UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

and **Case 20-CA-080497**

MICHELLE KRECZ-GONDOR, an Individual

RESPONDENTS' REPLY BRIEF IN FURTHER 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") submit this reply brief in further support of their exceptions 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. In this reply brief, Respondents do not attempt to respond to all of the arguments in the General Counsel's answering brief. Respondents only address those arguments about which there are glaring factual or legal inaccuracies, including the General Counsel's:

(1) attempts to twist the clear language of the C.A.R.E.S. Agreement to obfuscate its opt-out provision and explicit exclusion of matters within the NLRB's jurisdiction;

(2) failure to recognize the importance of the Supreme Court's recent decision in *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013), which another administrative law judge recently held "implicitly rejected" *D. R. Horton. Chesapeake Energy Corp.*, JD-78-13, slip op. at 9 (Nov. 8, 2013);

(3) disingenuous claim that the parties fully litigated the propriety of the confidentiality language in the C.A.R.E.S. Agreement, when that language was never even mentioned in the Amended Complaint or at the hearing of this matter.

Respondents respectfully urge the Board to dismiss the Amended Complaint for the reasons set forth below and in Respondents' opening brief.

II. ARGUMENT

A. The C.A.R.E.S. Agreement's Opt-Out Provision Is Not Illusory.

The General Counsel's argument that the Board can ignore the C.A.R.E.S Agreement's opt-out provision for California employees is based on two false premises. First, the General Counsel ignores the fact that Charging Party was a California employee, and thus had the right to opt-out. Therefore, regardless of the General Counsel's arguments about Respondents' non-California employees (none of whom are charging parties in this case), the Board must reach the question of whether the opt-out provision distinguishes this case from *D. R. Horton*.

Second, the General Counsel argues that the opt-out is "illusory" because it appears near the end of the C.A.R.E.S. Agreement. This attempt to twist the clear meaning of the Agreement by ignoring certain language is forbidden by *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). Indeed, the reading of the agreement advanced by the ALJ and the General Counsel here is even more egregious than the approach rejected in *Lafayette Park Hotel*. In that case, the General Counsel emphasized the importance of certain words in a rule, while ignoring their context. *Id.* Here, the General Counsel goes further and asks the Board to completely ignore a provision of the C.A.R.E.S. Agreement simply because it appears near the end of the Agreement. That is not how a reasonable person reads a contract. A reasonable person reads all the provisions of a contract, even the ones near the end. The General Counsel's apparent argument – that individuals won't read to the end of the contract – is paternalistic and simply wrong. And when read from start to finish, the C.A.R.E.S. Agreement is, in the words of a reviewing federal court, "crystal clear." *Ellerbee v. GameStop*, 604 F. Supp. 2d 349, 355 (D. Mass. 2009) (finding C.A.R.E.S. agreement enforceable); *see also New v. Gamestop, Inc.*, No. 12-1371, --- S.E.2d ---, 2013 WL 5976104, at * (W.Va. Nov. 6, 2013) (finding C.A.R.E.S. Agreement to be "clear and unambiguous"). Therefore, the Board should disregard the General Counsel's argument that the opt-out provision is irrelevant or illusory.

B. The C.A.R.E.S. Agreement's Opt-Out Provision Distinguishes this Case from *D. R. Horton.*

Despite defending *D. R. Horton* vociferously throughout the rest of the brief, the General Counsel is conspicuously silent as to *D. R. Horton*'s acknowledgement that a class and collective action waiver with an opt-out provision would present a "difficult question." 375 NLRB No.

184, at 13, n.28. The General Counsel's attempt to answer this question is unsuccessful. Even if the opt-out provision were not "illusory," the General Counsel argues, it still could not save the C.A.R.E.S. Agreement because: (1) it requires employees to "opt-in" to maintain their Section 7 rights by sending a letter; and (2) it is presented to employees at the beginning of employment. Neither argument has merit. First, the opt-out process the General Counsel finds so hard to "navigate" is the type of simple, everyday task that people must routinely complete to maintain their rights – it is no more difficult than completing and returning a manufacturer's rebate. The C.A.R.E.S. Agreement states that an employee who wants to opt-out must send notice to Respondents at a specified address via certified mail within sixty days of starting employment. The certified mail requirement benefits the employees by ensuring there is proof that they sent their opt-out notices. The General Counsel's attempt to characterize this as a torturous and hard to understand process that must be completed in a narrow window of time is bizarre. *See Bloomingdale's, Inc.,* No. 31-CA-071281, slip op. at 9 (N.L.R.B. Div. of Judges Jun. 25, 2013) (holding opt-out with 30-day deadline valid). Indeed, as noted in *Bloomingdale's*, the Board has approved a 30-day deadline when dealing with cases relating to nonmember employees objecting to paying fair-share union fees for non-collective bargaining activities. *Id*., citing *California Saw & Knife Works*, 320 NLRB 224, 235 (1995).

Second, presenting the C.A.R.E.S. Agreement to new hires at the beginning of their employment does not somehow render the opt-out provision invalid. The General Counsel's argument that new employees will be "unaware of employment-related issues" and "other employees' efforts to act concertedly to address such issues" is misplaced. Under the General Counsel's theory, parties could never enter into a pre-dispute arbitration agreement because they would be unaware of the workplace issues that might arise in the future when they signed the

agreement. Moreover, to the extent the General Counsel is concerned that new employees specifically might be unaware of pre-existing issues in the workplace that would cause them not to sign the C.A.R.E.S. Agreement, this argument ignores the sixty day opt-out window. If there are pre-existing employer-employee disputes in a workplace, surely two months is enough time for a new employee to become aware of those disputes. The General Counsel's argument seems to suggest that it would be more appropriate to present employees with an arbitration agreement after a workplace issue has already arisen. This is ironic, given the General Counsel's citation of *Williams v. Securitas Security Services*, in which the court rejected an employer's effort to bind employees to an arbitration agreement after collective litigation had already begun. 2011 WL 2713741, at *2 (E.D. Pa. 2011). Contrary to the General Counsel's argument, the beginning of employment – before any disputes between the parties have arisen – is the proper time to present an arbitration agreement to an employee for consideration. Therefore, the Board should find that the C.A.R.E.S. Agreement does not violate Section 8(a)(1) because it provided Charging Party with the opportunity to opt-out.

C. The C.A.R.E.S. Agreement Explicitly Permits Access To The Board.

The C.A.R.E.S. Agreement explicitly states that it does not cover "[m]atters within the jurisdiction of the National Labor Relations Board." This fact is all that the Board needs to know to reject the General Counsel and Administrative Law Judge's contention that the C.A.R.E.S. Agreement unlawfully interferes with employees' access to the Board.[1]

The General Counsel tries to obscure the clarity of the C.A.R.E.S. Agreement by heavily emphasizing certain provisions and simply ignoring others – precisely the type of reading rejected by *Lafayette Park Hotel* – but the Agreement is so clear that even these forbidden tactics

[1] As set forth in Respondents' opening brief in support of their Exceptions, the fact that the C.A.R.E.S. Agreement permits employees to access the Board and to file charges with the Equal Employment Opportunity Commission and other administrative agencies also distinguishes this case from *D. R. Horton*. Op. Br., Section III.B.

fail on their face. The General Counsel explains that the second page of the C.A.R.E.S. Agreement states that all "Covered Claims" must be arbitrated, the third page defines "Covered Claims" and informs the reader that an explanation of "What is not a Covered Claim" is coming soon, and the fourth page states that, among other things "[m]atters within the jurisdiction of the National Labor Relations Board" are not "Covered Claims." GC Br. at 21. No employee actually reading the C.A.R.E.S. Agreement could possibly come away with the belief that claims within the jurisdiction of the NLRB are covered by the Agreement. Indeed, this logical and orderly explanation of the C.A.R.E.S. program is the reason that the *Ellerbee* court referred to the C.A.R.E.S. Agreement as "crystal clear." 604 F. Supp. 2d at 355. Moreover, the fact that Charging Party herself filed a charge with the Board demonstrates that C.A.R.E.S. Agreement clearly communicates that employees retain the right to file such charges. General Counsel's argument that the C.A.R.E.S. Agreement is ambiguous because the explicit exclusion of claims before the Board does not appear until page four is, frankly, insulting to the intelligence of Respondents' employees. The Board should reject the Administrative Law Judge's finding that the C.A.R.E.S. Agreement unlawfully interferes with access to the Board.

D. ***D. R. Horton*** **Was Invalidly Issued and Wrongly Decided.**

Respondents have already set forth at length in their exceptions brief the arguments as to why *D. R. Horton* was invalidly issued and wrongly decided. Respondents will not reiterate those arguments here, but rather will only address the points on which the General Counsel's answering brief is incorrect or conspicuously silent.

First, the General Counsel argues that *D. R. Horton* was validly decided because the Board is permitted to decide a case with only two members if it has previously delegated its authority to decide the case to a three-member panel. Respondents completely agree. Indeed, this is the central premise of Respondents' argument. What the General Counsel fails to explain,

however, is when and how this supposed delegation occurred. As set forth in Respondents' opening brief, and not contradicted in the General Counsel's response, the Board never actually delegated its authority to decide *D. R. Horton* to a three-member panel. For this reason, which the General Counsel has not addressed, *D. R. Horton* is invalid and has no precedential effect.

Second, despite referencing the Supreme Court's recent decision in *American Express Co. v. Italian Colors Restaurant*, the General Counsel clearly fails to recognize its importance. Specifically, the Supreme Court held in *Italian Colors* that the "effective vindication" exception to the enforcement of class and collective action waivers only applies where a party would be effectively barred from even pursuing claims in any forum. *American Exp. Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304, 2310 (2013). The examples given by the Supreme Court where this exception would apply are an agreement that flatly forbids an individual from asserting a statutory right, or arbitration fees so high that they effectively prevent access to the forum. *Id.* at 2310-11. As long as an employee can individually pursue his or her statutory right in some forum, however, the Supreme Court held that the effective vindication would not apply, even where pursuing individual claims would be economically infeasible. *Id.* at 2311. Despite this clear holding, the General Counsel still argues that the effective vindication exception guarantees Charging Party the right to bring her claims on a class or collective action basis. This is incorrect. As a different Administrative Law Judge has recently held, *D. R. Horton* cannot survive the Supreme Court's decision in *Italian Colors*. *See Chesapeake Energy Corp.*, JD-78-13, slip op. at 9 (Nov. 8, 2013). The General Counsel's argument that *D. R. Horton* remains good law is simply incorrect in light of *Italian Colors*.

Third, the General Counsel incorrectly characterizes Section 7 as containing a congressional command forbidding waiver of the right to bring class or collective action claims.

This argument is contrary to the standard of the majority's holding in *Italian Colors*, which requires a clear congressional command set forth in the text of the statute to override the FAA. The General Counsel does not point to anything in the text of the Act, nor even in the legislative history or purpose of the Act, that evinces a clear congressional command contrary to the FAA. Further, this argument also ignores the well-established case law holding that Section 7 rights are not absolute and must be balanced against other legitimate rights and interests. *See, e.g., Hudgens v. NLRB*, 424 U.S. 507, 522 (1976) (the Board must consider "the nature and strength of the respective Section 7 rights"). Thus, the correct analysis does not begin with recognition of a Section 7 right to engage in class or collective action litigation. Rather the correct analysis begins with the FAA and its "liberal federal policy favoring arbitration agreements." *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 24-25 (1991).

Fourth, the General Counsel confuses the simple principle that when two statutes present an irreconcilable conflict, the later enacted statute takes precedence over the earlier one. It is important to note that no irreconcilable conflict exists here. The FAA, the FLSA, the NLRA, and the Norris-LaGuardia Act ("NLGA") can be – and indeed must be – reconciled to permit the enforcement of class and collective action waivers in keeping with the last decade of Supreme Court precedent. But to the extent a conflict exists, the FAA takes precedence because it was re-enacted in 1947, "twelve years after the NLRA and fifteen years after the passage of the Norris-LaGuardia Act." *Owen v. Bristol Care,* 702 F.3d 1050, 1053 (8th Cir. 2013). "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.* The FLSA was enacted after the original Wagner Act, and courts are in agreement that the FLSA permits enforcement of class and collective action waivers in arbitration agreements. *See, e.g.*,

Richards v. Ernst & Young, LLP, --- F.3d ---, No. 11-17530, 2013 WL 4437601 (9th Cir. Aug. 21, 2013); *Sutherland v. Ernst & Young LLP*, --- F.3d ---, No. 12-304-CV, 2013 WL 4033844 (2d Cir. Aug. 9, 2013); *Raniere v. Citigroup Inc.*, No. 11-5213-CV, 2013 WL 4046278 (2d Cir. Aug. 12, 2013) (summary order).

E. The Parties Did Not Litigate Whether the Confidentiality Language in the C.A.R.E.S. Agreement Violated the Act.

The General Counsel's argument that the parties litigated the propriety of the C.A.R.E.S. Agreement's confidentiality language is disingenuous at best. The General Counsel cannot deny that (1) the Amended Complaint did not contain any allegations regarding the confidentiality language; (2) the parties' stipulation did not contain any reference to the confidentiality language; and (3) the General Counsel's own post-hearing brief did not contain any discussion of or argument about the confidentiality language.

Ignoring these facts, the General Counsel argues that the Administrative Law Judge properly found that the confidentiality language violated the Act because Respondents stipulated that they distributed the C.A.R.E.S. Agreement to all employees. According to the General Counsel, stipulating to the existence and distribution of the C.A.R.E.S. Agreement means that the Administrative Law Judge was free to find that any aspect of the Agreement violated the Act, whether or not the Amended Complaint alleged such a violation or the parties had ever mentioned, let alone litigated, such a theory of violation. If the General Counsel's argument were right, it would eviscerate the due process rights afforded to parties in proceedings under the Act and the Constitution. The Board has clearly held that a theory not alleged by the General Counsel or litigated by the parties cannot form the basis of a violation of the Act. *See Sumo Airlines*, 317 NLRB 383, 384 (1995) (dismissing violations not alleged "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 parties). Therefore, the Board should reject the finding that the C.A.R.E.S. Agreement's confidentiality language violates the Act.

F. The General Counsel's Section 10(b) Argument Mischaracterizes the C.A.R.E.S. Agreement as a Rule.

The General Counsel's answer to Respondents' Section 10(b) argument is based on a failure to recognize the difference between a work rule unilaterally promulgated by an employer that applies to all employees, and a contract between an employer and an individual employee. It may be true that the date a work rule was implemented is irrelevant to a Section 10(b) analysis, because it is the employer's maintenance of the work rule that is unlawful, not the initial decision to implement it. When dealing with a contract, however, if the alleged violation is necessarily based on the conditions the contract was executed under, the date of execution is the crucial date for the Section 10(b) analysis. *See Local Lodge No. 1424 v. NLRB*, 362 U.S. 411 (1960). Here, Section 10(b) requires the Board to reject all of the General Counsel's arguments based on the claims that Charging Party entered into the C.A.R.E.S. Agreement as a condition of employment or under such conditions that her right to opt out was illusory or unreasonably restricted. Because the conditions under which Charging Party executed the C.A.R.E.S. Agreement are barred from consideration by Section 10(b), the Board must assume that she entered into the Agreement voluntarily and with a full opportunity to opt out, just as the Board was required to assume that the collective bargaining agreement in *Local Lodge No. 1424* was lawful at the time of its execution. The Board should dismiss the Amended Complaint on this basis alone.

G. Respondents Motions To Compel Arbitration Based on the C.A.R.E.S. Agreement Do Not Have an Unlawful Objective.

Because multiple district courts have held that the C.A.R.E.S. Agreement is lawful and enforceable, despite the Board's decision in *D. R. Horton*, Respondents' motions to compel

arbitration in those cases cannot be found to have an unlawful objective within the meaning of footnote 5 of *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 737 n.5 (1983). Therefore, those motions were protected by the First Amendment. The Board cannot find a violation of the Act based on those motions, nor can the Board order any remedy requiring Respondents to withdraw those motions. Counsel for the General Counsel cites no case in support of the proposition that a motion filed in federal court can have an "unlawful objective" even though the federal court has granted the motion and specifically rejected the argument that it has an objective that is unlawful under the Act. Here, Respondents filed motions to compel arbitration in federal court, pursuant to federal law. Those federal courts, which were fully capable of analyzing the NLRA and its interaction with the FAA and other federal laws, determined that the motions to compel were lawful and meritorious. These motions to compel arbitration, therefore, cannot be found to have an unlawful objective in these circumstances.

III. 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,

/s/ Ross H. Friedman
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Dated: December 3, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of December, 2013, a true and correct copy of the foregoing Respondents' Reply Brief in Further 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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