

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

APPLE AMERICAN GROUP LLC-APPLEBEES
D/B/A APPLEBEES NEIGHBORHOOD GRILL
AND BAR

and

Case 18-CA-103319

COLE S. ESSLING, An Individual

**BRIEF OF RESPONDENT APPLE AMERICAN GROUP LLC IN SUPPORT OF
EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE’S DECISION**

Respondent Apple American Group LLC (“Company” or “AAG”) has taken the following exceptions to the Administrative Law Judge’s findings:

- (1) The Company excepts to the ALJ’s finding “Section 7 rights include the right to collectively bring court and arbitral actions” (ALJD p.10, lines 25-26);
- (2) The Company excepts to the ALJ’s finding that collective or class actions constitute protected activity even when they are not concerted (ALJD p.10, lines 35-37);
- (3) The Company excepts to the ALJ’s finding the arbitration agreement violates the Act even though “it does not limit arbitrator’s ability to consolidate claims” (ALJD p.10, lines 37-39);
- (4) The Company excepts to the ALJ’s finding that the arbitration agreement’s explicit protection of the right to “join other employees in a collective action to improve working conditions” is limited to “filing charges with the Board” (ALJD p.10, lines 26-28);
- (5) The Company excepts to the ALJ’s finding that the arbitration agreement violates the Act despite its explicit protection of the right to “join other employees in a collective action to improve working conditions” (ALJD p.10, lines 26-28);
- (6) The Company excepts to the ALJ’s implicit agreement with Counsel for the General Counsel treatment of the arbitration agreement as a workplace “rule” instead of a contractual agreement (ALJD p.9, lines 50-54; p.10, lines 1-4);
- (7) The Company excepts to the ALJ’s finding that the arbitration agreement violates that Act “even with the proviso that employees maintain their right to file charges with the Board and other governmental agencies” (ALJD p.10, lines 26-28);

(8) The Company excepts to the ALJ's finding that the arbitration agreement violates that Act despite the fact that the charging party has never even expressed a desire to bring a class or collective action (ALJD p.10, lines 48-49);

(9) The Company excepts to the ALJ's finding that the arbitration agreement violates that Act despite the fact that employees routinely bring class or collective actions against the Company (ALJD p.10, lines 48-49);

(10) The Company excepts to the ALJ's ruling because it treats union agreements more favorably than individual agreements (ALJD p.10, lines 48-49);

(11) The Company excepts to the ALJ's reliance on the wrongly-decided and completely discredited decision in *D.R. Horton*, 357 NLRB No. 184 (2012) (ALJD p.10, lines 21-41);

(12) The Company excepts to the ALJ's conclusions of law as erroneous and unsupported in fact and law (ALJD p.10, lines 48-49);

(13) The Company excepts to the ALJ's remedy and order (ALJD p.11, lines 5-52; p. 12, lines 1-13) in their entirety; and

(14) The Company excepts to the ALJ's analysis, conclusions, remedy, and order because it contravenes the Federal Arbitration Act and cannot be enforced by this proceeding.

STATEMENT OF THE CASE

The arbitration agreement at issue is comprised of two documents. One is entitled "Receipt of Dispute Resolution Program and Agreement to Abide by Dispute Resolution Program" and the other is entitled "Dispute Resolution Program." It is stipulated that the Company has used the agreement since about March 1, 2013.

The "Receipt of Dispute Resolution Program and Agreement to Abide by Dispute Resolution Program" states,

- "In signing this Agreement, both the Company and I agree that all legal claims or disputes covered by the Agreement must be submitted to binding arbitration and that this binding arbitration will be the sole and exclusive final remedy for resolving any such claim or dispute."
- "We also agree that any arbitration between the Company and me will be on an individual basis and not as a class or collective action."
- "I also understand that I have not waived my rights under the National Labor Relations Act to join other employees in a collective action to improve working conditions. Further,

I will not be subject to adverse employment action if I challenge the validity of this arbitration agreement or its provisions.”

- “I understand that, notwithstanding the foregoing, this Agreement does not prohibit me from pursuing an administrative claim with the National Labor Relations Board, any state or federal department of labor, or the United States Equal Employment Opportunity Commission.”

The “Dispute Resolution Program” is incorporated into the agreement and sets forth the process for pursuing claims between the employee and employer.¹ In that Program, it reads,

- “The parties also agree that any arbitration between the employee and the Company is of their individual claim and that any claim subject to arbitration will not be arbitrated on a collective or class-wide basis. However, this provision does not preclude employees from exercising their rights under the National Labor Relations Act to joining other employees in a collective action to improve working conditions.”
- “Your agreement to adhere to this Dispute Resolution Program does not prohibit you from pursuing an administrative claim with the National Labor Relations Board, any state or federal department of labor or the United States Equal Employment Opportunity Commission.”

The entirety of the “Dispute Resolution Program” and the parties’ stipulated facts are set forth at the ALJ’s ruling in this case (ALJD p.1-9). The ““Receipt of Dispute Resolution Program and Agreement to Abide by Dispute Resolution Program” is in the record, attached to the parties Joint Motion and Stipulation of Facts as Exhibit D.

QUESTIONS INVOLVED

- I. WHETHER THIS CASE IS DISTINGUISHABLE FROM *HORTON* (EXCEPTIONS 3, 4, 5, 7, 8, 9, 12,)
- II. WHETHER *HORTON* SURVIVES SUBSEQUENT SUPREME COURT CASES (EXCEPTION 14)
- III. WHETHER *HORTON* WAS WRONGLY DECIDED (EXCEPTIONS 1, 2, 6, 10, 11, 14)
- IV. WHETHER THE ALJ’S REMEDY IS OVERBROAD (EXCEPTIONS 13, 14)

¹ Hereinafter, the “Receipt of Dispute Resolution Program and Agreement to Abide by Dispute Resolution Program” and “Dispute Resolution Program” will be collectively referred to as the “ADR Agreement.”

ARGUMENT

I. THIS CASE IS DISTINGUISHABLE FROM HORTON

Administrative Law Judge Joel P. Biblowitz based his ruling in this case on a prior decision in *D.R. Horton*, 357 NLRB No. 184 (2012), writing, “the Board decided *Horton* and unless and until it determines that *Horton* was incorrectly decided, or the Supreme Court so decides, I am bound by that decision. I therefore find that the Respondent’s Dispute Resolution Program violates Section 8(a)(1) of the Act.” (ALJD p.10, lines 39-41).

On the contrary, *Horton* does not mandate a finding that Respondent has violated the Act. In *Horton*, the Board held that “maintaining a mandatory arbitration agreement provision that waives the right to maintain class or collective actions in all forums, whether arbitral or judicial,” is a violation of Section 8(a)(1) of the Act. *Id.* at *13. However, in this case employees are not prohibited from class or collective actions in all forums. As set forth more fully below, unlike the MAA at issue in *Horton*, the ADR Agreement here does not prohibit consolidated actions and allows employees to bring class actions through government agencies, including the NLRB. Also, employees’ Section 7 rights are explicitly protected and there is no evidence that employees reasonably believe that the agreement impairs Section 7 rights. For these reasons, the ALJ erred in holding that the Board’s decision in *Horton* requires a finding that Respondent has violated the Act.

A. AN ARBITRATION AGREEMENT DOES NOT VIOLATE THE ACT WHERE IT PERMITS MULTIPLE PLAINTIFFS TO JOIN TOGETHER TO ASSERT CLAIMS AGAINST THE EMPLOYER

The agreement at issue in *Horton* stated that the arbitrator “may hear only Employee’s individual claims,” “will not have the authority to consolidate the claims of other employees,” and “does not have authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding.” *Horton*, above at *1.

Based on these provisions, the Board ruled:

the MAA requires employees, as a condition of their employment, to refrain from bringing collective or class claims in any forum: in court, **because the MAA waives their right to a judicial forum; in arbitration, because the MAA provides that the arbitrator cannot consolidate claims or award collective relief.** The MAA thus clearly and expressly bars employees from exercising substantive rights that have long been held protected by Section 7 of the NLRA.

Id. at 4 (emphasis supplied).

Implicit in the foregoing is this: allowing consolidation of claims in arbitration is sufficient to allow employees to pursue their Section 7 rights.

The ADR Agreement in this case does not limit the arbitrator's ability to consolidate claims.

While “collective or class-wide” action is prohibited, nothing impairs the ability of parties to consent to, or the arbitrator to order, multiple plaintiffs to proceed together in one action and receive relief on that basis. The only requirement in the ADR Agreement is that claims must be filed by actual individuals, not unknown, unnamed class members.² This is all that *Horton* requires.

B. AN ARBITRATION AGREEMENT DOES NOT VIOLATE THE ACT WHERE IT PERMITS EMPLOYEES TO FILE CHARGES WITH THE BOARD AND OTHER GOVERNMENTAL AGENCIES.

In *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013), the Eighth Circuit Court (with jurisdiction over this Minnesota claim) considered an arbitration agreement similar to the one at issue in this case and held the it does not violate the ruling in *Horton*:

[T]he NLRB [in *D.R. Horton*] limited its holding to arbitration agreements barring all protected concerted action. *Id.* at *16. In contrast, the MAA [at issue in this case] does not preclude an employee from filing a complaint with an administrative agency such as the Department of Labor (which has jurisdiction over FLSA claims, see 29 U.S.C. § 204), the Equal Employment Opportunity Commission, the NLRB, or any similar administrative body....Further, nothing in the MAA precludes any of these agencies from investigating and, if necessary, filing suit on behalf of a class of employees.

Owen v. Bristol Care, Inc., above at 1053-1054. See also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991)(upholding an arbitration agreement that allowed Age Discrimination in

² While it is not at issue in this case, no other form of concerted action is limited by the ADR Agreement. For example, employees are free to coordinate resources, testify for one another and share counsel.

Employment Act claimants to pursue their claims before the Equal Employment Opportunity Commission).

Like the agreement at issue in *Owen*, in this case the ADR Agreement expressly permits employees to file claims with the NLRB, “and state or federal department of labor, or the United States Equal Opportunity Commission.” (Jt. Stip. Ex. D) Nothing in the ADR Agreement precludes any of these agencies from investigating and, if necessary, filing a collective or class (or in the case of the EEOC, representative) action on behalf of employees. *See* 42 U.S.C. § 2000e-5 (granting EEOC power to bring class action lawsuits on behalf of aggrieved employees).³

In his decision, ALJ Biblowitz ruled that, because the Board in *Horton* held that employees are entitled to more than simply the right to file charges with the Board, the right to file in *other* administrative forums – even ones that can bring class or collective actions – can never be enough to protect employees’ Section 7 rights. (ALJD p.10, lines 21-28). He was wrong.

The Board in *Horton* held that the Respondent violated Section 8(a)(1) of the Act, “by maintaining a mandatory arbitration agreement that did not allow its employees to file joint, class, or collective employment-related claims *in any forum*, arbitral or judicial.”⁴ *Horton*, above at *1. In doing so, the Board relied on *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978) for the proposition that Section 7 “protects employees from retaliation by their employer when they seek to improve their working conditions through resort to administrative and judicial forums.”⁵ Each case relied upon in *Eastex* to

³ *Horton* held a class waiver unenforceable because it precluded the employee from filing an FLSA challenge, but in this case the ADR Agreement expressly allows an employee to file a complaint the United States Department of Labor, which has jurisdiction over FLSA claims and the authority to bring a collective action. 29 U.S.C. § 204.

⁴ In *Horton*, the arbitration agreement did not contain an exception for government agencies that enforce employees’ rights. *Id.* at *15. Supervisors were instructed that, if asked, they should verbally inform employees that they could bring a claim with the EEOC, but that was the extent to which employees were notified that they could file charges with an agency. *Ibid.*

⁵ Specifically, the Court in *Eastex* stated, “[I]t has been held that the ‘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.” *Id.* at 565-566.

make the preceding statement involved a claim for relief *in an administrative forum*.⁶ The Court in *Eastex* thus construed the adjudicative proceedings provided by agencies as “judicial forums.”

The Eighth Circuit in *Owen* was correct in ruling that permitting employees to pursue collective action through administrative agencies is all that *Horton* requires.

C. AN ARBITRATION AGREEMENT THAT EXPRESSLY PROTECTS SECTION 7 ACTIVITY DOES NOT VIOLATE THE ACT.

Respondent objects to the treatment of an arbitration agreement as a “work rule” in *Horton* (at *4) but even under the work rule analysis, the ADR Agreement in this case is lawful.⁷

To determine whether an employer rule interferes with, restrains, or coerces employees in the exercise of their statutorily protected rights, the Board considers whether the rule would reasonably tend to chill employees in their exercise of Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). In deciding whether an employer’s rule is unlawful, the Board must give the rule a reasonable reading and must not presume improper interference with employee rights. *Lutheran Heritage*, 343 NLRB 646 (2004).

The Board cannot declare an employer policy or rule facially unlawful based upon “fanciful” speculation—it must consider the context in which the rule or policy is applied and its actual impact on employees. *See Adtranz ABB Daimler-Benz Transportation, N.A., Inc. v. NLRB*, 253 F. 3d 19, 28 (D.C. Cir. 2001) (“The NLRB could not declare a policy to be facially unlawful based upon ‘fanciful’ speculation, but rather had to consider the context in which the rule was applied and its actual impact on employees.”), *Aroostook Co. Regional Ophthalmology Ctr. v. NLRB*, 81 F. 3d 209 (D.C. Cir. 1996).

Both the context in which the ADR Agreement is applied and the actual impact of the policy on

Respondent’s employees clearly show that the policy does not chill employees’ protected rights.

⁶ *Walls Mfg. Co.*, 137 NLRB 1317 (1962) (employee wrote letter to local health agency), *Socony Mobil Oil Co.*, 153 NLRB 1244 (1965) (employee complained about workplace safety to US Coast Guard), *Wray Electric Contracting, Inc.*, 210 NLRB 757 (1974) (OSHA complaint), *Alleluia Cushion Co.*, 221 NLRB 999 (1975) (CalOSHA complaint), *King Soopers, Inc.*, 222 NLRB 1011 (1976) (EEOC complaint), and *Triangle Tool & Engineering, Inc.*, 226 NLRB 1354 (1976) (U.S. Department of Labor Complaint).

⁷ The ALJ did not explicitly address this issue but Respondent infers that its defense on these grounds was rejected, albeit wrongfully.

Determining whether a rule impedes Section 7 rights is a two-step process. The Board first looks at whether the employer rule at issue explicitly restricts activities protected by Section 7. *Lutheran Heritage* at 647. The ADR Agreement in this case explicitly protects Section 7 activity. Unlike the agreement at issue in *Horton*, Respondent's ADR Agreement contains the following provisions:

I also understand that I have not waived my rights under the National Labor Relations Act to join other employees in a collective action to improve working conditions. (Jt. Exhibit D)

And

The parties also agree that any arbitration between the employee and the Company is of their individual claim and that any claim subject to arbitration will not be arbitrated on a collective or class-wide basis. However, this provision does not preclude employees from exercising their rights under the National Labor Relations Act to joining (sic) other employees in a collective action to improve working conditions. (ALJD p.7, lines 21-25). Because the language of the ADR agreement explicitly permits Section 7 activity and access to the NLRB, it does not restrict activities protected by Section 7. *See Baltimore Sun*, 2005 WL 1668458 (N.L.R.B.G.C) (where ethics code explicitly permitted discussions protected by Section 7, otherwise broad clause did not violate the Act), *compare Supply Technology, LLC*, 359 NLRB No. 38 (2012) (finding an agreement explicitly restricts Section 7 activities because it restricts filing of Board charge).

D. WHERE THE COMPLAINING EMPLOYEE HAS NEVER EXPRESSED INTEREST IN BRINGING A CONCERTED OR COLLECTIVE ACTION, THE ARBITRATION AGREEMENT DOES NOT VIOLATE THE ACT

Where a rule does not explicitly restrict activity protected by Section 7, the Board may still find the rule unlawful if there is a showing that: (1) the rule was promulgated in response to union activity; (2) the rule has been applied to restrict the exercise of Section 7 rights; or (3) employees would *reasonably* construe the language to prohibit Section 7 activity. *Lutheran Heritage*, above at 647 (emphasis supplied).

Here, there is zero evidence that the ADR Agreement was promulgated in response to union activity and the Charging Party does not make this allegation.

In addition, unlike the charging party at issue in *Horton* and *every decision relied upon in Horton* for the proposition that litigation is a protected activity, the Charging Party in this case has not and cannot claim that he was interfered with, restrained or coerced in exercising his right to engage in concerted, protected activity. Essling has not attempted to file a class action complaint or engage in other collective action in any forum. (Joint Stip. ¶10) The ADR Agreement has not been applied to restrict the exercise of Section 7 rights in this case.

E. THE FACT THAT EMPLOYEES ROUTINELY BRING CLASS OR COLLECTIVE ACTIONS DESPITE THE PRESENCE OF AN ARBITRATION AGREEMENT PROHIBITING SUCH SUITS IS EVIDENCE THAT EMPLOYEES WOULD NOT REASONABLY CONSTRUE THE AGREEMENT TO PROHIBIT SECTION 7 ACTIVITY.

As for the third factor, whether an employee would reasonably believe that the ADR Agreement interferes with protected rights must be “established by a preponderance of the evidence.” *Guardsmark v. NLRB*, 475 F.3d 369, 375-376 (D.C. Cir. 2007). In this case, employees have filed charges with governmental agencies such as the EEOC, state departments of labor, and importantly, class actions in state and federal court. (Joint Stip. ¶9) Essling himself filed a charge with the NLRB prior to the instant case. (18-CA-097617) In light of these facts, it is not reasonable to conclude that the ADR Agreement’s language would lead employees to believe that they are prohibited from filing charges with the Board or with other governmental agencies that can bring class or collective actions. The strongest evidence of what employees reasonably believe is the employees’ own actions—their filing of class action lawsuits and charges with governmental agencies that can bring class action lawsuits is overwhelming proof that employees *do not reasonably believe* that they are precluded from exercising Section 7 rights. *See Concordia Honda*, 2012 WL 5942369 (N.L.R.B.G.C.) (no violation of 8(a)(1) where employees were actually permitted to proceed in collective action despite waiver).

In this case and unlike *Horton*, (1) consolidated claims are not prohibited, (2) employees may pursue claims with agencies that can bring class or collective action, (3) Section 7 activities are

expressly protected, (4) the Claimant in this case has asserted no class or collective action claim, and (5) employees routinely bring claims against the Respondent outside of the ADR Agreement and on a classwide basis. For these reasons, the ALJ erred in finding that *Horton* compels a finding that the Respondent has violated the Act.

II. HORTON DOES NOT SURVIVE SUBSEQUENT SUPREME COURT CASES

Section 2 of the Federal Arbitration Act (“FAA”) provides that:

[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, **shall be valid, irrevocable, and enforceable, save upon such grounds as exists at law or in equity for the revocation of any contract.**

9 U.S.C. § 2 (emphasis added). The United States Supreme Court has noted that Congress enacted the FAA to “reverse the long-standing judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts.” *Gilmer v. Interstate/Johnson*

Lane Corp., 500 U.S. 20, 24 (1991) (citing *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 219-220 (1985)). Notwithstanding the historical skepticism of binding arbitration as a dispute mechanism, the Supreme Court recognized that the FAA signaled a major change in course, establishing a strong federal policy favoring arbitration as a dispute resolution mechanism. *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 111 (2001), *Gilmer*, 500 U.S. at 25.

One week after *Horton* was decided the United States Supreme Court decided *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012). In that case, which dealt with the Credit Repair Organization Act, the Supreme Court held that courts are required to enforce arbitration agreements according to their terms “even when the claims at issue are federal statutory claims, unless the [Federal Arbitration Act’s] mandate has been ‘overridden by a contrary congressional command.’” *Id.* at 669.

Subsequently, the United States Supreme Court in *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (June 20, 2013) found the FAA’s mandate to enforce arbitration agreements was not “overridden by a contrary congressional command” because the statutes at issue “make no mention of class actions. In fact, they were enacted decades before the advent of Federal Rule of Civil Procedure 23, which was ‘designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.’ The parties here agreed to arbitrate pursuant to that ‘usual rule,’ and it would be remarkable for a court to erase that expectation.” *American Express*, above at 2309.

The Act’s text contains no command that is contrary to enforcing the FAA’s mandate. The Act’s protection of concerted activities does not guarantee an unwaivable right to proceed as a group in either litigation or arbitration. The Age Discrimination in Employment Act and the Fair Labor Standards Act offer employees collective actions. But even those express options have been held to be insufficient statutory commands.⁸ *Gilmer*, above at 32. Statutory references to having causes of action, filing in court, allowing suits, and even pursuing class actions are insufficient commands too. *CompuCredit*, above at 670–71. The Act’s text, even if one assumes that class litigation is concerted activity, likewise gives an insufficient command against the FAA.

Administrative Law Judge, Bruce Rosenstein, in a similar case construing *Horton* came to the same conclusion when considering an arbitration agreement that prevents class or collective actions. In *Chesapeake Energy Corp*, 2013 WL 5984336 (N.L.R.B. Div. of Judges) the Judge Rosenstein ruled:

The Supreme Court noted in the *American Express* decision that no contrary congressional command required us to reject the waiver of class arbitration here and the Sherman and Clayton Acts make no mention of class actions. In fact, they were enacted decades before the advent of Federal Rule of Civil Procedure 23, which was “designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.” As it concerns the subject case, the principles expressed

⁸ *Gilmer* speaks of looking for a congressional “intention to preclude a waiver of judicial remedies for the statutory rights at issue.” *Gilmer*, above at 26 (quotation omitted). “If such an intention exists, it will be discoverable in the text of the [Act], its legislative history, or an inherent conflict between arbitration and the [Act’s] underlying purposes.” *Ibid*.

by the Supreme Court equally apply to the Board since the Act does not mention class actions, and was enacted long before the advent of Rule 23.

Chesapeake Energy, above at *9. The judge concluded that, “For all of the above reasons⁹ and principally relying on the decision of the Supreme Court in *American Express* discussed above, I find in agreement with the Respondents that the Board’s position that class and collective action waivers in arbitration agreements violate Section 8(a)(1) of the Act cannot be sustained.” *Ibid*.

The two Board members who decided *Horton* may have successfully threaded a needle when the decision was issued, but the case cannot withstand subsequent Supreme Court decisions that unequivocally require an express contrary congressional command to circumvent the FAA.

III. HORTON WAS WRONGLY DECIDED

Decisions of the National labor Relations Board are not set in stone. Unlike Article III judges, Board members are not restricted by the doctrine of *stare decisis*. See *NLRB v. Kostel Corp.*, 440 F.2d 347 (7th Cir. 1971). In fact, change is not only proper under the Act when “prudently exercised,” but “was envisaged by Congress.”¹⁰

As an initial matter, *Horton* – a **2-0 decision** - has been discredited by every citable court decision in which it has been considered.¹¹ Furthermore, the decision has been appealed to the United

⁹ The “above reasons” from the decision bear repeating as well: “In recent years, the Supreme Court has decided several cases upholding the enforceability of arbitration agreements. In *AT&T Mobility LLC v. Concepcion*, 131 S. CT. 1740 (2011), the Supreme Court held that the FAA preempted a state law precluding enforcement of a class arbitration waiver. Likewise, in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 558 U.S. 662 (2010), the Supreme Court held that a party may not be compelled to submit to class arbitration absent an agreement to do so. Additionally, the Supreme Court in *Rent-A-Center, West, Inc. v. Jackson*, 130 S. CT. 2772 (2010), held that the FAA reflects the overarching principle that arbitration is a matter of contract and in *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985), stated it applied even for claims alleging a violation of a federal statute unless the FAA’s mandate has been overridden by a contrary congressional command.” *Ibid*.

¹⁰ Testimony of Robert J. Battista, Senate Committee on Health, Education, Labor and Pensions Subcommittee on Employment and Workplace Safety (Dec. 13, 2007) at 16.

¹¹ *Richards v. Ernst & Young, LLP*--- F.3d ---, 2013 WL 4437601 (9th Cir. Aug. 21, 2013), *Sutherland v. Ernst & Young LLP*, 2013 WL 4033844 (2nd Cir. Aug 9, 2013), *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. Jan 07, 2013), *Delock v. Securitas Sec. Services USA, Inc.*, 883 F.Supp.2d 784 (E.D. Ark. Aug 1, 2012), *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F.Supp.2d 831 (N.D. Cal. May 7, 2012), *Jasso v. Money Mart Exp., Inc.*, 879 F.Supp.2d 1038 (N.D. Cal. Apr 13, 2012), *Grant v. Convergys Corp.*, Slip Copy, 2013 WL 781898 (E.D. Mo. Mar 01, 2013), *LaVoice v. UBS Financial Services, Inc.*, 2013 WL 5380759 (S.D. N.Y. Sep. 26, 2013), *Lloyd v. J.P. Morgan Chase & Co.*, 2013 WL 4828588 (S.D. N.Y. Sep 09, 2013), *Dixon v. NBC Universal Media, LLC*, --- F.Supp.2d ---, 2013 WL 2355521 (S.D. N.Y. May 28, 2013), *Torres v. United Healthcare Services, Inc.*, 920 F.Supp.2d 368 (E.D. N.Y. Feb 01, 2013), *Noffsinger-Harrison v. LP Spring City, LLC*,

States Court of Appeals for the Fifth Circuit (No. 12-60031) where it has been fully briefed, oral argument was heard on February 5, 2013 and in light of the universal rejection of the case's doctrine, will likely be reversed.

This Board need not, and should not follow *Horton*'s conclusion that:

By maintaining a mandatory arbitration agreement provision that waives the right to maintain class or collective actions in all forums, whether arbitral or judicial, and that employees reasonably could believe bars or restricts their right to file charges with the National Labor Relations Board, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and has violated Section 8(a)(1) of the Act.

Id. at *13.

Where the Board has adopted an unreasonable position, “it can find no solace in the fact that it made the same mistake in prior cases...[and] “merely applying an unreasonable statutory interpretation for several years [cannot] transform it into a reasonable interpretation.” *Adtranz v. NLRB*, 253 F.3d 19, 28 (D.C. Cir. 2001) (quoting *F.J. Vollmer Co. v. Magaw*, 102 F.3d 591, 598 (D.C. Cir. 1996)).

A. THERE IS NO SECTION 7 RIGHT TO CLASS OR COLLECTIVE ACTIONS THAT ARE NOT CONCERTED ACTIVITIES

The Board's reasoning in *Horton* is fatally flawed and its conclusions should not be expanded by applying them to this case. In ruling, *for the first time in the Act's history*, that “employees who join together to bring employment-related claims on a classwide or collective basis in court or before an arbitrator are exercising rights protected by Section 7 of the NLRA,” (*Horton*, 357 NLRB at *3) the Board ignored the fact that, as set forth above in the *Chesapeake Energy* ruling, “the Act does not mention class actions, and was enacted long before the advent of Rule 23 [procedure for filing class

Slip Copy, 2013 WL 499210 (E.D. Tenn. Feb 07, 2013), *Long v. BDP Intern., Inc.*, 919 F.Supp.2d 832 (S.D. Tex. Jan 22, 2013), *Truly Nolen of America v. Superior Court*, 145 Cal.Rptr.3d 432 (Cal. App. 4 Dist Aug 9, 2012), *Nelsen v. Legacy Partners Residential, Inc.*, 144 Cal.Rptr.3d 198 (Cal. App. 1 Dist. Jul 18, 2012). See also *Walthour v. Chipio Windshield Repair, LLC*, --- F.Supp.2d ---, 2013 WL 1932655 (N.D. Ga. Feb. 27, 2013) (finding *Horton* persuasive, but requiring the parties to proceed with individual arbitration anyway given the judicial trend upholding class waivers and the strong presumption in favor of arbitration).

actions]” *Chesapeake Energy*, above at *9. There is simply no way for the Act’s creators to have contemplated that its provisions would include protection of class or collective actions.

Further, the Board relied on the statement that “the NLRA protects employees’ ability to join together to pursue workplace grievances, including through litigation.” *Horton*, above at *2. In making that assertion, the Board relied on a number of cases, none of which stand for the conclusion that class or collective action is protected activity.¹²

The Board has long recognized that an employee’s action is “concerted” only if it was “engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.” *Prill II*, 835 F.2d 1481, 1483 (D.C. Cir. 1987). As the D.C. Circuit explained, “concerted action cannot be imputed from the object of the action.” *Ibid*. “In other words, if a worker takes action by himself without contacting his fellow employees, even though he has a desire to help all workers, not just himself, he will not have satisfied the concerted action requirement.” *Ibid*. Insofar as an individual or individuals file a putative class action allegedly on behalf of potential class members, without action by each employee to affirmatively associate with the filing of the lawsuit, there is no concerted action. *Horton* recklessly casts a wide net without concern for such distinctions.

In *Horton*, the Board tries to overcome the requirement that action be “concerted” by making the unsupported assertion that “Clearly, an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7.” *Horton*, above at *3. This is far from clear and has no precedent. In *Meyers Industries*, 281 NLRB No. 118 (1986), cited by the Board for the foregoing

¹² See discussion of *Eastex* at FN 6; *Spandsco Oil & Royalty Co.*, 42 NLRB 942 (1942) (not a class action; employees were referred to an attorney by the Wage and Hour Division of the US. Department of Labor, which is expressly permitted by the ADR Agreement at issue in this case), *Salt River Valley Water Users Ass’n*, 99 NLRB 849 (1952) (employee was terminated for circulating petition prior to filing lawsuit), *Le Madri Restaurant*, 331 NLRB 269, 275 (2000) (multi-plaintiff), *Trinity Trucking & Materials Corp.*, 221 NLRB 364 (1975) (multi-plaintiff), *United Parcel Service*, 252 NLRB 1015 (1980) (unlawful to terminate an employee for “certain union and employee organizations”; Board did not specify that class action activities were the “certain” activities among many), *Brady v. National Football League*, 644 F.3d 661 (8th Cir. 2011) (law at issue was the Norris-LaGuardia Act; reference to the NLRA is *dicta*), *Mohave Elec. Co-op, Inc. v. NLRB*, 206 F.3d 1183 (D.C. Cir. 2000) (multi-plaintiff; also employees were seeking injunctive relief, which is expressly permitted by Respondent’s ADR Agreement).

proposition, the Board held *that an employee's actions were not concerted* because they were not “*at least*” related to “initiating or inducing or preparing for group action.” *Id.* at *5. In *Meyers* the Board *did not hold* that “initiating or inducing or preparing for group action” was the standard for finding concerted activity, only that the actions in that case failed to meet even that low threshold. *Id.* at *7. *Meyers* does not support the Board’s brand new contention that filing a class action is always concerted activity.

In its ruling in *Horton*, the Board relied on a series of cases that did not involve class or collective actions to make the false assumption that all collective and class action cases are concerted action. The Board’s illegitimate conclusion should not be followed.

B. COLLECTIVE PURSUIT OF A WORKPLACE GRIEVANCE IN ARBITRATION IS NOT PROTECTED BY THE ACT IN A NON-UNION SETTING

In ruling that class and collective actions in litigation and arbitration are protected activities, the Board in *Horton* relied on the statement, “collective pursuit of a workplace grievance in arbitration is equally protected by the NLRA.” *Horton*, above at *2. Again the Board in *Horton* cited to cases that do not support its conclusion. Every case cited for the proposition that representative actions (those where one employee represents the whole, akin to a class or collective action) were protected, that protection was because the grievance process had been collectively bargained.¹³ *Id.* at *3. This reasoning does not extend to a non-union workplace where there is no “representative” that has been approved by the employees and authorized to bring complaints on their behalf. Nor is there a grievance procedure that a majority of employees have endorsed with a contract vote in a non-union setting. Collective or classwide actions pursuant to a framework that has been endorsed by a vote of individual employees may be entitled to protection under the Act, but such protection is based on the fact that individual employees have already engaged in the concerted activity of ratifying the contract/framework. Without such a step,

¹³ *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822 (**), *Brad Snodgrass, Inc.*, 338 NLRB 917, 923 (2003) (unionized workplace); *UForma/Shelby Business Forms*, 320 NLRB 71, 77 (1995), *enf. denied on other grounds* 111 F.3d 1284 (6th Cir. 1997) (unionized workplace); *El Dorado Club*, 220 NLRB 886 (1975), *enf. 557 F.2d 692* (9th Cir. 1977) (unionized workplace).

individual employees have not given the consent required to make the jump from unnamed, unknown employees to those engaged in “concerted activity” in a classwide action.

Importantly, in a non-union setting, there is zero precedent for finding a representative grievance to be “concerted activity.” The Board in *Horton* claimed otherwise, but then only cited cases in which the actions of a group of individual, known, named employees (not unnamed, unknown class members) were adjudged to have engaged in concerted activity.¹⁴ *Id.* at *2-*3. There is neither precedent nor logic to suggest that, in a non-union setting, unnamed and unaware employees can be engaged in “collective pursuit of a workplace grievance in arbitration.”

D. HORTON CONTRAVENES FEDERAL LAW

Relying on *Horton*, the ALJ in this case ruled that “Section 7 rights include the right to collectively bring court and arbitral actions.” (ALJD p.10, lines 25-26). As set forth in Section II, above, the FAA requires signatories to the ADR Agreement in this case to arbitrate all employment-related disputes individually, not collectively. *E.g., Stolt–Nielsen*, 559 U.S. 662, 682 (2010).

In *Horton*, the Board addressed the conflict between its construction of the Act and the FAA by asserting, “the Supreme Court has held that when two federal statutes conflict, the later enacted statute, here the NLRA, must be understood to have impliedly repealed inconsistent provisions in the earlier enacted statute.” *Horton*, above at *12, fn. 26 (citations omitted). And “The Norris-LaGuardia Act, in turn—passed 7 years after the FAA,—repealed ‘[a]ll acts and parts of act in conflict’ with the later statute (Section 15).” *Id.* at *12.

It is simply untrue that the Act was passed after the FAA.

Congress first enacted the FAA in 1925, **and it reenacted the statute in 1947**— after passing the Norris–LaGuardia Act and reenacting the NLRA. Federal Arbitration Act, ch. 213, 43 Stat. 883 (1925);

¹⁴ *NLRB v. Washington Aluminum Company, Incorporated*, 370 U.S. 9 (1962)(seven named employees left work because of workplace conditions); *NLRB v. Walls Manufacturing Company*, 321 F.2d 753 (C.A.D.C., 1963)(“concerted” because one employee wrote, and two employees approved, letter to health inspector); *NLRB v. Hoover Design Corporation*, 402 F.2d 987 (C.A. 6, 1968)(employees signed their names to a petition to contest pay issue), *Clara Barton Terrace Convalescent Center*, 225 NLRB 1028, 1033 (1976)(unionized workforce).

Norris–LaGuardia Act, ch. 90, 47 Stat. 70 (1932); National Labor Relations Act, ch. 120, 61 Stat. 136 (1947); Federal Arbitration Act, ch. 392, 61 Stat. 670 (1947). The terms of § 2 of the FAA have never varied. The Board was incorrect in concluding that the FAA had to give way.

As for the conflict of statutory purposes between the FAA and the Act, the FAA must prevail in any balancing test. *Cf. Horton*, at *11. First, while the Board in *Horton* states that its decision did not favor litigation over arbitration (*Id.* at *13) in practice it would. Collective arbitration can no more be manufactured by the Board than it can by the California Supreme Court. *AT & T Mobility v. Concepcion*, 131 S.Ct. 1750–51. While the United States Supreme Court has left open the possibility of consensual class arbitration, it strongly criticized that process. *Id.* at 1750–53. In the beginning and the end, arbitration is a matter of consent. Groups of employees proceeding collectively will be in court absent agreement by all parties to have class arbitration. And that agreement cannot be mandated. *Stolt–Nielsen*, 559 U.S. at 682. *Horton*'s result, then, is more collective litigation and less arbitration. This result is at odds with the “emphatic federal policy in favor of arbitral dispute resolution.” *KPMG LLP v. Cocchi*, 132 S.Ct. 23, 25 (2011) (quotation omitted).

Second, adopting the Board's reasoning would lead to a patchwork of inconsistent results and proceedings. An employee and an employer can agree to resolve the employee's statutory claims in arbitration. *Gilmer*, 500 U.S. at 35. A union can make the same bargain for all its employee members. *14 Penn Plaza v. Pyett*, 556 U.S. 257, 251 (2009). But *Horton*'s concerted-action rationale would require that any matter pursued by two or more employees must proceed collectively. This quilt of possibilities introduces uncertainty and complexity. And it would treat similarly situated individuals differently without adequate reason.

Third, though the Board said that the impact of its decision would be small (*Horton*, above at *11) this is simply untrue. Indeed, under the *Horton* rationale, agreements to arbitrate any type of employment-related claim – whether it be race discrimination, unpaid wages, or sex discrimination –

would never be permitted if two or more employees assert the claim in concert. That would be a sweeping change in the law.

The Act's (alleged) protection of concerted activities should not override the FAA's mandate to enforce arbitration agreements. *CompuCredit*, 132 S.Ct. at 669; *Gilmer*, 500 U.S. at 26. This conclusion best advances the "liberal federal policy favoring arbitration" and the "fundamental principle that arbitration is a matter of contract[.]" *Concepcion*, 131 S.Ct. at 1745 (quotation omitted). Applying Supreme Court precedent, the FAA must prevail in this conflict with the Act.

In this case, the ALJ concluded that "the Dispute Resolution Program maintained by the Respondent violates Section 8(a)(1) of the Act." (ALJD p.10, lines 48-49). As explained above, this conclusion is at odds with the straightforward approach to contract interpretation mandated by the FAA and the U.S. Supreme Court.

E. HOLDING THAT THE ADR AGREEMENT VIOLATES SECTION 7 WOULD CONTRAVENE THE SUPREME COURT BY TREATING UNION AGREEMENTS MORE FAVORABLY THAN INDIVIDUAL AGREEMENTS

Unions can waive Section 7 rights in collective bargaining agreements, including the right to pursue claims in a judicial forum. *See Horton*, at *10; *14 Penn Plaza LLC*, 556 U.S. at 247. The decision in *Horton* prevents individual employees from waiving the same rights. That is not only illogical but violates the Supreme Court's conclusion that "nothing in the law suggest[s] a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative." *Id.* at 258. *Accord Supply Technologies, LLC*, 359 NLRB No. 38 (2012) (Member Hayes dissent, recognizing the unsupported disparity in treatment of arbitration agreements in union versus nonunion settings).

F. THE ADMINISTRATIVE LAW JUDGE SHOULD NOT RELY ON THE BOARD'S DECISION IN *HORTON* BECAUSE THE BOARD LACKED A QUORUM WHEN IT DECIDED *HORTON*

On January 25, 2013, the D.C. Circuit vacated an order of the NLRB on the ground that the NLRB lacked a quorum when it issued the order. The D.C. Circuit found the NLRB lacked a quorum beginning at least as early as January 4, 2012, because the President's attempted recess appointments of three new members to the NLRB on that date were invalid. *See Noel Canning v. NLRB*, No.12-1115, 2013 WL 276024, at *8-24 (D.C. Cir. Jan. 25, 2013). The D.C. Circuit found (1) the Recess Appointments Clause of the United States Constitution applies only to intersession recesses, not to recesses within a session, *id.* at *16; (2) the Clause authorizes the President to fill only vacancies that arise during such a recess, not vacancies that arose prior to the recess, *id.* at *21; and (3) the President's power to appoint an officer to fill such a vacancy expires at the end of the recess in which the vacancy arose, *id.* at *23. The Court held the three vacancies at issue did not "happen" during the Senate's recess and the President's purported appointments to the NLRB did not occur during that recess as required under the Recess Appointments Clause. *Id.* at *16 & *23; *see* U.S. CONST. art. II, § 2, cl. 3.

Noel Canning demonstrates that the NLRB also lacked a quorum when it issued its decision in *Horton* on January 3, 2012. At that time, the NLRB had only three purported members, one of whom was Mr. Becker. However, under *Noel Canning*, Mr. Becker's recess appointment to the NLRB on March 27, 2010, also was invalid. The vacancy that Mr. Becker was appointed to fill did not arise during the Senate's recess but rather had been vacant for over two years. In addition, the President did not appoint Mr. Becker during an intersession recess, but rather during an intrasession break. Therefore, when the NLRB issued its Order in this case, it had only two properly appointed members and no quorum to act. *See New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635 (2010).

IV. THE ALJ'S REMEDY IS OVERBROAD

As an initial matter, as there were no unfair labor practices in this case, there should be no remedy whatsoever, including remedies in the form of notice or posting.

Also, the ALJ's order the Respondent "Cease and desist from: (a) Maintaining or enforcing its Dispute Resolution Program. (b) In any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights guaranteed to them by Section 7 of the Act" is nonsensical. (ALJD p.11, lines 21-26). The admonition to cease enforcing the ADR Agreement altogether, despite the small sections that are at issue in this case, is overly broad.¹⁵ The latter admonition is inappropriate in this case where there are no allegations of animus.

Finally, the ALJ makes the egregious and unbelievable demand that Respondent:

Notify arbitral or judicial panels, if any, where the Respondent has attempted to enjoin or otherwise prohibit employees from bringing or participating in a class or collective action that it is withdrawing those objections and that it no longer objects to such employee actions.

(ALJD p.11, lines 36-39).

There are many reasons why the foregoing demand cannot and should not be enforced. First, even the Board in *Horton* doesn't include this provision as a remedy. *Horton*, 357 NLRB at *13-*14. Second, there is no timetable related to this broad command. Shall the Respondent contact employees who attempted to file a class action 10 years ago? Are persons who have not been employed with Respondent for over six months (and thus outside of the Act's statute of limitations) entitled to notice?

Finally, the remedy is not limited to instances in which the employer sought to enforce the ADR Agreement to prohibit employees from bringing or participating in a class or collective action. Motions to decertify a class or dismiss a lawsuit, pre-class certification settlements and **any action** to defend against a class or collective claims are included in the ALJ's remedy. Despite the fact that *Horton* specifically provides, "Employees who seek class certification in Federal court will still be required to prove that the requirements for certification under Rule 23 are met, and the employer remains free to assert any and all arguments against certification (other than the MAA)." *Horton*, above at *10, fn 24.

¹⁵ Notably, the ADR Agreement expressly states that "The provisions of the Program are severable and, should any provision be held unenforceable, all others will remain valid and binding." (ALJD p.9, lines 1-2).

The ALJ failed to appropriately limit this section of the remedy to Respondent's use of the ADR Agreement.

V. CONCLUSION

For the foregoing reasons, the Charge in this case should be dismissed in its entirety.

Respectfully submitted,

Dated: November 15, 2013

APPLE AMERICAN GROUP LLC

By: _____/s/_____

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