R. Horton* has a clear answer compelled by the Board and the Supreme Court: Employers can enter into agreements that are not conditions of employment with individual employees to arbitrate their claims on a non-class basis.

The alternative – that employees are not permitted to enter into voluntary, mutually beneficial agreements to arbitrate – would lead to an absurd result. The Board and the Supreme Court agree that labor unions can enter into agreements requiring all union members to arbitrate their claims on an individual basis. *D.R. Horton*, 357 NLRB at 22 (citing *14 Penn Plaza*, 556 U.S. at 1465). Moreover, in *14 Penn Plaza* the Supreme Court explained that “[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative.” 556 U.S. at 258. Thus, expanding *D.R. Horton* to cover voluntary arbitration agreements would strip individual, non-union employees – approximately 93.4% of the national private sector labor force – of a right unquestionably given to labor unions.³ Stripping the right to enter into a mutually beneficial agreement to arbitrate from the vast majority of American workers is inconsistent with the robust national policy favoring arbitration embodied in the FAA and scores of Supreme Court and Board decisions. Such a holding would be wildly inconsistent with the Board’s characterization of its *D.R. Horton* holding as limited, rather than “a large-scale or sweeping invalidation of arbitration agreements.”

³ See <http://www.bls.gov/news.release/union2.nr0.htm> (last visited October 21, 2013).

More importantly, such a holding would be inconsistent with the Taft-Hartley Act, Pub. L. 80-101 (1947), which guarantees workers the right to “refrain from any and all [] activities” protected under Section 7. While the Board in *D.R. Horton* based its holding on the premise that only unions can waive Section 7 rights, the Taft-Hartley Act makes this premise false. Thus, *D.R. Horton* cannot be expanded to cover voluntary agreements to arbitrate without ignoring the Taft-Hartley Act and stripping an important right from more than 93% of American workers in the private sector.

In his decision, the ALJ relies on a number of erroneous conclusions to reach his finding that the C.A.R.E.S. agreement violates the Act. First, the ALJ finds that because the opt-out provision appears on page 14 of the agreement, it is “ambiguous” and “do[es] not clearly inform” employees that they can opt-out. Therefore, the ALJ finds, the agreement is *not* actually voluntary. ALJD at 12-13. This conclusion makes little sense. The language providing a right to opt out is set forth as a separate, clearly written provision, and explicitly states that California employees can “forgo the benefits [of C.A.R.E.S.] “if they so choose,” and then provides very easy instructions to follow to “opt out.” Stip. Ex. M at 14. The opt-out provision is very clearly unambiguous, and there is no basis for the ALJ’s conclusion that the opt-out provision becomes ambiguous solely because it appears near the end of the agreement.

Second, the ALJ concludes that the agreement would still violate the Act even if it were voluntary, for a number of erroneous reasons:

- *Because the opt-out provision disturbs the status quo that employees “can file a charge with the NLRB at no cost to the charging party” and then have that charge prosecuted as a class or representative action by the government.* ALJD at 14.
 - As set forth at length in sections III.A-B, *infra*, the C.A.R.E.S agreement specifically excludes matters within the Board’s jurisdiction and permits the filing of charges with the Board. Thus, the status quo described by the ALJ is not actually disturbed whether or not an employee opts out of the C.A.R.E.S. agreement.

- *Because employers cannot force employees to take affirmative action to maintain their Section 7 rights.* ALJD at 14.
 - The C.A.R.E.S. agreement does not take away employees’ Section 7 rights. Even if it did, however, employees could be required to take affirmative action to maintain those rights. As the ALJ explained in *Bloomingtondale’s*, “life is full of deadlines and there is nothing particularly onerous about this one.” No. 31-CA-071281, slip op. at 9 (quoting *Nielsen v. Machinists Local 2569*, 94 F.3d 1107, 1117 (7th Cir. 1996)).
- *Because arbitration “is not favored or beneficial” for employees.* ALJD at 16.
 - As set forth in detail in this section, the Board and the Supreme Court have both consistently held that arbitration *is* a favored and beneficial method of resolving disputes. The ALJ improperly substituted his personal, paternalistic view of arbitration for the binding position of the Supreme Court and the Board.
- *Because the FAA is trumped by the NLRA and the Norris-LaGuardia Act.* ALJD at 15.
 - As set forth in section III.D.2.c, *infra*, the FAA was reenacted after the NLRA and the Norris-LaGuardia Act, and it therefore stands on at least equal footing with those statutes and was not partially repealed by their passage.
- *Because employees have a “substantive right to pursue work-related claims in a collective or class action.”* ALJD at 16.
 - As set forth in section III.D.1.a, *infra*, the Supreme Court has made it abundantly clear that there is no substantive right to bring class or collective action claims unless Congress included a clear command in the relevant statute creating such a right.

Third, the ALJ incorrectly chose to break with the reasoning of the recent *Bloomingtondale’s* decision and instead follow the logic of two incorrect, distinguishable ALJ decisions on this issue. In *Bloomingtondale’s*, the ALJ examined a policy very similar to the C.A.R.E.S. Agreement at issue in this case. The employer maintained a dispute resolution process that ended with mandatory and binding individual arbitration, but all employees were given thirty days to affirmatively opt-out of mandatory arbitration by sending in a form. *Bloomingtondale’s*, No. 31-CA-071281, slip op. at 2-6. The ALJ found that this opt-out process was sufficient to render the arbitration agreement voluntary and that it therefore did not violate Section 8(a)(1). *Id.* at 9. In response to the argument that a thirty-day opt-out period provided at the beginning of employment was insufficient, the ALJ explained that “life is full of deadlines and there is

nothing particularly onerous about this one.” *Id.* (quoting *Nielsen v. Machinists Local 2569*, 94 F.3d 1107, 1117 (7th Cir. 1996). The ALJ also found unconvincing the argument that employees might fear retaliation if they opted out, because there was “no allegation or record evidence that the Company had threatened employees with reprisals or retaliated against them for opting out.” *Id.* at 9. Relying on the “emphatic federal policy” in favor of arbitrating disputes, the ALJ described arbitration “as a federally favored and supported benefit” and explained that forbidding voluntary arbitration agreements could create “very real and adverse consequences” for the future of employer-employee arbitration. *Id.* at 10-11. Specifically, the ALJ stated that employers with thousands of employees – like Bloomingdale’s and its parent Macy’s – would be unlikely to offer arbitration agreements if they were not permitted to require individual arbitration. *Id.* at 11. For these reasons, the ALJ found that the General Counsel failed to carry his burden to prove that the arbitration agreement violated Section 8(a)(1).

The C.A.R.E.S. Agreement is very similar to the arbitration agreement approved by the ALJ in *Bloomingdale’s*. Both agreements allowed employees to opt out and remain free to bring their employment claims in any forum **and** on a class and/or collective action basis. *See Bloomingdale’s*, No. 31-CA-071281, slip op. at 7; *Mastec Svcs. Co.*, No. 16-CA-86102, slip. op at 5 (NLRB Div. Judges Jun. 3, 2013) (holding that arbitration agreement with opt-out provision was “clearly distinguishable” from *Horton*). Like the agreement in *Bloomingdale’s*, the C.A.R.E.S. Agreement is a voluntary, mutually beneficial agreement to arbitrate and, therefore, it does not violate the Act.

The two recent ALJ decisions reaching the opposite conclusion on this issue are both distinguishable and wrongly decided. In *24 Hour Fitness*, the ALJ relied heavily on his conclusion that the opt-out provision in the agreement was “an illusion.” Slip. op. at 16. Here,

unlike the multi-step opt-out process in *24 Hour Fitness* (but like the opt-out in *Bloomingtondales*), the C.A.R.E.S. Agreement only requires a single step – sending a letter indicating intent to opt out. There is no evidence in this case to support a conclusion the opt-out provision in the C.A.R.E.S. Agreement is an illusion. Moreover, the ALJ’s conclusion that a voluntary arbitration agreement “require[s]” employees “to prospectively trade away their statutory rights” is simply wrong. By definition, a voluntary agreement does not “require” an employee to do anything. The case cited by the ALJ for this proposition, *Ishikawa Gasket American, Inc.*, 337 NLRB 175, 176 (2001), which was also cited by the ALJ here, is wholly off-point. That case dealt with a severance agreement that required an employee to give up her right to engage in any union activity for one year in exchange for severance pay. Here, the C.A.R.E.S Agreement does not strip Krecz-Gondor of her right to engage in any union activity or any activity at all in exchange for monetary compensation. It merely entitles her to take advantage of the C.A.R.E.S. policy *if she so chooses*. There is obviously a clear difference – both from a legal and a policy standpoint – between conditioning an offer of severance pay on an agreement to forego all union activity and offering an employee the opportunity to engage in the “federally favored and supported benefit” of arbitration. *See Bloomingtondale’s*, slip op. at 10 (distinguishing *Ishikawa* because “there is no ‘emphatic federal policy’ in favor of employees getting severance pay.”)

Similarly, in *Mastec Services*, the ALJ based his decision on the conclusion that “an employer may not lawfully require its employees to affirmatively act” in order to maintain Section 7 rights. But even if bringing class and/or collective action claims were an activity protected by Section 7 – which it is not – there is no support for the proposition that an employee need not take affirmative action to exercise these rights. Indeed, any exercise of Section 7 rights

is, logically, an affirmative action. The only authority cited by the ALJ for this proposition is *Ishikawa Gasket*, which simply does not contain any language relevant to this point.

Moreover, the decision overlooks the fact that employees also have a statutorily guaranteed right to *refrain* from engaging in Section 7 activities. The *Mastec Services* decision paternalistically assumes that an employee that chooses not to opt out of an arbitration agreement is *accidentally* trading away his or her Section 7 rights, ignoring the possibility that the employee is actually exercising his or her right to refrain from such activity and take advantage of a mutually beneficial form of dispute resolution. *24 Hour Fitness* and *Mastec* are in conflict with the Taft-Hartley Act and Board and Supreme Court precedent, which grant employees and employers the right to enter into mutually beneficial, voluntary contracts, including agreements to arbitrate. The ALJ incorrectly relied on these cases in determining that the C.A.R.E.S. agreement violates the Act despite its opt-out provision.

B. Even If It Were Not Voluntary, The C.A.R.E.S Agreement Would Still Be Distinguishable from the Agreement in *D. R. Horton*.

As noted previously, the Board in *D. R. Horton* emphasized the limits of its holding, stating that “[o]nly a small percentage of arbitration agreements are potentially implicated by the holding in this case.” 357 NLRB No. 184, slip op. at 12. The C.A.R.E.S. agreement is not among the “small percentage” of arbitration agreements covered by *D. R. Horton*. Unlike the agreement in *D. R. Horton*, the C.A.R.E.S agreement (1) does not preclude employees from filing charges with the Board or other administrative agencies; and (2) specifically excludes all claims within the jurisdiction of the Board. The right to file an administrative charge, in addition to pursuing a claim through arbitration, is a significant factor weighing in favor of the enforceability of the arbitration agreement. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (“An individual ADEA claimant subject to an arbitration agreement will still

be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action.”). If the agency finds that the employees’ claim has merit, the agency can prosecute the claim against the employer and seek a remedy on behalf of all affected employees. Agency enforcement of covered claims on behalf of employees is an adequate substitute for class or collective action litigation brought by the employees. Therefore, by protecting employees’ right to file administrative charges, the C.A.R.E.S. agreement does not foreclose the pursuit of group-wide remedies. This is a significant difference from *D. R. Horton*.

C. No Employee Could Reasonably Read the C.A.R.E.S. Agreement to Require Arbitration of NLRB Claims.

The ALJ’s finding that a reasonable employee could read the C.A.R.E.S. agreement as prohibiting the filing of claims with the Board is based on an unreasonable reading of the agreement. The C.A.R.E.S. agreement explicitly excludes claims arising under the Act, stating that “[m]atters within the jurisdiction of the National Labor Relations Board” are not “Covered Claims.” Where, as here, a rule does not explicitly restrict Section 7 rights, that rule will be found to violate Section 8(a)(1) only if employees would reasonably construe the language to prohibit Section 7 activity. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004).

In evaluating a rule challenged under Section 8(a)(1), the Board requires judges to give the rule a reasonable reading, and forbids them from reading phrases in isolation or presuming improper interference with employee rights. *Id.* at 646. A rule that unambiguously has no bearing on Section 7 activity cannot be twisted into ambiguity by parsing specific words or phrases while ignoring others. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998) (holding that rule forbidding activity inconsistent with employers “goals and objectives” could not reasonably be read to restrict Section 7 activity unless the phrase “goals and objectives” was parsed in isolation). But that is exactly what the ALJ did here, parsing certain words and phrases while

entirely ignoring the explicit carve-out language. This is exactly the type of selective reading forbidden by *Lutheran Heritage* and *Lafayette Park Hotel*.

There is no dispute that the C.A.R.E.S. agreement contains an explicit carve-out for NLRB claims. That explicit exception and the provision specifically permitting the filing of charges with administrative agencies make it impossible for a reasonable employee to construe the agreement as prohibiting them from filing a Charge, or requiring that any Charge be taken to arbitration. As noted above, the C.A.R.E.S. agreement contains, on pages 3 and 4, in bold, capital letters, a recitation of “**WHAT IS A COVERED CLAIM?**” and “**WHAT IS NOT A COVERED CLAIM?**” Under “**WHAT IS A COVERED CLAIM?**” the agreement contains the following introduction:

Arbitration applies to any “Covered Claim” whether arising before or after the Effective Date of the Rules. A Covered Claim is any claim asserting the violation or infringement of a legally protected right, whether based on statutory or common law, brought by an existing or former employee or job applicant, arising out of or in any way relating to the employee’s employment, the terms or conditions of employment, or an application for employment, including the denial of employment, unless specifically excluded as noted in “**What Is Not a Covered Claim**” below.

Ex. M at 3 (emphasis added). Immediately following the “**WHAT IS A COVERED CLAIM?**” section of the agreement is the “**WHAT IS NOT A COVERED CLAIM?**” section. That section provides a five bullet point list of claims that are not covered under the C.A.R.E.S. agreement, as follows:

- Claims for workers’ compensation benefits, except for claims of retaliation.
- Claims for benefits under a written employee pension or welfare benefit plan, including claims covered under ERISA.
- Claims for unemployment compensation benefits.
- Criminal charges.
- *Matters within the jurisdiction of the National Labor Relations Board.*

Id. at 4 (emphasis added). This explicit carve-out for Board claims, by itself, requires dismissal of this allegation. No reasonable employee, when faced with an explicit carve-out for “[m]atters within the jurisdiction of the National Labor Relations Board,” could possibly view the C.A.R.E.S. agreement as prohibiting them from going to the Board to file a Charge, and no reasonable employee could possibly believe, given this explicit carve-out, that they would be required to arbitrate NLRB claims. The C.A.R.E.S. agreement is clearly written and is simply not susceptible to the ALJ’s twisted reading. Indeed, the U.S. District Court for the District of Massachusetts found the C.A.R.E.S. agreement to be “crystal clear” in a decision enforcing that agreement. *Ellerbee*, 604 F. Supp. 2d at 355; *see also McBride v. GameStop, Inc.*, No. 10-CV-2376-RWS, 2011 WL 578821, at *3 (N.D. Ga. Feb. 8, 2011) (compelling arbitration based on C.A.R.E.S. agreement); *Pomposi v. GameStop*, No. 3:09-CV-340(VLB), 2010 WL 147196 (D. Conn. Jan. 11, 2010) (same); *Smusz v. Gamestop Corp.*, No. CV-56193, slip op. (Cal. Sup. Ct. May 6, 2011) (same).

The ALJ’s contrary conclusion is based on just the type of unreasonable reading prohibited by *Lutheran Heritage* and *Lafayette Park Hotel*. The ALJ holds that the statement that “[m]atters within the jurisdiction of the National Labor Relations Board” are not covered is unclear because it does not come until page four of the C.A.R.E.S. agreement. ALJD at 21. Yet all of the language that the ALJ claims casts doubt on this explicit statement appears on pages 2-4, immediately before and after the language in question. *Id.* In reality, the explanation of what claims are and are not covered is contained in a single, clear section of the C.A.R.E.S. agreement that no employee could reasonably read to forbid the filing of claims with the NLRB. *Id.* at 2-5. The second page of the C.A.R.E.S. agreement states that it does not prohibit filing charges with administrative agencies. Stip. Ex. M at 2. There are nine references to the defined term

“Covered Claim” in the first two pages of the C.A.R.E.S. agreement. *Id.* Employees are explicitly told that only “Covered Claims” must be submitted to arbitration (“[i]f your dispute is not resolved to your satisfaction in Step 2, and the issue is a Covered Claim, you must submit the Covered Claim to Step 3, Binding Arbitration, if you wish to pursue it further”). *Id.* Employees are also told that the C.A.R.E.S. agreement only reaches “Covered Claims” and specifically directs employees to the definition of “Covered Claims.” *Id.* (“The Rules are a mutual agreement to arbitrate Covered Claims (as defined below).” Finally, the definition of “Covered Claims” specifically informs employees that some claims are not covered, and directs employees to the section of the agreement called “What is Not a Covered Claim,” where, of course, “[m]atters within the jurisdiction of the National Labor Relations Board” are specifically excepted from the C.A.R.E.S. agreement.⁴

The ALJ also reasons that the C.A.R.E.S. agreement – also referred to as the “Rules” – is rendered ambiguous because the separate brochure and acknowledgment page do not state that matters within the jurisdiction of the Board are not covered. ALJD at 22. Yet the brochure explicitly states that (1) “Only Covered Claims (*as defined in the Rules*) may be raised”; and (2) “If there are any differences between this brochure and the GameStop C.A.R.E.S. Rules, the Rules shall control.” Stip. Ex. N at 5 (emphasis added). Similarly, the acknowledgment page requires employees to acknowledge that they have received a copy of the C.A.R.E.S. agreement. Stip. Ex. O. No reasonable employee would read either of these two documents to modify the Agreement’s clear statements that employees are permitted to file administrative charges and that matters within the Board’s jurisdiction are not covered. The ALJ’s conclusion to the contrary appears rooted in his inappropriate, lacking in any foundation (and wrong) claim that

⁴ Obviously, Ms. Krecz-Gondor believed that she had the ability to file a charge with the NLRB, as evidenced by the fact that she did so.

Respondents' employees are "20-something videogame enthusiast[s]" unworthy of the title "associates" who are easily misled through "slick advertising" like "a trendy cartoon camel." ALJD at 21 n.5.

The ALJ cites *U-Haul Co. of California*, 347 NLRB 375 (2006), in support of his conclusion that an employee could reasonably construe the C.A.R.E.S. agreement to prohibit Section 7 activity. In *U-Haul*, however, the only exclusion to the arbitration policy was a provision stating that the "arbitration process is limited to disputes, claims or controversies that a court of law would be authorized to entertain or would have jurisdiction over to grant relief." *Id.* at 377-78. Because there was essentially no carve-out in *U-Haul*, the Board found a violation. The explicit carve-out for claims within the jurisdiction of the NLRB distinguishes the instant case from *U-Haul*.

In *D.R. Horton*, the Board explicitly based its holding that the agreement would chill filing of NLRB claims on its broad prohibition against maintaining *any* civil proceeding and lack of an "exception for unfair labor practice charges." *Id.*; see also *Dish Network*, 358 NLRB No. 29 (2012) (holding that agreement that carved out unemployment and workers' compensation claims, but not NLRB claims, violated Section 8(a)(1)). The obvious implication of these decisions, however, is that an arbitration agreement containing a carve-out for NLRB claims – like the C.A.R.E.S. agreement – does not violate Section 8(a)(1). See *24 Hour Fitness USA, Inc.*, 2012 NLRB LEXIS 761 at n.6 (ALJ Dec., Nov. 6, 2012) (stating that, unlike *D.R. Horton*, no claim was being made that a reasonable employee would view the arbitration policy in question as restricting access to the Board "presumably because Respondent's arbitration policy specifically provides that it does not preclude the filing of charges with the NLRB or the EEOC").

D. *D.R. Horton* Has No Bearing on this Case Because It Is Procedurally Invalid and Wrongly Decided.

The ALJ declined to consider Respondents' arguments that *D. R. Horton* is invalid and wrongly decided, resting on the proposition that he is bound by the Board's decision regardless of its validity or merit. ALJD at 10 n.3, 12. Given the serious questions regarding the validity of *D. R. Horton* and its universal rejection by the Circuit Courts, the Respondents urge the Board to take this opportunity to reconsider the novel and extraordinary position taken by two Members in *D. R. Horton*, one of whom held an invalid recess appointment.

1. *D.R. Horton* Is Procedurally Invalid.

The Board did not have authority to issue its decision in *D. R. Horton* for two reasons: (1) because Member Becker's recess appointment in March 2010 was constitutionally invalid, the Board lacked a quorum when it issued *D. R. Horton*; and (2) even if Member Becker's recess appointment had been valid, *D. R. Horton* was decided by only two members without a delegation of the full Board to a three-member panel.

The Board must have at least three members in order to issue decisions. *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2644-45 (2010) (*citing* 29 U.S.C. § 153(b)). The Board had only two valid members when it issued *D. R. Horton* because Member Becker's March 27, 2010 recess appointment was invalid. A recess appointment is invalid if (1) it occurs during a session of Congress; or (2) it fills a vacancy that originated during a prior intersession recess. *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). Member Becker's March 27, 2010 recess appointment was invalid for both reasons: (1) it occurred intrasession (during the second session of the 111th Congress, *see* Congressional Directory for the 112th Congress, *available* at <http://www.gpo.gov/fdsys/pkg/CDIR-2011-12-01/pdf/CDIR-2011-12-01.pdf> (pages 536-538) (last visited September 25, 2013)); and (2) it purported to fill a vacancy on the Board that

originated during a previous intersession recess (on December 17, 2004, between the 108th and 109th Congresses, *see* <http://www.nlr.gov/who-we-are/board/members-nlr-1935> (last visited September 25, 2013)).

The Third Circuit has specifically held that Member Becker's March 27, 2010 recess appointment was invalid. *NLRB v. New Vista Nursing & Rehab.*, 719 F.3d 203, 221 (3d Cir. May 16, 2013) (holding that Member Becker's recess appointment was invalid because it occurred during an intrasession break, but declining to rule whether the appointment was also invalid because it originated during a previous intersession recess). The D.C. Circuit has also indicated that Member Becker's recess appointment was invalid. *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 952 (D.C. Cir. 2013) (assuming, without deciding, that Member Becker's March 27, 2010 recess appointment was constitutionally invalid); *cf. NLRB v. Enter. Leasing Co. Se.*, 722 F.3d 609, 647 (4th Cir. 2013) (agreeing with *New Vista* and *Noel Canning* that appointments that occur during intrasession breaks are invalid and holding that January 4, 2012 recess appointments were invalid). Because Member Becker's recess appointment was invalid and the Board lacked a three-member quorum when it issued *D. R. Horton*, that decision is a legal nullity.

Even if Member Becker's recess appointment had been constitutional, *D. R. Horton* would still be invalid because it was issued by only two members without prior delegation to a three-member panel. The Board could have properly issued the *D. R. Horton* decision with two members only if it had delegated its authority to a three-member panel. 29 U.S.C. § 153(b); *see also* United States Department of Justice, Office of Legal Counsel Memorandum, dated March 4, 2003, at 7a (“[T]he statute provides that once a delegation is made to a group of three or more members, the quorum becomes the group of two.”). In its brief to the Supreme Court in *New*

Process Steel, the Board recognized that two members may act only pursuant to a valid delegation to a group of three or more members. *See, e.g.*, Brief for NLRB at 12; *New Process Steel*, 130 S. Ct. 2635 (2010) (“Congress amended the Act in 1947 by increasing the size of the Board from three to five members, by allowing the Board to delegate any or all of its powers to a group of three members, and by allowing such a delegee group to operate with a two-member quorum.”).

The Board has, in fact, delegated its authority to a three-member panel in many cases, but not in *D. R. Horton*. “[W]hen the Board’s membership has fallen to three members, the Board has developed a practice of designating those members as a ‘group’ in cases where one member will be disqualified.” Office of Legal Counsel Memorandum Opinion for the Solicitor National Labor Relations Board, NLRB *New Process Steel Br.*, Appendix A at 7a. Of course, if the statute permitted the Board to act in all cases with two members when the Board has only three members – which it clearly does not – the Board would not have had to issue a delegation to its three members in order for two members to act.

The Board’s statement that it has “developed a practice” of delegating its powers to a three member group is borne out in the text of thousands of NLRB decisions, including several decisions issued in the days and weeks immediately before and after the *D. R. Horton* decision. *See, e.g.*, *New Vista Nursing & Rehab., LLC*, 2011 WL 6936391, at *1 (NLRB Dec. 30, 2011); *Apollo Detective, Inc.*, 358 NLRB No. 1 (Jan. 31, 2012). In these decisions, the NLRB made its delegation explicit; stating in *Apollo Detective* that “[t]he National Labor Relations Board has delegated its authority in this proceeding to a three member panel”, 358 NLRB No. 1, slip op. at 1, and in *New Vista Nursing* that “[p]ursuant to the provisions of Section 3(b) of the National

Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.” 358 NLRB No. 55, slip op. at 1 (2012).

In its decision in *D. R. Horton*, however, the Board made no such delegation. 357 NLRB No. 184. Instead, the Board simply stated “Chairman Pearce and Member Becker participated; Member Hayes was recused.” *Id.* at 1. This does not satisfy the Act’s three-member delegation requirement. While the delegation clause does not require Member Hayes to participate in the decision on the merits, it does require that he and the other members of the Board delegate the Board’s authority to a three-member group before a decision on the merits is issued by only two members. 29 U.S.C. § 153(b). In contravention of its own established practice, the Board did not make such a delegation in this case.

While Member Hayes’ recusal would not have affected the quorum had there been a proper delegation, in the absence of a proper delegation, Member Hayes could not properly be considered to have “participated” in the *D. R. Horton* decision. *See Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111, 1186-1187 (2000) (discussing cases holding that members of multimember agencies who are disqualified from participating in a decision do not count towards the quorum). Thus, *D. R. Horton* was issued by only two Board members. Therefore, it was improperly issued because 29 U.S.C. § 153(b) requires that a quorum of three members participate in each decision. It did not do so, rendering *D. R. Horton* invalid under *New Process Steel*.

2. *D.R. Horton* Was Wrongly Decided.

Even if *D. R. Horton* had been validly decided, the Board should reconsider and reverse that decision in light of its overwhelming rejection in the courts. All of the Circuit Courts that have considered *D. R. Horton* since the decision issued in January 2012 have rejected it. *See, e.g., Richards v. Ernst & Young, LLP*, ---F.3d---, 2013 WL 4437601 (9th Cir. Aug. 21, 2013);

Ranieri v. Citigroup Inc., 2013 WL 4046278 (2d Cir. Aug. 12, 2013) (summary order);
Sutherland v. Ernst & Young LLP, --- F.3d ---, 2013 WL 4033844 (2d Cir. Aug. 9, 2013); *Owen v. Bristol Care*, 702 F.3d 1050 (8th Cir. 2013)

Moreover, virtually all of the other federal and state courts that have considered *D. R. Horton* have rejected it as well. See *Lloyd v. J.P. Morgan Chase & Co.*, 2013 WL 4828588, at *6 (S.D.N.Y. Sept. 9, 2013); *Dixon v. NBCUniversal Media, LLC*, --- F. Supp. 2d ---, 2013 WL 2355521, at *9 n.11 (S.D.N.Y. May 28, 2013); *Birdsong v. AT&T Corp.*, 2013 WL 1120783, at *6 n.4 (N.D. Cal. Mar. 18, 2013); *Ryan v. J.P. Morgan Chase & Co.*, 924 F. Supp. 2d 559, 562 (S.D.N.Y. 2013); *Noffsinger-Harrison v. LP Spring City, LLC*, 2013 WL 499210, at *5-6 (E.D. Tenn. Feb. 7, 2013); *Miguel v. JPMorgan Chase Bank*, 2013 WL 452418 (C.D. Cal. Feb. 5, 2013); *Torres v. United Healthcare Servs., Inc.*, 920 F. Supp. 2d 368 (E.D.N.Y. 2013); *Long v. BDP Int'l, Inc.*, 919 F. Supp. 2d 832 (S.D. Tex. 2013); *Cohen v. UBS Fin. Servs, Inc.*, 2012 WL 6041634, at *4 (S.D.N.Y. Dec. 4, 2012); *Andrus v. D. R. Horton, Inc.*, 2012 WL 5989646, at *8-9 (D. Nev. Nov. 5, 2012); *Johnson v. TruGreen Ltd. P'ship*, No. 12-00166, slip op. at 11-16 (W.D. Tex. Oct. 25, 2012); *Carey v. 24 Hour Fitness USA, Inc.*, 2012 WL 4754726, at *2 (S.D. Tex. Oct. 4, 2012); *Tenet Healthsystem Phila., Inc. v. Rooney*, 2012 WL 3550496, at *4 (E.D. Pa. Aug. 17, 2012); *Truly Nolen of Am. v. Superior Court*, 208 Cal.App. 4th 487 (Cal. App. 4 Dist. 2012); *Delock v. Securitas Sec. Servs. USA, Inc.*, 883 F. Supp. 2d 784 (E.D. Ark. 2012); *Luchini v. Carmax, Inc.*, 2012 WL 2995483, at *7 (E.D. Cal. July 23, 2012); *Spears v. Mid-America Waffles, Inc.*, 2012 WL 2568157, at *2 (D. Kan. July 2, 2012); *De Oliverira v. Citigroup NA, Inc.*, 2012 WL 1831230, at *2 (M.D. Fla. May 18, 2012); *Coleman v. Jenny Craig, Inc.*, 2012 WL 3140299, at *3-4 (S.D. Cal. May 15, 2012); *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831 (N.D. Cal. May 2012); *Brown v. Trueblue, Inc.*, 2012

WL 1268644 (M.D. Pa. Apr. 16, 2012); *Jasso v. Money Mart Express, Inc.*, 879 F. Supp. 2d 1038 (N.D. Cal. 2012); *Johnmohammadi v. Bloomingdales*, No. 11-6434-GW-AJWx, Dkt. No. 38, slip op. at 2-3 (C.D. Cal. Feb. 23, 2012); *Palmer v. Convergys Corp.*, 2012 WL 425256, at *3 (M.D. Ga. Feb. 9, 2012); *Sanders v. Swift Transp. Co. of Arizona, LLC*, 843 F. Supp. 2d 1033, 1036 n.1 (N.D. Cal. 2012); *LaVoice v. UBS Fin. Servs., Inc.*, 2012 WL 124590, at *6 (S.D.N.Y. Jan. 13, 2012); *Nelsen v. Legacy Partners Residential, Inc.*, 207 Cal. App. 4th 1115 (Cal. Ct. App. 2012).

These decisions demonstrate that the NLRB overstepped its authority in attempting to outlaw such mandatory arbitration agreements, which are intended to govern the resolution of *non-NLRA* claims. The NLRB overstepped its authority in several fundamental ways. First, the NLRB failed to apply appropriate deference to the FAA and Supreme Court authority holding that mandatory arbitration agreements with class/collective action waivers are enforceable under the FAA. Second, there is no right under Section 7 to litigate claims on a class or collective action basis. Third, the NLRB failed to recognize that these types of arbitration agreements do not seek to regulate or affect core Section 7 rights (i.e., the rights to organize and bargain collectively), but rather seek to resolve claims that arise under other federal and state laws that have their own regulatory and enforcement mechanisms. Fourth, the NLRB's decision rests on a flawed interpretation of a statute, the Norris-LaGuardia Act, that the NLRB has no authority to interpret or enforce.

a. The NLRA must be accommodated to the FAA and the strong federal policy favoring arbitration of employment disputes.

The Board in *D. R. Horton* failed to give appropriate deference to the FAA and the strong federal policy favoring arbitration of employment disputes. The Board acknowledged that when there is a conflict between the policies of the NLRA and another federal statute, such as the

FAA, the Board must undertake a “careful accommodation” of the two statutes. *D. R. Horton*, slip. op. at 8 (citing *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942)). See also *Collyer Insulated Wire*, 192 NLRB 837, 840 (1971) (“[L]abor law as administered by the Board does not operate in a vacuum isolated from other parts of the Act, or, indeed, from other acts of Congress.”); *Int’l Harvester Co.*, 138 NLRB 923, 927 (1962), *aff’d*, *Ramsey v. NLRB*, 327 F.2d 784 (7th Cir. 1964) (citing *Southern Steamship*: “the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives”).

In the case of the FAA, the Supreme Court has made it abundantly clear how the FAA and another federal statute are to be accommodated. The FAA requires enforcement of arbitration agreements according to their terms unless the NLRA contains a clear “congressional command” to the contrary. *Italian Colors*, 130 S.Ct. at 2309 (citing *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012)). Despite the absence of any such clear command in the NLRA, the Board found that to the extent the FAA conflicts with the NLRA, “the FAA would have to yield.” *D. R. Horton*, slip. op. at 12. Thus, *D. R. Horton* clearly conflicts with the Supreme Court’s unequivocal directive that arbitration agreements should be enforced under the FAA in the absence of clear statutory language requiring the FAA to yield.

The FAA provides that an arbitration agreement “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. Enacted in 1925 to combat the “judicial hostility to arbitration agreements,” the FAA “place[s] arbitration agreements upon the same footing as other contracts,” and incorporate[s] a “liberal federal policy favoring arbitration agreements.” *Gilmer*, 500 U.S. at 24-25 (internal citations omitted).

The courts interpreting the FAA, including the Supreme Court, have concluded that arbitration agreements are to be enforced “even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator.” *Gilmer*, 500 U.S. at 32 (internal citations omitted). The Supreme Court reiterated in *Italian Colors*, 130 S.Ct. at 2309; *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); and *CompuCredit Corp.*, 132 S. Ct. at 669, that the FAA *requires* courts to enforce arbitration agreements according to their terms unless there is a clear congressional intent to override that mandate. That mandate is essential to preserving the strong federal policy favoring arbitration, a policy difficult to overstate.

In its recent decision in *CompuCredit*, a decision that the *D. R. Horton* panel did not have the benefit of reviewing, the Supreme Court reaffirmed that “even when the claims at issue are federal statutory claims, unless the FAA’s mandate has been overridden by a contrary congressional command,” the arbitration agreement is enforceable. *CompuCredit Corp.*, 132 S. Ct. at 669 (internal quotations and citations omitted). This “congressional command” must be clear. *Id.* Indeed, when Congress intends to restrict the use of arbitration, it must do so “with a clarity that far exceeds” the generic language regarding the creation of causes of action found in many statutes. *Id.* at 672. The Supreme Court has reinforced this time and again by finding that even “[s]tatutory references to having causes of action, filing in court, allowing suits, and even pursuing class actions are insufficient commands” to override the FAA’s mandate. *See Delock*, 883 F. Supp. 2d at 789-90 (citing *CompuCredit*, 132 S. Ct. at 670-71).

For example, in *Gilmer*, the Court enforced an agreement to arbitrate claims under the ADEA, which specifically provides for a right to a jury trial and further states: “Any person aggrieved may bring a civil action in any *court* of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter,” 29 U.S.C. § 626(c)(1) (emphasis

added). *See* 500 U.S. at 29 (rejecting argument that “arbitration is improper because it deprives claimants of the judicial forum provided for by the ADEA,” because Congress “did not explicitly preclude arbitration or other nonjudicial resolution of claims”).

Moreover, the ADEA incorporates the Fair Labor Standard Act’s collective action provision, 29 U.S.C. § 216(b). The Court concluded, however, that Section 216(b)’s specific reference to collective actions was an insufficiently clear statutory command to override the FAA’s mandate: “[E]ven if the arbitration *could not go forward as a class action* or class relief could not be granted by the arbitrator, the fact that the ADEA provides for the possibility of bringing a collective action does not mean that individual attempts at conciliation were intended to be barred.” 500 U.S. at 32 (quotations omitted, emphasis added). *See also Italian Colors*, 133 S.Ct. at 2311 (Court had “no qualms in enforcing a class waiver in an arbitration agreement even though the federal statute at issue, the [ADEA], expressly permitted collective actions).

Likewise, the Ninth Circuit has expressly “reject[ed] the argument . . . that the 1991 [Civil Rights] Act’s provision of a right to jury trial precludes arbitration of Title VII claims.” *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 750 (9th Cir. 2003) (en banc). The Ninth Circuit acknowledged that “the view that compulsory arbitration weakens Title VII conflicts with the Supreme Court’s stated position that arbitration affects only the choice of forum, not substantive rights.” *Id.*

In reaching the same result, the Second Circuit found it “untenable to contend that compulsory arbitration conflicts with the [Civil Rights] Act’s provision for the right to a jury trial,” even though there was “express language in the legislative history that suggests a congressional purpose to *preclude* mandatory arbitration of Title VII claims.” *Desiderio v. NASD, Inc.*, 191 F.3d 198, 205 (2d Cir. 1999). As the court concluded, “we assume, as does the

Supreme Court, that the drafters of Title VII and the amendments introduced in the Act were well aware of what language was required for Congress to evince an intent to preclude a waiver of judicial remedies. In construing Title VII, the absence of that language is a meaningful omission.” *Id.*

These employment cases are consistent with Supreme Court interpretation of other statutes. For example, in *Shearson/American Express, Inc. v. McMahon*, the Court found that nothing in the text, history, or purpose of the Securities Exchange Act of 1934 demonstrated a sufficiently clear congressional intent to override the FAA’s mandate in favor of arbitration, even though the statute provides that “[t]he district courts of the United States . . . shall have *exclusive jurisdiction* of violations of this title . . . , and of *all suits* in equity and actions at law brought to enforce any liability or duty created by this title[.]” 482 U.S. 220, 227-28 (1987); 15 U.S.C. § 78aa (emphasis added). The Court reached the same result regarding the Racketeering Influenced Corrupt Organizations Act (“RICO”), which provides that any person injured by a violation of the statute “may sue therefor in any appropriate *United States district court* and shall recover threefold the damages he sustains and the cost of the suit,” 18 U.S.C. § 1964(c) (emphasis added). *McMahon*, 482 U.S. at 239-42. By contrast, the NLRA says *nothing* about access to any particular forum or procedure for pursuing non-NLRA claims.

More recently, in *CompuCredit*, the Court addressed the Credit Repair Organizations Act (“CROA”), which requires covered organizations to inform customers of their “right to sue” and contains an express “anti-waiver” provision that prohibits requiring consumers to waive any rights under the statute. 15 U.S.C. § 1679f(a). The Supreme Court reversed a lower court’s conclusions that (1) the statute gave consumers the right to bring an action in a court of law, and therefore (2) the “anti-waiver” provision precluded an arbitration agreement waiving that right.

132 S. Ct. at 668-75. In doing so, the Supreme Court laid out the “contrary congressional command” analysis described above and held that a statute that simply speaks in terms of available court proceedings—using terms like action, class action, or court—does not signify congressional intent to preclude arbitration. “If the mere formulation of the cause of action in this standard fashion were sufficient to establish the ‘contrary congressional command’ overriding the FAA, valid arbitration agreements covering federal causes of action would be rare indeed. But that is not the law.” *Id.* at 670 (citation omitted).

Here, nothing in the NLRA’s text or legislative history suggests that Congress intended to ban class action waivers in arbitration agreements. Section 7 provides employees with “the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]” 29 U.S.C. § 157. If language governing how claims under a statute are adjudicated does not evince a sufficiently clear command to override the FAA, it surely follows that the NLRA’s more ambiguous definition of “concerted activities” for the “mutual aid or protection” of employees is insufficient. If Congress had intended to engraft onto *every* employment statute a right to collective litigation, it could and “would have done so in a manner less obtuse.” *CompuCredit*, 132 S. Ct. at 672.⁵

Section 7 says nothing about arbitration, federal court jurisdiction, the right to particular procedural options to resolve legal claims, or *anything* else about what goes on during judicial

⁵ Congress does so when it wants to. *See CompuCredit*, 132 S. Ct. at 672. Section 26 of the Commodity Exchange Act expressly provides that “[n]o predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section.” 7 U.S.C. § 26(n); *see also* 15 U.S.C. § 1226(a)(2) (providing that when an a motor vehicle franchise contract includes an agreement to arbitrate a controversy arising out of or related to the contract, arbitration may be used only if *after* the controversy arises all parties consent in writing to use arbitration); *cf.* 12 U.S.C. § 5518 (authorizing the Bureau of Consumer Financial Protection, by regulation, to “prohibit or impose conditions or limitations” on the use of pre-dispute arbitration agreements in contracts for consumer financial products or services).

proceedings. *Delock*, 883 F. Supp. 2d at 789-90 (“The NLRA’s text contains no command that is contrary to enforcing the FAA’s mandate.”); *Morvant*, 870 F. Supp. 2d at 845 (“Congress did not expressly provide that it was overriding any provision in the FAA when it enacted the NLRA or the Norris-LaGuardia Act[.]”); *Jasso*, 879 F. Supp. 2d at 1047 (“[T]here is no language in the NLRA . . . demonstrating that Congress intended the employee concerted action rights therein to override the mandate of the FAA.”). When a statute “is silent on whether claims under [it] can proceed in an arbitral forum, the FAA requires the arbitration agreement to be enforced according to its terms.” *CompuCredit*, 132 S. Ct. at 673.

Moreover, there is nothing in the legislative history of the NLRA to suggest antipathy towards individual arbitration. Section 1 of the NLRA declares that it is the policy of the United States to protect union organizing and collective bargaining “for the purpose of negotiating the terms and conditions of . . . employment...[.]” 29 U.S.C. § 151; *see also Allied Chem. & Alkali Workers of Am. v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 166 (1971) (the NLRA “is concerned with the disruption to commerce that arises from interference with the *organization* and *collective-bargaining rights* of workers...” (emphasis added)). Nor does the legislative history of Section 7 have anything specific to say about employees’ use of a particular procedural device to adjudicate a claim under an *unrelated, non-NLRA* statute. *See Owen*, 702 F.3d at 1053. In fact, modern class action procedures were not even adopted in federal courts until 1966, decades after the Wagner Act was first enacted. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997) (describing 1966 developments in Rule 23). Therefore, Congress could not possibly have intended for Section 7 to guarantee access to a procedural mechanism that did not yet exist. *See Italian Colors*, 130 S.Ct. at 2309 (noting that antitrust laws could not contain a contrary congressional command because they predated the adoption of Rule 23).

In sum, the NLRA’s text and legislative history do not contain *any* indication that Congress intended to override the FAA’s mandate to enforce arbitration agreements according to their terms. At the very least, Congress did not do so with the “clarity” required for the NLRA to override the FAA. *CompuCredit*, 132 S. Ct. at 672. Thus, it is no surprise that both the current Acting General Counsel (“GC”) and prior GC of the NLRB have taken the position that an employee *can* permissibly waive the right to bring a class or collective action without implicating concerns under the NLRA. In its arguments to the two-member panel in *D. R. Horton*, the Acting GC stated: “An employer has the right to limit arbitration to individual claims—as long as it is clear that there will be no retaliation for concertedly challenging the agreement.”⁶ *D. R. Horton*, Acting GC’s Reply Br. at 2.⁷ In other words, as long as employees can join together to test the *validity* of an arbitration agreement, free from any retaliation, the NLRA does not prevent *enforcement* of an otherwise valid agreement.

This position is consistent with that of the prior GC, who stated that “no Section 7 right is violated when an employee possessed of an individual right to sue enters such a *Gilmer* agreement⁸ as a condition of employment[.]” GC Mem. 10-06, at 6 (June 16, 2010).⁹ That GC also found that “no issue cognizable under the NLRA is presented” if an arbitration agreement “make[s] clear that the employees’ Section 7 rights to challenge those agreements through concerted activity are preserved[.]” *Id.* at 2. Thus, an employer “may lawfully seek to have a

⁶ In fact, because the GC in *D. R. Horton* agreed on this issue, there was no actual controversy before the NLRB on this point. In resolving it anyway, the NLRB improperly rendered an advisory opinion. *Cf. United States v. Alpine Land & Reservoir Co.*, 887 F.2d 207, 214 (9th Cir 1989) (“[C]ourts should not render advisory opinions upon issues which are not pressed before the court, precisely framed and necessary for decision.”).

⁷ Available at <https://www.nlr.gov/search/advanced/all/> (case: 12-CA-025764).

⁸ The GC described this term as an employee’s agreement, “as a condition of employment, to channel his or her individual non-NLRA employment claims into a private arbitral forum for resolution.” GC Mem. 10-06 at 1.

⁹ Available at <https://www.nlr.gov/publications/general-counsel-memos> (search: GC 10-06).

class action complaint dismissed by the court on the ground that each purported class member is bound by his or her signing of a lawful *Gilmer* agreement/waiver.” *Id.* at 7.

Consistent with the NLRB’s longstanding position pre-*D. R. Horton*, the ALJ who initially heard *D. R. Horton* acknowledged “the absence . . . of direct Board precedent” and was “not aware of any Board decision holding that an arbitration clause cannot lawfully prevent class action lawsuits or joinder of arbitration claims.” *D. R. Horton, Inc. & Michael Cuda*, No. 12-CA-25764, JD(ATL)-32-10, slip op. at 5 (Div. of Judges Jan. 3, 2011). Although the Board in *D. R. Horton* overruled the ALJ, it acknowledged the tension between its decision and the GC’s prior position. 357 NLRB No. 184, slip op. at 6.

This historical absence of any notion that the NLRA precludes a class-action waiver in an arbitration agreement belies the NLRB’s decision in *D. R. Horton*. Not only does the fact that a “right” to collective litigation was articulated for the first time in 2012 by an invalid two-member panel severely undermine the idea that such a *nonwaivable* “right” exists at all, but the fact that the federal courts, the NLRB’s past and present GC, and even the ALJ in *D. R. Horton* reached the opposite conclusion and never identified *any* “contrary congressional command” in the Act for over 75 years means, at a *minimum*, that such a command has not been expressed with the “clarity” necessary to override the FAA’s strong mandate. *CompuCredit*, 132 S. Ct. at 672.

The absence of clear Congressional intent to override the FAA is also confirmed by the well-established principle that Section 7 rights are not absolute. Rather, there are limits on Section 7’s protections when necessary to promote other legitimate purposes or when the concerted activities are not linked to the NLRA’s core concerns: organizing and collective bargaining. *See, e.g., Hudgens v. NLRB*, 424 U.S. 507, 522 (1976) (NLRB must consider “the nature and strength of the respective Section 7 rights”). For example, an employer need not provide an open forum for

all union communication; reasonable restrictions may be used to advance legitimate business purposes. *See, e.g., NLRB v. United Steel Workers*, 357 U.S. 357, 361-64 (1958) (employer’s no-solicitation rules “may duly serve production, order and discipline”); *Guardian Indus. Corp. v. NLRB*, 49 F.3d 317, 318 (7th Cir. 1995) (reasonable restrictions allowed on bulletin board postings); *NLRB v. Starbucks Corp.*, 679 F.3d 70 (2d Cir. 2012) (employer may limit employees’ ability to wear union insignia). Similarly, concerted activity that is disloyal, disruptive, opprobrious, or insubordinate is not protected by the NLRA. *See, e.g., NLRB v. Local Union No. 1229, IBEW*, 346 U.S. 464 (1953). In these circumstances, other interests must be considered and can take preeminence. The FAA’s mandate that courts “rigorously enforce” arbitration agreements as written is just such an interest.

As argued more fully in section III.D.2.b, *infra*, when concerted activity does not directly relate to employee organizing or collective bargaining, other interests must be considered and can take on preeminence. *See, e.g., United Food & Commercial Workers, Local No. 880 v. NLRB*, 74 F.3d 292, 294 (D.C. Cir. 1996); *NLRB v. Great Scot, Inc.*, 39 F.3d 678, 682 (6th Cir. 1994). The FAA’s “emphatic” policy favoring enforcement of arbitration agreements is a competing purpose here, just as it has carried the day when courts have ordered arbitration of so many other types of claims. *See supra* at pp. 23-29. Section 7 rights, especially when they do not relate to the Act’s core protection of collective bargaining and employee organizing, must give way to the FAA.

There is no Section 7 right to litigate non-NLRA claims on a class or collective action basis.

D. R. Horton is an unprecedented expansion of the principle that Section 7’s mutual aid or protection clause “protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums....” *Eastex*,

Inc. v. NLRB, 437 U.S. 556, 565-66 (1978). Even if Section 7 protects employees from retaliation when they file a claim on a class or concerted basis, that does not mean the entire course of the litigation also is governed by Section 7. The NLRA does not displace the Federal Rules of Civil Procedure and dictate that every legal claim that is for “mutual aid or protection” must therefore be litigated as a class or collective action. Indeed, the Board in *D. R. Horton* acknowledged that “there is no Section 7 right to class certification.” *D. R. Horton*, 357 NLRB No. 184, slip op. at 10. When a class or collective action is filed in federal court, the employees still must prove all of the requirements for class certification under Rule 23 and employers are “free to assert any and all arguments against certification.” *Id.* at n.24. The only Section 7 right found by the Board in *D. R. Horton* is the “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.” *Id.* This conclusion is inconsistent, however, with the Board’s position that an employer cannot compel individual arbitration based on the existence of an agreement to arbitrate. There is no logical distinction that can be drawn between filing a motion to compel arbitration and filing an opposition to class certification, and the Board’s attempt to preclude employers from filing meritorious motions to compel arbitration or to withdraw such motions after the fact violates those employers’ rights to free speech under the First Amendment. *See Bill Johnson’s v. NLRB*, 461 U.S. 731, (1983) (holding that employer’s right to prosecute a meritorious action against an employee was protected by the First Amendment and, therefore, does not violate the Act).

The C.A.R.E.S. Agreement does not contain any threat of “coercion, restraint or interference” if an employee or group of employees files a class or collective action in court. Indeed, the C.A.R.E.S Agreement allows employees to challenge the procedure in Court. Ex. M

at 2. The importance of this distinction is shown by the cases cited in *D. R. Horton*, which involve situations in which employees are *disciplined or discharged* merely for asserting common legal claims or jointly selecting a common representative to present such claims to their employer. See *D. R. Horton*, 357 NLRB No. 184, slip op. 2 (citing *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948-49 (1942) (finding that three employees who filed FLSA suit for overtime pay were engaged in protected, concerted activity), and *Salt River Valley Water Users Ass'n*, 99 NLRB 849, 853-54 (1952) (finding that employees who circulated a petition to have employee designated as representative for FLSA claim was engaged in activity protected under Section 7)). There is no evidence that the claims in these cases were actually litigated as class or collective actions. In *Spandsco Oil*, the case was dismissed, with prejudice, four months after it was filed. In *Salt River Valley Water Users Ass'n*, it does not appear that the claim was ever filed in court. Precedent holding that employees may not be fired merely for attempting to file, or unsuccessfully filing, a claim in court cannot be read to also hold that the employees have a Section 7 right to actually litigate that claim as a class or collective action; such a reading is not supported by the facts of those cases.

Further, *D. R. Horton* mistakenly equates the right to discuss employment claims with other employees, pool resources to hire an attorney, and seek advice and litigation support from a union – rights and activities that can be protected by Section 7 depending on the circumstances – as legally equivalent to having a single forum adjudicate common legal claims under other statutes and rules of civil procedure. *Id.* at slip op. at 6. Courts that have considered *D. R. Horton* rejected the proposition that the NLRA creates a non-waivable right to adjudicate, in a single forum, common claims arising under other laws and rules of civil procedure. After all, the NLRB has no expertise in the process or rules by which individual claimants may seek to have

one court address their claims at the same time. *See, e.g., Nelsen v. Legacy Partners Residential, Inc.*, 144 Cal. Rptr. 3d 198, 213 (Cal. App. 2012).

The Board must recognize that the Supreme Court and federal courts have repeatedly deemed a class or collective action as principally a procedural and, therefore waivable option, rather than a substantive right protected by the NLRA or any other law. The Supreme Court recently reiterated that Rule 23 “was designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.” *Italian Colors*, 2013 WL 3064410, at *4. The Supreme Court also has held that “the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.” *Deposit Guarantee Nat. Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 332 (1980); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S.Ct. 1431, 1442 (2010) (upholding Rule 23 under the Rules Enabling Act because “it governs only ‘the manner and the means’ by which the litigants’ rights are ‘enforced’”) (internal citations omitted); *Blas v. Belfer*, 368 F.3d 501, 505 (5th Cir. 2004) (“no substantive right to a class remedy; a class action is a procedural device.”). Most importantly, *Gilmer* itself found that a class or collective action procedure is not a guaranteed right, but rather a waivable option. *Gilmer*, 500 U.S. at 32 (arbitration agreement should be enforced “even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator”).

Consequently, an arbitration procedure which, like the C.A.R.E.S. Agreement, seeks only to regulate *how* a claim will be litigated or arbitrated, but contains no threat of discipline or discharge if an employee refuses to acknowledge or challenges that procedure, does not implicate the NLRA because it fully permits the employee to pursue their litigation “without employer coercion, restraint or interference.” *D. R. Horton*, 357 NLRB No. 184, slip op. at 10,

n.24. Employees retain the ability to join together to discuss and present their claim, as a group, in court. Whether a court decides to compel individual arbitration of that claim is a matter for the court to decide under the rules of civil procedure, the FAA, and the substantive law governing the claim – not the NLRA.

b. Mandatory arbitration agreements that seek to resolve non-NLRA claims do not affect core Section 7 rights and therefore must yield to other interests.

The Board in *D. R. Horton* failed to recognize that Section 7 rights fall on a spectrum and, at some point, must be balanced against other rights. *See Hudgens v. NLRB*, 424 U.S. 507, 521-23 (1976) (stating that whether Section 7 rights must give way to other legal rights, such as property rights, “largely depend[s] upon the content and the context of the [Section] 7 rights being asserted”); *Hoffman Plastic Compounds Inc. v. NLRB*, 535 U.S. 137, 144 (2002) (“we have accordingly never deferred to the Board’s remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA”).

The spectrum of rights becomes weaker the farther the purported Section 7 activity falls from the NLRA’s core concerns: organizing and collective bargaining. The Board must “tak[e] account of the relative strength of the Section 7 right” in a given case before determining that the NLRA is predominant. *Jean Country*, 291 NLRB 11, 18 (1988). When the Section 7 activity does not directly relate to employee organizing or collective bargaining, other rights and interests must be given greater weight. *See, e.g., United Food & Commercial Workers, Local No. 880 v. NLRB*, 74 F.3d 292, 294 (D.C. Cir. 1996) (“*Babcock* and its progeny indicate that . . . the interest of nonemployees in organizing an employer’s employees is stronger than the interest of nonemployees engaged in protest or boycott activities”); *NLRB v. Great Scot, Inc.*, 39 F.3d 678, 682 (6th Cir. 1994) (“Non-employee area standards picketing is even farther removed from

the core concerns of Section 7 . . . their picketing was not even ostensibly aimed at organization . . . [which] warrants even less protection than non-employee organizational activity.”).

Whether an employment claim is litigated on a class or collective basis has nothing to do with organizing or bargaining collectively under the NLRA. Thus, the Section 7 right identified in *D. R. Horton* falls on the dimmest end of the spectrum, if even on the spectrum at all. Courts that have considered, and rejected, *D. R. Horton* have reached this very conclusion. *See, e.g., Nelsen v. Legacy Partners Residential, Inc.*, Case No. A132927, at slip op. 19 (Cal. Ct. App. July 18, 2012) (“[The Board] cites no prior legislative expression, or judicial or administrative precedent suggesting class action litigation constitutes ‘concerted activity for the purpose of . . . other mutual aid or protection.’”).

For this reason, arbitration agreements with class/collection action waivers for non-NLRA claims do not constitute agreements that “purport to restrict Section 7 rights” as the Board found in *D. R. Horton*. 357 NLRB No. 183, slip op. at 4. The cases cited in *D. R. Horton* all involved individual employment agreements that purported to restrict core Section 7 activity – the right to organize and engage in collective bargaining. For instance, the individual contracts at issue in *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940) were “procured through the mediation of a company-dominated labor organization” and were a means of displacing a legitimate union representative. *Id.* at 360. Furthermore, in those individual agreements, the employees agreed not to “demand a closed shop or a signed agreement by his employer with any Union.” *Id.* The Supreme Court held that these individual agreements “were the fruits of unfair labor practices, stipulated for the renunciation by the employees of rights guaranteed by the Act, and were a continuing means of thwarting the policy of the Act....” *Id.* at 361.

Similarly, the individual agreements at issue in *J. H. Stone & Sons*, 33 NLRB 1014 (1941), another case that the Board relies upon heavily in *D. R. Horton*, clearly interfered with employees' core Section 7 rights. The Board in *J. H. Stone* found that these individual agreements "were the fruit of the respondents' interference, restraint, and coercion and *had the purpose of defeating unionization of their employees.*" *Id.* at 1023 (emphasis added). In enforcing the Board's order in *J. H. Stone*, the Seventh Circuit noted that one of the stated purposes of these agreements was "to prevent strikes and labor troubles" and found that, through the agreement's arbitration provision, the employee "not only waived his right to collective bargaining but his right to strike or otherwise protest on the failure to obtain redress through arbitration." *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942).

The individual contracts in *National Licorice*, *J. H. Stone*, and other cases cited by the Board in *D. R. Horton* in no way resemble the C.A.R.E.S. Agreement or similar agreements to arbitrate non-NLRA claims on an individual basis. There was no evidence in *D. R. Horton*, and there is no evidence here, that the individual arbitration agreements "had the purpose of defeating unionization" or were intended to "prevent strikes and labor troubles." There is no evidence that these agreements have *anything* to do with the right to organize and bargain collectively under the NLRA. Instead, they are agreements that are designed to resolve *non-NLRA* claims efficiently through arbitration. Congress has not given the Board the power to police employment agreements that have nothing to do with the right to organize or bargain collectively under the Act, especially when balanced against other specific federal laws regulating such agreements, like the FAA.

Numerous courts have concluded that arbitration of claims under the Fair Labor Standards Act and other employment laws does not interfere with the substantive rights under

those laws. *See, e.g., Italian Colors*, 130 S.Ct. at 2311; *Gilmer*, 500 U.S. at 32; *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002) (affirming an order to compel plaintiff’s FLSA claim to arbitration on an individual basis, finding “no suggestion in the text, legislative history, or purpose of the FLSA that Congress intended to confer a nonwaivable right to a class action under that statute”); *Horenstein v. Mortg. Mkt., Inc.*, 9 F. App’x 618, 619 (9th Cir. 2001) (affirming an order to compel plaintiffs’ FLSA claims to arbitration, holding that “[a]lthough plaintiffs who sign arbitration agreements lack the procedural right to proceed as a class, they nonetheless retain all substantive rights under the statute”) (internal citation omitted); *Johnson v. W. Suburban Bank*, 225 F.3d 366, 373 (3d Cir. 2000) (“even if plaintiffs who sign valid arbitration agreements lack the procedural right to proceed as part of a class, they retain the full range of rights created by the [relevant statute]”).

The Board in *D. R. Horton* impermissibly expanded the NLRA to confer procedural rights that do not otherwise exist under these laws. The NLRB has no authority to invoke Section 7 to regulate how claims will be resolved under other statutes.

c. The NLRB has no statutory authority to interpret the NLGA, and even if it did, the NLGA does not prohibit enforcing arbitration agreements that include class/collective action waivers.

The Board in *D. R. Horton* also erred in holding that the Norris-LaGuardia Act (“NLGA”), and by implication the NLRA, partially repealed the FAA so that it does not apply to employment arbitration agreements containing class/collective action waivers. *D. R. Horton*, 357 NLRB No. 184, slip op. at 5-6, 12. The Board noted the FAA was enacted in 1925 and predated both the NLGA and the NLRA. *D. R. Horton*, 357 NLRB No. 184, slip op. at 12. Therefore, if the FAA conflicts with either of those statutes, the Board in *D. R. Horton* reasoned the FAA must have been repealed, either by the NLGA’s provision repealing statutes in conflict with it or impliedly by the NLRA. *Id.*

The Board, however, failed to account for the dates when the NLRA and FAA were amended or re-enacted. Those are the relevant dates for this analysis. *See Chicago & N. W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 582 n.18 (1971) (looking to re-enactment date of the Railway Labor Act to determine that it post-dated the NLGA and concluding “[i]n the event of irreconcilable conflict” between the two statutes, the former would prevail). Congress reenacted the FAA in 1947, “twelve years after the NLRA and fifteen years after the passage of the Norris-LaGuardia Act.” *Owen*, 702 F.3d at 1053 (emphasis in original). Thus, in any conflict between these statutes, the FAA must prevail. “The decision to reenact the FAA suggests that Congress intended its arbitration protections to remain intact even in light of the earlier passage of three major labor relations statutes [including the FLSA].” *Id.*

In any event, the Board’s reading of the NLGA is unreasonable and beyond the scope of its jurisdiction. The NLGA is an anti-injunction statute. It deprives courts of authority to issue injunctions in labor disputes, except under certain specific exceptions. *D. R. Horton* was not an injunction proceeding and the NLGA has nothing to do with whether employees have an unwaivable Section 7 right to adjudicate class or collective action claims in court. Further, the NLGA can only be enforced by courts. The statute provides that “[n]o restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction” 29 U.S.C. § 109. The NLGA specifically defines those contracts to which it applies (colloquially known as “yellow-dog” contracts) as limited to contracts not to join a union or to quit employment if one becomes a member of a union. NLGA § 3(a), (b), 29 U.S.C. § 103(a), (b). *See also Barrow Utilities &*

Elec., 308 NLRB 4, 11, n.5 (1992) (defining a yellow dog contract as “[a]ny promise by a statutory employee to refrain from union activity or to report the union activities of others”).

D. R. Horton’s characterization of the “right” to engage in class and collective legal actions as “the core substantive right protected by the NLRA” and “the foundation on which the Act and Federal labor policy rest,” *D. R. Horton*, slip op. at 10, makes no sense given that when the original Wagner Act was passed in 1935, the FLSA, Title VII, the ADEA, and the many other statutes that give rise to modern employment law class and collective actions did not exist. In any event, the Supreme Court has found that the NLGA must accommodate the substantial changes in labor relations and the law since it was enacted. In *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970), the Court considered whether the NLGA prohibited a federal court from enjoining a strike in breach of a no-strike obligation under a CBA when that agreement provided for binding arbitration of the dispute that was the subject of the strike. The Court concluded the NLGA “must be accommodated to the subsequently enacted” Labor Management Relations Act (“LMRA”) “and the purposes of arbitration” as envisioned under the LMRA. *Id.* at 250. The Court noted that through the LMRA, Congress attached significant importance to arbitration as a means of settling labor disputes. *Id.* at 252.

The federal courts have, in several cases, rejected *D. R. Horton*’s analysis of the history of the NLGA, NLRA, and FAA. These courts concluded that Congress was silent on the NLGA and the NLRA’s intersection with the FAA and that no such preemptive provision may be read into federal labor law, particularly in light of the fact that the FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements, while the NLRA was enacted later in 1935 and subsequently amended in 1947—providing Congress with two opportunities to express its command that the NLRA, or the NLGA, overrides the FAA. *See Morvant*, 2012 WL

1604851, at *11; *Jasso*, 2012 WL 1309171, at *10 & n.3. Accordingly, of the three statutes at issue, the FAA is the most recently re-enacted and Congress never spoke to the intersection of the FAA and the NLRA. If there is any “irreconcilable conflict” among them, the FAA prevails.

For all of these reasons, *D.R. Horton* is wrongly decided and, because it is procedurally invalid and therefore non-binding, this Court should ignore it in reaching its decision. *D.R. Horton* far exceeds the Board’s authority and administrative expertise under the NLRA and, therefore, has been rejected by virtually every court that has considered it.

E. The ALJ Erred in Holding that the Language Regarding Confidentiality in the C.A.R.E.S. Agreement Violated the Act.

Respondents except to the ALJ’s finding that the confidentiality language in the C.A.R.E.S. agreement violates the Act for two reasons. First, this finding is improper because it is not based on an allegation set forth in the Amended Complaint and was not litigated by the parties. Second, the minimal confidentiality protections set forth in the C.A.R.E.S. agreement cannot reasonably be read to restrict Section 7 Activity.

1. The ALJ Violated Respondents’ Due Process Rights by Finding that the Confidentiality Provision Violates the Act.

The ALJ’s finding that the confidentiality provision violates the Act must be thrown out because it does not satisfy the requirements of due process. The fundamental elements of procedural due process are notice and an opportunity to be heard. *Lamar Advertising of Hartford*, 343 NLRB 261 (2004), quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). In addition:

Congress incorporated these notions of due process in the Administrative Procedure Act. Under the Act, ‘persons entitled to notice of an agency hearing shall be timely informed of . . . the matters of fact and law asserted.’ 5 U.S.C. Section 554(b). To satisfy the requirements of due process, *an administrative agency must give the party charged a clear statement of the theory on which the agency will proceed with the case. Additionally, an agency may not change*

theories in midstream without giving respondents reasonable notice of the change.

Lamar Advertising, 343 NLRB at 265-66, quoting *Yellow Freight Sys., Inc. v. Martin*, 954 F.2d 353, 357 (6th Cir. 1992) (emphasis added). The Board has held on numerous occasions that it will not hold an employer or union in violation of the Act based on allegations that were not set forth in the complaint or litigated by the parties. See *Sumo Airlines*, 317 NLRB 383, 384 (1995) (dismissing violations that General Counsel failed to allege “with particularity” because “there was no paragraph of the complaint which could be construed as reasonably comprehending them”); *Albert Einstein Med. Ctr.*, 316 NLRB 1040, 1040 (1995) (dismissing violation not alleged in complaint nor litigated by the parties).

Here, the claim that the confidentiality protections in the C.A.R.E.S. agreement violated the Act was neither set forth in the Amended Complaint, nor litigated by the parties. The Amended Complaint does not contain any allegations related to the confidentiality language. Stip. Ex. J. Indeed, the Amended Complaint does not contain so much as a single reference to the confidentiality language. *Id.* Nor was this issue litigated by the parties. This case was tried based on a stipulated record and the parties’ competing briefs. ALJD at 1. Because the Amended Complaint did not contain an allegation regarding the confidentiality language, Respondents did not devote a single word of their brief to this issue. Similarly, while the Acting General Counsel mentioned the confidentiality provision in his brief, he did not argue that this language violated the Act.

Despite the complete absence of notice and an opportunity to litigate, the ALJ relied on isolated statements in the Acting General Counsel’s brief to find that the confidentiality requirements violate the Act. While the Board may find and remedy a violation in the absence of a specific allegation in the complaint, it may only do so if there is a close connection to the

allegations in the complaint and the alleged violation has been fully litigated. *Pergament United Sales*, 296 NLRB 333, 334 (1989), *en f' d.*, 920 F.2d 130 (2d Cir. 1990). Here, the legality of the confidentiality language was not litigated by the parties at all, let alone fully litigated. The fact that the Acting General Counsel raised the confidentiality language in his brief counsels *against* a finding that the issue was litigated. The Acting General Counsel filed his brief simultaneously with Respondents, meaning that Respondents had no opportunity to address or respond to his discussion of the confidentiality language. An issue is fully litigated when *all* parties have the opportunity to address that issue. Tangential discussion of an issue by one party at the last stage of a proceeding does not alleviate the due process problem, it exacerbates it. Here, Respondents had neither notice of nor an opportunity to address the allegation that the confidentiality language violated the Act. Therefore, the ALJ erred in finding such a violation.

2. The Confidentiality Language Does Not Violate the Act.

Even if the allegation regarding the confidentiality language had been properly before the ALJ, his finding that this provision of the C.A.R.E.S. agreement violates the Act would still be incorrect. The C.A.R.E.S. agreement's minimal confidentiality protections cannot reasonably be read to restrict Section 7 activity. On the topic of confidentiality, the C.A.R.E.S. agreement merely states that:

The parties will have access throughout the arbitration proceedings to information that may be sensitive to the other party. Information disclosed by the parties or witnesses shall remain confidential. All records, reports or other documents disclosed by either party shall be confidential. The results of the arbitration, including any award, are confidential.

Stip. Ex. 5. No employee could reasonably read this language as prohibiting concerted activity protected by Section 7.

As set forth in Section III.C, *supra*, an employer only violates Section 8(a)(1) by maintaining workplace rules that – when reasonably read in their overall context – would chill

Section 7 activity by its employees. *Lafayette Park Hotel*, 326 NLRB at 825 (1998). In all cases, the Board must give the rule a reasonable reading, refrain from reading particular phrases in isolation, and must not presume interference with employee rights. *Lutheran Heritage*, 343 NLRB at 646.

Here, the language of the C.A.R.E.S. agreement cannot be read to prohibit employees from discussing the substance of their legal claims or their working conditions generally. Unlike the language found to be unlawful in *Double Eagle Hotel & Casino*, cited by the ALJ, the C.A.R.E.S. agreement does not “explicitly state that employees [a]re prohibited from discussing their wages and working conditions.” 341 NLRB 112, 115 (2004). Here, the language only applies to the actual proceedings before the arbitrator and any awards rendered by the arbitrator. Thus, employees remain free to discuss the issues that caused the arbitration in the first place. In other words, employees remain completely free to engage in protected, concerted activity.

Moreover, mutual confidentiality provisions such as this one are governed by and enforceable under the FAA. *See, e.g., Iberia Credit Bureau, Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 175-76 (5th Cir. 2004) (holding that a mutually applicable confidentiality provision was enforceable because confidentiality may be just as beneficial to individual litigants as it is to the employer). Accordingly, in interpreting confidentiality provisions such as this one, the Board must accommodate the policies of the FAA, which governs the C.A.R.E.S. agreement. Respondents have not infringed on employees’ Section 7 rights by seeking to maintain the confidentiality of arbitration procedures that are lawful and enforceable under the FAA. Although the arbitration proceedings are intended to be confidential, for the mutual benefit of Respondents and their employees, employees remain totally free to discuss the substance of their claims or their terms and conditions of employment generally. Therefore, the confidentiality

provision of the C.A.R.E.S. agreement cannot reasonably be read to infringe on Section 7 rights.¹⁰

F. The ALJ Did Not Properly Analyze The Section 10(b) Issues In This Case.

The ALJ's finding that Krecz-Gondor's entry into the C.A.R.E.S. agreement violated Section 8(a)(1) is barred as untimely by Section 10(b) of the Act because she signed the agreement more than six months prior to the filing of the charge. Section 10(b) states that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board" 29 U.S.C. § 160(b). Krecz-Gondor entered into the C.A.R.E.S. agreement on April 1, 2010. The Charge was filed on May 7, 2012, more than two years she signed the agreement.

The ALJ found that the allegations in the Amended Complaint were not time-barred by Section 10(b) because they were not dependent on the conditions present when Krecz-Gondor entered into the C.A.R.E.S. agreement. This finding is incorrect. In *D. R. Horton*, the Board held only that "a small percentage of arbitration agreements are potentially implicated by the holding in this case." 357 NLRB No. 184, slip op. at 12. Moreover, the Board in *D. R. Horton* specifically declined to rule on whether such an agreement would violate the Act if it were *not* entered into as a condition of employment. *Id.*, slip op. at 13 n.28.

Thus, the theory of violation under *D.R. Horton* depends on the circumstances at the time the C.A.R.E.S. agreement was entered into – *i.e.*, whether the employee voluntarily entered into it or was compelled to do so as a condition of employment. It does not matter that the Respondents have stipulated that employees outside California are required to enter into the

¹⁰ The mutuality of the confidentiality obligation also serves another important purpose – the protection of sensitive information about employees. For example, employees may bring claims based on the ADA or FMLA, thus touching on sensitive medical information, or may bring claims after being terminated for misconduct. The mutual confidentiality protects those employees from having their sensitive information made public.

C.A.R.E.S. agreement as a condition of employment. Stip. 7.¹¹ What matters from a statute of limitations perspective is that the legality of the agreement's class/collective action waiver, which under *D.R. Horton*, depends on the circumstances in which the agreement was entered into. In this sense, the timeliness of the charge with respect to the C.A.R.E.S. agreement is analogous to a CBA that is alleged to be unlawful based on the circumstances existing at the time the agreement was entered into.

In *Local Lodge No. 1424 v. NLRB*, 362 U.S. 411 (1960), the Supreme Court held that “a finding of violation which is inescapably grounded on events predating the limitations period is directly at odds with the purposes of the § 10(b) proviso.” *Id.* at 422. The allegation in that case was that a CBA containing a union security clause was unlawful because the union did not represent a majority of the employees in the bargaining unit at the time the agreement was entered into. There was no dispute as to that fact before the Supreme Court – the union did not challenge that it lacked majority status at that time. *Id.* at 412 n.1. The charge was filed more than six months after the agreement was entered into, and the complaint alleged that the continued enforcement of the agreement violated the Act. The Supreme Court held that this complaint was barred by Section 10(b), reasoning that:

[W]here conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice . . . the use of the earlier unfair labor practice is not merely ‘evidentiary,’ since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is time-barred, to permit the event itself to be so used in effect results in reviving a legally defunct unfair labor practice.

Id. at 417.

¹¹ The parties did not concede the relevance of any fact attested to in the stipulation.

In this case, the complaint similarly alleges that the Respondents violated the Act by maintaining the C.A.R.E.S. agreement. Under *D.R. Horton*, this allegation depends on the circumstances at the time the C.A.R.E.S. agreement was entered into – i.e., whether Krecz-Gondor voluntarily entered into the C.A.R.E.S. agreement or was compelled to do so as a condition of employment. Because Krecz-Gondor entered into the C.A.R.E.S. agreement outside the Section 10(b) period, the complaint allegation with respect to Respondents’ attempt to maintain the Agreement is, as in *Local Lodge No. 1424*, an effort to revise a now “legally defunct unfair labor practice.” The complaint should be dismissed on this basis.

With respect to any other employees of Respondents, there is no evidence or stipulation as to when those other employees entered into the C.A.R.E.S. agreement, whether they continued to be employed by the Respondents within the Section 10(b) period, and whether the Respondents have made any effort to enforce the C.A.R.E.S. agreement against them within the 10(b) period. Therefore, while the Respondents stipulated that, since November 7, 2011, all new employees have been given copies of the C.A.R.E.S. agreement upon hire, that stipulation does not obviate the 10(b) issue with respect to Krecz-Gondor or any other employees.

Unlike a work rule, the C.A.R.E.S. agreement is an individual agreement entered into between the employee and Respondents. Therefore, it is necessary to determine whether a particular employee entered into the C.A.R.E.S. agreement during the Section 10(b) period, whether the employee continued to be employed during the 10(b) period, and whether there has been any subsequent effort by the Respondents to enforce the C.A.R.E.S. Agreement during the 10(b) period. The ALJ erred in dismissing these issues. Of course, neither entering into nor enforcing the C.A.R.E.S. agreement is an unfair labor practice, regardless of whether it occurred during the 10(b) period, because, as set forth in section III.D, *D. R. Horton* (1) is distinguishable

from the present case; (2) was not decided by a valid quorum of the Board; and (3) was wrongly decided.

G. The ALJ's Proposed Remedy of Requiring Respondents To Withdraw All Motions To Compel Arbitration Based on the C.A.R.E.S Agreement Violates the First Amendment.

While Respondents are not currently seeking to compel Krecz-Gondor to arbitrate any claims under the C.A.R.E.S. agreement, the ALJ recommends that Respondents be required to:

Notify any arbitral or judicial tribunal where it has pursued the enforcement of the prohibition against bringing or participating in class or collective actions relating to the wages, hours, or other terms and conditions of employment of its employees since April 1, 2010, that it desires to withdrawal [*sic*] any such motion or request, and that it no longer objects to it employees bringing or participating in such class or collective actions.

ALJD at 24. This remedy violates Respondents' First Amendment right to petition the courts.

Respondents have successfully compelled arbitration pursuant to the C.A.R.E.S. agreement in other proceedings since April 1, 2010. *See, e.g., McBride v. GameStop, Inc.*, No. 10-CV-2376, 2011 WL 578821 (N.D. Ga. Feb. 8, 2011). Respondents had and have a First Amendment right to petition state and federal courts to determine whether the C.A.R.E.S. agreement is enforceable under federal law. *See Bill Johnson's*, 461 U.S. at 746 (holding that the Board "must not deprive a litigant of his right to have genuine state-law legal questions decided by the state judiciary"); *BASF Wyandotte Corp.*, 278 NLRB 173, 181 (1986) (applying *Bill Johnson's* in the context of action in federal court to decide issue of federal law). Under *Bill Johnson's*, litigation loses this First Amendment protection only if it is objectively baseless and subjectively undertaken with an improper motive. *Bill Johnson's*, 461 U.S. at 747 ("[T]he filing of a meritorious law[suit], even for a retaliatory motive, is not an unfair labor practice").

Here, Respondents' argument that the C.A.R.E.S. agreement is enforceable is not objectively baseless. To the contrary, it is clearly meritorious, as multiple federal courts and at

least one state court have found. *See McBride*, 2011 WL 578821, at *3; *Pomposi v. GameStop*, No. 3:09-CV-340 (VLB), 2010 WL 147196 (D. Conn. Jan. 11, 2010); *Ellerbee v. GameStop, Inc.*, 604 F. Supp. 2d 349 (D. Mass. 2009); *Smusz v. GameStop Corp.*, Cal. Super. Ct., Cty. of Tuolumne, Case No. CV-56193 (May 6, 2011). Requiring Respondents to withdraw their motions and ask these courts to reverse their decisions would violate Respondents' First Amendment right to petition. *See Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 956 (D.C. Cir. 2013) (“[F]reedom of speech prohibits the government from telling people what they must say”).

IV. CONCLUSION

Respondents respectfully urge the Board to dismiss the Amended Complaint because: (1) Krecz-Gondor's C.A.R.E.S agreement does not violate the Act because it was voluntary; (2) the C.A.R.E.S. agreement is distinguishable from the arbitration agreement in *D. R. Horton* because it excludes matters within the jurisdiction of the NLRB; (3) no reasonable employee could read the C.A.R.E.S. agreement to prohibit filing charges with the Board; (4) the Amended Complaint did not allege that the confidentiality provision in C.A.R.E.S. violates the Act and, even if it had, the provision does not violate the Act; (5) the Amended Complaint is time-barred by Section 10(b); and, (6) *D. R. Horton* is procedurally invalid and was wrongly decided.

Respectfully submitted,

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Dated: October 28, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of October, 2013, a true and correct copy of the foregoing Respondents' Brief in Support of Their Exceptions to the Decision of the Administrative Law Judge was filed via the Board's electronic filing system, and served by electronic mail upon the following:

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