JD(ATL)–31–13
El Monte, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

NIJJAR REALTY, INC.,
d/b/a PAMA MANAGEMENT

and **CASE 21–CA–092054**

GERAPDO HARO, An Individual[1]

Cecelia Valentine, Esq., for the Government.[2]
Ronald W. Novotny, Esq., for the Company.[3]
David Spivak Esq., for the Charging Party.

DECISION

Statement of the Case

WILLIAM NELSON CATES, Administrative Law Judge. This case was tried before me on August 26, 2013, in Los Angeles, California. Charging Party Haro filed the charge initiating this matter on October 25, 2012, and the Acting General Counsel issued a complaint and notice of hearing (complaint) on May 30, 2013. The Government alleges the Company violated Section 8(a)(1) of the National Labor Relations Act (the Act) by, since on or about April 26, 2012, maintaining a Comprehensive Agreement and Applicant's Statement of Agreement (CAASA) which contains provisions that precludes employees from participating in collective and class litigation to resolve disputes arising out of employment, and, prohibits employees from arbitrating disputes as a class. It is further alleged the Company has, since on or about April 26, 2012, required all new and existing employees to execute the CAASA forms which provides that employees resolve all disputes arising out of employment through binding arbitration (unless they opt out by checking a box on the CAASA forms) and also, provides employees must arbitrate their claims individually. It is also alleged the Company has, since at

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1 I shall refer to the Charging Party as the Charging Party or Haro and counsel for the Charging Party as Counsel for Haro or Counsel for the Charging Party.

2 I shall refer to counsel for the Acting General Counsel as Counsel for the Government and the Acting General Counsel as the Government.

3 I shall refer to Counsel for the Respondent as Counsel for the Company and shall refer to the Respondent as the Company.

least December 14, 2012, enforced the arbitration provisions regarding resolving disputes arising out of employment through binding arbitration as set forth in the CAASA forms, by asserting it in litigation brought against the Company by Charging Party Haro in *Gerardo Haro Guadarrama v. Nijjar Realty, Inc. et al Case number BC487199 (Superior Court of California, Los Angeles County)* by filing a petition to compel plaintiffs to individually arbitrate their class wide wage and hour claims against the Company. The trial court (Superior Court of California, Los Angeles County) on March 6, 2013, adopted its tentative ruling to Sever and Stay the Private Attorney General Act (PAGA) claims and to compel arbitration of Charging Party Haro's and all other claims on an individual basis..

This is another case raising issues concerning arbitration policies that effect collective bargaining and representational rights related to *D. R. Horton, Inc*., 357 NLRB No. 184 (2012), petition to review filed 12-60031 *(*5th Cir. 2012*), (*oral argument heard on February 5, 2013).

The Company, in its answer to the complaint, and at trial, denies having violated the Act in any manner alleged in the complaint.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. I carefully observed the demeanor of the witnesses as they testified and I rely on those observations here. I have studied the whole record, and based on the detailed findings and analysis below, I conclude and find the Company violated the Act essentially as alleged in the complaint.

Findings of Fact

I. Jurisdiction

The Company is a corporation with an office and place of business in El Monte, California, where it has been, and continues to be, engaged in the business of property management including management of leased residential properties. During the past year, a representative period, the Company derived gross revenues in excess of $500,000, and during that same time purchased and received at its El Monte, California facility goods from other enterprises located within the State of California, each of which other enterprises received these goods directly from points outside the State of California. The parties admit, and I find, the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.[4]

[4] The Company at trial, and in its posttrial brief, contends *D. R. Horton,* supra is invalid because it was not decided by a quorum of at least three Board Members pursuant to 29 U.S.C. § 153(b) and was thus unconstitutional (citing *Noel Canning v. NLRB* 705 F.3d 490 (D.C. Cir. 2013), cert. granted 133 S.Ct. 2861 (June 24, 2013). The Board has rejected similar contentions in numerous cases, see, e.g., *Bloomingdale's Inc.,* 359 NLRB No. 113 (2013). I note the Board now has a full complement of five members nominated by the President and confirmed by the Senate and could, if they deemed appropriate, reaffirm the earlier Board's actions. Consistent with Board precedent, I reject the Company's *Noel Canning,* supra, defense.

II. Facts

Charging Party Haro made his initial application for employment with the Company on August 24, and commenced working around September 1, 2011. Haro was employed as a maintenance worker working from the Company's Ontario, California office the first 3 months and from the San Bernardino, California office the last month of his employment. Haro left his employment with the Company around mid-January 2012. The circumstances of Haro's departure from the Company are not before me.

Haro, who lives in San Bernardino, performed general maintenance work on, for example, floors, ceilings and welding assignments at company managed properties. Haro testified Rocio Chanez (Supervisor Chanez) was in charge of the San Bernardino area and Alejandro Montiel (Supervisor Montiel)[5] was supervisor of the maintenance workers.

Haro was required to and filled out a second job application and related employment documents for the Company on December 29, 2011. Haro testified that when he and 18 to 20 other maintenance employees reported for work at the San Bernardino office on the morning of December 29, 2011, they were told by both Supervisors Chanez and Montiel they had to fill out and sign new employment documents and if they did not "they would not pay us." Haro said Chanez and Montiel did not tell them anything about the documents except that they had to sign them. Haro asked what kind of documents they were and Chanez replied they were from the Company's El Monte, California office. Haro testified Montiel and Chanez "just wanted us to sign [the documents] in a hurry and go to work."

Haro completed the documents while in the office and placed them on Montiel's desk before going to work. Haro placed a question mark on the signature line of Applicant's Statement and Agreement because he "did not understand any of this." When Haro returned to the office that afternoon the secretary told him he had failed to sign some portions of the documents. The secretary placed post-its where Haro was to sign or mark which he did. The documents were in English. Haro started speaking English at age 30 and can read some English. Haro did not ask for a copy of the CAASA forms he signed on December 29, 2011, nor, did he request a Spanish language copy before signing the forms. Haro did not ask that the documents be translated for him. Haro testified he did not ask his supervisors any questions about the documents but did ask coworkers who did not know what the documents were. Haro testified he understood he had to sign the documents to continue working for the Company, and, he also understood that by having to sign the documents he was agreeing to the terms of the documents. No one from management or the secretary brought to Haro's attention when he signed the documents in the morning or when he further signed them in the afternoon that there was an "opt out" box in the CAASA forms that he could initial.

[5] While Chanez and Montiel were not named as supervisors in the complaint, and it is not necessary here to decide that issue, it appears no party disputes their positions or authority. I have applied the supervisory title to them for ease of understanding the sequence of events leading to the signing of the employment documents at issue here.

The CAASA forms executed by Charging Party Haro and the other maintenance employees, which were required by the Company as a condition of employment, contains, in part, the following:

Comprehensive Agreement

2. Employee, Emplicity and Company, agree to utilize binding arbitration as the sole and exclusive means to resolve all disputes that may arise out of or be related in any way to Employee's employment, including but not limited to the termination of Employee's employment and Employee's compensation. Employee specifically waives and relinquishes his/her right to bring a claim against Emplicity and/or Company, in a court of law, and this waiver shall be equally binding on any person who represents or seeks to represent Employee in a lawsuit against Emplicity or Company in a court of law. Similarly, Emplicity and Company specifically waive and relinquish their rights to bring a claim against Employee in a court of law, and this waiver shall be equally binding on any person who represents or seeks to represent Emplicity or Company in a lawsuit against the Employee in a court of law. Employee, Emplicity, and Company agree that any claim, dispute, and/or controversy that Employee may have against Emplicity (or its owners, directors, officers, managers, employees, or agents), or Company (or its owners, directors, officers, managers, employees, or agents), or that Emplicity or Company may have against Employee, shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act ("FAA"), in conformity with the procedures of the California Arbitration Act, (CAL. Code Civ. Proc. Sec 1280 et seq., including section 1283.05 and all of the Act's other mandatory and permissive rights to discovery). The FAA applies to this agreement because both Emplicity and Company business involves interstate commerce. Included within the scope of this Agreement are all disputes, whether based on tort, contract, statute (including, but not limited to, any claims of discrimination, harassment and/or retaliation, whether they be based on the California Fair Employment and Housing Act, Title VII of the Civil Rights Act of 1964, as amended, or any other state or federal law or regulation), equitable law, or otherwise. The only exception to the requirement of binding arbitration shall be for claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers' Compensation Act, Employment Development department claims, or as may otherwise be required by state or federal law. However, nothing herein shall prevent Employee from filing and pursuing proceedings before the California Department of Fair Employment and Housing, or the United States Equal Employment Opportunity Commission (although if Employee chooses to pursue a claim following the exhaustion of such administrative remedies, that claim would be subject to the provisions of this Agreement). By this binding arbitration provision, Employee, Emplicity and Company give up their right to trial by jury of any claim Employee may have against Emplicity or Company, or of any claim Emplicity or Company may have against Employee. This agreement is not intended to interfere with Employee's

rights to collectively bargain, to engage in protected, concerted activity, or to exercise other rights protected under the National Labor Relations Act.

4. This binding arbitration agreement shall not be construed to allow or permit the consolidation or joinder of other claims or controversies involving any other employees, and will not proceed as a class action, collective action, private attorney general action or any similar representative action. No arbitrator shall have the authority under this agreement to order any such class of representative action. I further understand and acknowledge that the terms of this Agreement include a waiver of any substantive or procedural rights that I may have to bring an action on a class, collective, private attorney general, representative or other similar basis. However, due to the nature of this waiver, the Company has provided me with the ability to choose to retain these rights by affirmatively checking the box at the end of this paragraph. Accordingly, I expressly agree to waive any right I may have to bring an action on a class, collective, private attorney general, representative or other similar basis, unless I check this box [ ].

Applicant's Statement and Agreement:

I further agree and acknowledge that Emplicity, the Worksite Employer, and I will utilize binding arbitration to resolve all disputes that may arise out of the employment context. Emplicity, the Worksite Employer, and I agree that any claim, dispute, and/or controversy that either I may have against Emplicity or the Worksite Employer (or their owners, directors, officers, managers, employees, agents, and parties affiliated with their employee benefit and health plans) or Emplicity or the Worksite Employer may have against me, arising from, related to, or having any relationship or connection whatsoever with my seeking employment with, employment by, or other association with Emplicity or the Worksite Employer shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act, in conformity with the procedures of the California Arbitration Act (Cal. Code Civ. Proc. Sec 1280 et seq., including section 1283.05 and all of the Act's other mandatory and permissive rights to discovery), included within the scope of this Agreement are all disputes, whether based on tort, contract, statute (including, but not limited to any claims of discrimination and harassment, whether they be based on the California Fair Employment and Housing act, Title VII of the Civil Rights Act of 1964, as amended, or any other state or federal law or regulation), equitable law, or otherwise with exception of claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers' Compensation Act, Employment Development Department claims, or as otherwise required by state or federal law. However, nothing herein shall prevent me from filing and pursuing proceedings before the California Department of Fair Employment and Housing, or the United States Equal Employment Opportunity Commission (although if I choose to pursue a claim following the exhaustion of such

administrative remedies, that claim would be subject to the provisions of this Agreement). Further, this Agreement shall not prevent either me or the Company from obtaining provisional remedies to the extent permitted by Code of Civil Procedure Section 1281.8 either before the commencement of or during the arbitration process. In addition to any other requirements imposed by law, the arbitrator selected shall be a retired California Superior Court Judge, or otherwise qualified individual to whom the parties mutually agree, and shall be subject to disqualification on the same grounds as would apply to a judge of such court. All rules of pleading (including the right of demurrer), all rules of evidence, all rights to resolution of the dispute by means of motions for summary judgment, judgment on the pleadings, and judgment under Code of Civil Procedure Section 631.8 shall apply and be observed. Resolution of the dispute shall be based solely upon the law governing the claims and defenses pleaded, and the arbitrator may not invoke any basis (including but not limited to, notions of "just cause") other than such controlling law. The arbitrator shall have the immunity of a judicial officer from civil liability when acting in the capacity of an arbitrator, which immunity supplements any other existing immunity. Likewise all communications during or in connection with the arbitration proceedings are privileged in accordance with Cal. Civil Code Section 47(b). As reasonably required to allow full use and benefit of this agreement's modifications to the Act's procedures, the arbitrator shall extend the times set by the Act for the giving of notices and setting of hearings. Awards shall include the arbitrator's written reasoned opinion. **I understand and agree to this binding arbitration provision, and I, the Worksite Employer and Emplicity give up our right to trial by jury of any claim, the Worksite Employer and/or Emplicity may have against me.**

On June 29, 2012, Charging Party Haro, through counsel, filed his Fair Labor Standard's Act lawsuit (*Gerardo Haro Guadarrama v Nijjar Realty, Inc. et. al.*) against the Company on behalf of himself and all others similarly situated, and as an "aggrieved employee" on behalf of other "aggrieved employees" under the Labor Code Private Attorney General Act of 2004 (PAGA). Haro testified that before he filed his lawsuit he did not discuss doing so with other employees. Haro explained he did not even know what a class action lawsuit meant. Haro said he had, after he filed his lawsuit, discussed the claims made in his lawsuit "lots" of times with current and former employees of the Company.

On December 14, 2012, the Company filed a Petition to Compel Arbitration and to Stay Action Pending Completion of Arbitration in *Gerardo Haro Guadarrama v. Nijjar Realty, Inc. et. al*. seeking to enforce the provisions of the CAASA forms its employees, including Haro, had been compelled to sign.

On March 6, 2013, Superior Court of California, County of Los Angeles, Judge Jane R. Johnson issued her Ruling on Submitted Matter in the *Gerardo Haro Guadarrama v. Nijjar Realty, Inc. et. al*. case stating, "The Court adopts its tentative ruling (1) severing and staying the PAGA claims, and (2) compelling arbitration of Guadarrama's individual claims as to all remaining claims."

Company Chief Financial Officer Evert Miller (CFO Miller or Miller) testified the Company, for a number of years, utilized professional employer organizations to staff its workforce. For example, the Company utilized a professional employer organization "Workforce" at least in 2010. On December 3, 2011, the Company started using the professional employee organization Emplicity. These professional employee organizations handled employment applications and payroll documents for the Company. CFO Miller explained the Company would "interview and select the employee" and Emplicity "would have them sign the actual employment agreement and put them on the payroll." Miller testified Emplicity developed the application and employment documents utilized including the Comprehensive Agreement and Applicant's Statement of Agreement (CAASA) forms. Miller stated the Company had no input in drafting these documents but added he read over the CAASA forms after they were drafted. Miller testified that by the Company adopting and utilizing the CAASA forms it was not the Company's intention to interfere with the employees' right to assert group claims. Miller stated the Company no longer contracts with Emplicity and, has not since the expiration of that contractual relationship in 2012, utilized the CAASA forms. Miller explained the Company attempted to enforce the CAASA forms against Charging Party Haro in order to limit exposure to costs and it was also easier for the Company to handle individual claim cases. CFO Miller further explained the use of individual arbitration for claims is a "much less costly method to deal with claims against the Company."

III. Some Preliminary Contentions and Findings

A. The 10(b) Issue

The Company contends the entire complaint here should be dismissed because it is time-barred in that it is based on events that occurred entirely outside the applicable limitations period. Section 10(b) of the Act requires that alleged violations of the Act occur within 6 months of the filing of a charge. The Company contends, correctly so, that the first date of allegations the Company violated the Act in the complaint is that "since on or about April 26, 2012" the Company has maintained a Comprehensive Agreement and Applicant's Statement and Agreement (CAASA) containing provisions that preclude employees from: arbitrating disputes as a class; requiring new and existing employees to execute CAASA forms providing that employees resolve all disputes arising out of employment through arbitration unless they opt out by checking a box on the CAASA forms' and, that the Company requires its new and existing employees to execute the CAASA forms which requires its employees to arbitrate their claims individually. The Company correctly notes Charging Party Haro signed his CAASA forms on December 29, 2011. The Company contends there is no showing it required any employees to sign the CAASA forms or that it actually hired any employees after April 26, 2012. The Company contends these seminal allegations of the complaint, upon which all other allegations are based, has not been established. The Company further contends that because the unfair labor practice relating to the enforcement of the CAASA agreements in the civil suit, filed on December 14, 2012, (*Gerardo Haro Guadarrama v. Nijjar Realty, Inc. et al.*) was "inescapable grounded" on events predating the 6-month limitations period, and as such, the entire complaint is barred by Section 10(b) of the Act.

I find the Company's 10(b) defense without merit. First it is clear, as testified to by CFO Miller, the Company continued to hire employees after December 29, 2011, and continued, at least for a time, to have new employees execute the CAASA forms. Second, again as testified to by CFO Miller, the Company made no effort, after it stopped using the professional employer Emplcity, to: rescind any of the agreements (CAASA forms) that had been instituted with employees by Emplicity; nor, did it seek to withdraw the arbitration component of the agreements previously signed by its employees as instituted by Emplicity; nor, did the Company seek to eliminate the waivers the employees entered into by signing the CAASA forms waiving their right to collective action or class related arbitration. I am persuaded the Company maintained the CAASA employment forms, singed by its employees on and after April 26, 2012. That the evidence establishes the Company continued to maintain the CAASA forms after April 26, 2012, is clearly demonstrated in that the Company still maintain Charging Party Haro's CAASA forms into mid-December 2012 even after Haro's employment with the Company had ended. The charge filed on October 25, 2012,was timely filed with respect to events on and after April 26, 2012. Even if one considers December 29, 2011, the date Charging Party Haro signed the CAASA employment forms, as the controlling date, the Company's 10(b) defense fails. The allegations are that the Company continued to maintain the CAASA forms on and after April 26, 2012. It is clear the Company maintained Haro's CAASA employment forms even as of December 14, 2012, when it utilized those forms in its defense to Haro's lawsuit. It is irrelevant when Haro signed the CAASA forms the Company continued to maintain, and in Haro's case utilize, because this is a continuing matter subject to an ongoing violation within the 10(b) period. Thus, the continued maintaining and enforcing of the CAASA forms within the 10(b) period establishes that this conduct and action by the Company is not inescapable grounded in pre-10(b) events and the Supreme Court's holding in *Local Lodge 1424 v. NLRB (Bryan Mfg.),* 362 U.S. 411 (1960), does not require a different result than what I reach here.

It is well established that unlawful rules maintained by an employer inside the 10(b) period can be found unlawful, even if executed, adopted or promulgated outside the 10(b) period. See, e.g., *Camey Hospital,* 350 NLRB 627, 640 (2007).

Having rejected the Company's 10(b) defense, I turn to other complaint allegations.

B. The Company is responsible for the Comprehensive Agreement and Applicant's Statement of Agreement

As noted elsewhere herein, the complaint alleges the Company violated Section 8(a)(1) of the Act by, since on or about, April 26, 2012, maintaining and requiring its employees to execute a Comprehensive Agreement and Applicant's Statement of Agreement (CAASA) forms which contains provisions precluding employees from participating in collective and class litigation to resolve disputes arising out of employment, and prohibits employees from arbitrating disputes as a class.

The CAASA employment application forms at issue here are part of the record and undisputed. I consider the Comprehensive Agreement and Applicant's Statement of Agreement to, in essence, constitute one inextricably intertwined employment application

packet. Stated differently, at all applicable times here, employees, or applicants for employment, were required to sign both forms. On December 29, 2011, then current employees were required to execute the CAASA forms under the penalty of not being paid or allowed to continue working. As fully explained elsewhere, these CAASA forms were maintained at least until December 14, 2012, at which time the Company utilized Haro's forms in its state court action. To the extent the Company, advances as a defense, it was not responsible for the CAASA forms because the forms were formulated and drafted by the professional employer organization Emplicity, is totally without merit. First, the Applicants Statement of Agreement expressly refers to the Company here as the "Worksite Employer." Second, CFO Miller testified that while the Company had no input in formulating or drafting the CAASA employment forms, he read the forms and added that when the Company *utilized* and *adopted* the CAASA employment forms it was not the Company's intention to interfere with the employees' right to assert group claims. Clearly CFO Miller knew, and so testified, the Company adopted and utilized the CAASA forms crafted by Emplicity. CAASA forms were utilized in all hiring for the Company. I conclude and find, the Company is responsible for the content of the employment forms utilized for and/or by it.

IV. Analysis of Central Issues

The complaint alleges that since April 26, 2012, the Company has maintained a Comprehensive Agreement and Applicant's Statement and Agreement (CAASA) which contains provisions that precludes employees from participating in collective and class litigation to resolve disputes arising out of employment and prohibits employees form arbitrating disputes as a class and requires all new and existing employees to resolve all disputes arising out of employment through binding arbitration unless they opt out by checking a box in the Comprehensive Agreement and requires new and existing employees to arbitrate their claims individually. Additionally, it is alleged that as least since December 14, 2012, the Company has enforced the arbitration provisions regarding resolving disputes arising out of employment through binding arbitration as set forth in the CAASA forms by asserting it in litigation brought against the Company by the Charging Party in *Gerardo Haro Guadarrama v. Nijjar Realty, Inc. et al* and by filing a petition to compel plaintiffs to individually arbitrate their class wide wage and hour claims against the Company. The State Court, on March 6, 2013, adopted its tentative ruling to sever and stay the PAGA claims and to compel arbitration of the Charging Party's individual claims as to all remaining claims.

The Company, at trial, argued at length in a motion to dismiss that it considers *D. R. Horton,* supra wrongly decided and unenforceable. The Company, at trial, raised various asserted justifications including that numerous Federal and State court decisions, issued after D. *R. Horton*, have rejected the *D.R. Horton* rational of the Board. The Company renews here, its argument, that *D. R. Horton* was wrongly decided. I reject again the Company's request I find *D. R. Horton* wrongly decided. Such requested action must be made directly to the Board and not to me. I am bound by Board precedent, including *D. R. Horton*, unless and until the Supreme Court overturns it or the Board itself does so. I must, and do, follow *D. R. Horton.*

The overriding issue here is whether the Company's Comprehensive Agreement and Applicant's Statement of Agreement (CAASA) forms contain restrictive provisions that

violates Section 8(a)(1) of the Act. In addressing the CAASA forms, I do not consider them to be separate documents, but, rather one inextricably intertwined employment document. The CAASA forms had to be signed by all current and new employees and were mandatory conditions of employment. As Charging Party Haro credibly testified, the 18 to 20 employed maintenance workers were required, on December 29, 2011, to sign the new CAASA forms or the Company "would not pay" or allow them to return to work unless they signed the CAASA forms "in a hurry" so they could go "back to work."

Looking further at the content of the CAASA forms, it is necessary to review the rules the Board has established for doing so.

In evaluating whether a rule applied to all employees, as a condition of continued employment, including the mandatory CAASA rules at issue here, violates Section 8(a)(1), the Board, as noted in *D. R. Horton Inc.*, at 4–6, applies its test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), citing *U–Haul Co. of California,* 347 NLRB 375, 377 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007). Pursuant to *Lutheran Heritage* the inquiry, or test to be applied, is whether the rule explicitly restricts activities protected by Section 7 of the Act. If so, the rule is unlawful. If it does not explicitly restrict protected activity, the finding of a violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or, (3) the rule has been applied to restrict the exercise of Section 7 rights.

Viewing the CAASA employment forms as a whole, I am fully persuaded a reasonable employee would read the rules as restricting his or her ability to resolve in concert employment disputes protected by Section 7 of the Act.

Counsel for the Government, in her posttrial brief, states the CAASA employment forms "are lawful in that they specifically exempt claims arising under the National Labor Relations Act", but, rather asserts the CAASA employment forms unlawfully restrict employees' ability to resolve employment-related issues in a protected concerted manner. Accordingly, I do not address whether the CAASA employment forms could reasonably be construed as restricting employees' rights to file charges or claims with the National Labor Relations Board.

While I do not address whether the CAASA forms restricts or bars filing of Board charges, I do address whether the CAASA forms interferes with and restricts employees' from engaging in protected concerted conduct. In this regard, the Board in *D. R. Horton, Inc., supra* at slip op. at 13, held an employer violates Section 8(a)(1) of the Act "by requiring employees to waive their right to collectively pursue employment-related claims in all forums, arbitral and judicial." The Board noted at. 10 "The right to engage in collective action—including collective *legal* action—is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest."

Provisions of the CAASA employment forms, in part, state: "Employee. . . and Company, agree to utilize binding arbitration as the sole and exclusive means to resolve all

disputes that may arise out of or be related in any way to Employee's employment, including but not limited to termination . . . [and] . . . compensation." The rules, in part, further state: "This binding arbitration shall not be construed to allow or permit the Consolidation or joinder of other claims or controversies involving any other employees, and will not proceed as a class action, collective action, private attorney general action or any similar representative action. No arbitrator shall have the authority under this agreement to order any such class or representative action." Again in the CAASA forms it states; "I further agree and acknowledge that . . . the . . .[Company] and I will utilize binding arbitration to resolve all disputes that may arise out of the employment context." The CAASA forms conclude; in part, "I understand and agree to this binding arbitration provision. . ."

The CAASA employment forms clearly inhibits and interferes with Section 7 conduct, and, the Company's insisting its employees waive their right to pursue class actions in court, arbitration or any other forum as a condition of employment violates Section 8(a)(1) of the Act and I so find.

I reject the Company's contention the "opt-out" provision in the CAASA forms, allowing an employee to entirely opt-out of the waiver relating to the right to bring class and concerted actions, renders the waiver lawful under the *D. R. Horton* rational. Although I view the Comprehensive Agreement and the Applicant's Statement of Agreement to constitute one document and as such the waiver would, if valid, apply to both portions of the CAASA employment forms, I would, nonetheless, conclude the waiver is invalid even if applied to each portion separately.

I find the Company's "opt-out" policy has a reasonable tendency to chill employees from exercising their statutory rights because they are required to take an affirmative action simply to preserve Section 7 rights they already have. State differently, the CAASA waiver unlawfully compels, as a condition of employment, employees to affirmatively act (check an "opt-out" box at the end of a long paragraph, with little explanation, as to its far reaching effects) in order to maintain rights they already have under Section 7; for example, to exercise their substantive statutory right to bring collective or class claims. The CAASA waiver is also invalid because it imposes a waiver of Section 7 rights, or to "opt-out" at a time when the employees are unlikely to have an awareness of employment issues that may now, or in the future, be best addressed by collective or class action. Additionally the CAASA waiver violates public policy. While not precedent Judge Gerald M. Etchingham in *Gamestop Corp., Gamestop Inc., Sunrise Publications, Inc., and Gamestop Texas LTD. (L.P.)* JD(SF)-42-13 WL– (August 29, 2013) spoke to why such waivers violates public policy. Judge Etchingham explained, and I adopt his rational, that a waiver, such as the one here, violates public policy because such waivers operate as a prospective waiver of employees rights to pursue future concerted conduct in the form of collective class action(s). I am persuaded the Company, by imposing an immediate and affirmative requirement on Charging Party Haro and his co-workers, in a hurried setting, to sign the CAASA waiver simply to maintain their statutory Section 7 rights, or forever lose them, interfered with Haro and his coworkers exercise of those statutory rights.

In summary, I find, the "opt-out" provision of the CAASA employment forms does not render the waiver of class and collective action voluntary; but, rather unlawfully burdens employees requiring them to prospectively trade away their statutory right to engage in collective or class actions, including litigation in any forum, that may arise in the future. I note the Board has long held employees may not be required to prospectively trade away their statutory rights. *Ishikawa Gasket American, Inc.,* 337 NLRB 175, 176 (2001).

Contrary to the Company's contention the Federal Arbitration Act (FAA) does not preclude a finding the CAASA waiver is invalid. The Board in *D. R. Horton, Inc.* concluded that finding restrictions on class or collective actions unlawful under the NLRA would not necessarily conflict with the FAA. The Board recognized it must be mindful of any conflicts between the terms or policies of the Act and those of other federal statues, including the FAA. The Board explained that where possible conflict exists, it is required, when possible, to undertake a "careful accommodation" of the two statues, citing, *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942). The Board concluded such accommodation does not mean that the Act must automatically yield to the FAA—or the other way around. The Board explained that when two Federal statues are capable of coexisting both should be given effect absent a clearly expressed congressional intent to the contrary. The Board in *D. R. Horton, Inc.* noted arbitration agreements may be invalidated, in whole or in part, for any grounds that exist at law or in equity for the revocation of any contract, including that the agreement is contrary to public policy. The Board in *D. R. Horton, Inc.,* held that if it considered the policies underlying the FAA and the NLRA as part of the balancing test required to determine if a term of a contract is against public policy and invalid under section 2 of the FAA; or, as a part of the accommodation analysis required in *Southern Steamship,* its conclusion would be the same; that an employer violates the NLRA by requiring employees, as a condition of employment, to waiver their right to pursue collective redress in both judicial and arbitral forums and it also accommodates policies underlying both the NLRA and the FAA to the greatest extent possible. In summary on this point, the FAA does not preclude a finding that, the wavier here is invalid.

The Company contends two Supreme Court cases decided after *D. R. Horton, Inc.,* are controlling and that the waiver here must be found valid. One case, *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304 (2013), involved merchants who accepted American Express cards and in their agreement with American Express agreed to arbitrate disputes arising between them and American Express and further precluded any claims from being arbitrated on a class action basis. The merchants, nonetheless, filed a class action suit against American Express contending their agreement with American Express violated federal antitrust statues. The merchants contended waiving class arbitration made their agreement with American Express invalid and unenforceable because the cost of individually arbitrating a Federal statutory claim would exceed any potential recovery. In response to the merchant's suit, American Express moved to enforce the individual arbitration agreement terms pursuant to provisions of the FAA. The Supreme Court rejected the merchants' position and held arbitration is a matter of contract agreement between the parties and the FAA precludes courts from invalidating a contractual waiver of class arbitration simply because the cost of individually arbitrating a Federal statutory claim exceeds any potential recovery.

The other case the Company relies on; *CompuCredit Corp v. Greenwood* 132 S.Ct 665, 669 (2012), involved actions brought by consumers against the marketer of credit cards and the issuing bank, alleging fees that were charged in connection with the credit cards violated the Federal Credit Repair Organization Act (CROA). The Court held that CROA provisions requiring credit repair organizations to disclose to consumers their right to sue for violations of CROA and prohibiting waiver of that right did not preclude enforcement of the arbitration agreement the parties had also executed. The Supreme Court held the FAA required the parties' arbitration agreement to be enforced according to its terms. The court specifically concluded that even when the claims at issue are Federal statutory claims, the FAA's mandate can not be overridden unless "overridden by a contrary congressional command." The Company here argues there is no such "command" in the NLRA and the Board has no authority to declare the arbitration agreement here invalid.

The two Supreme Court cases above address consumer rights and contract language, and, in my opinion, have absolutely nothing to do with unilaterally imposed arbitration agreements in the context of employee—employer relationships. The cases do not discuss how, if at all, the FAA may be applied to alter, by private arbitration agreements, the core substantive rights protected by the NLRA which are the foundation on which the NLRA and all Federal labor law rests. It goes without saying the core issue before me is whether the Company may, by private arbitration agreement imposed on its employees, restrict the right of its employees to engage in concerted or class activities recognized and protected by Section 7 of the Act. I have elsewhere here concluded the Company can not lawfully do so and nothing in the subsequent Supreme Court decisions compels a different conclusion than I make.

Did the Company, as alleged in the complaint, violate Section 8(a)(1) of the Act when it enforced the arbitration provisions by asserting them in litigation brought against it by Charging Party Haro in *Gerardo Haro Guadarrama v. Nijjar Realty et al* by filing a petition to compel Haro and other plaintiffs to individually arbitrate their class wide wage and hour claims against the Company? The answer is clearly yes.

The Company asserts, in its post trial brief, Haro was not engaging in "protected concerted activity" when he filed his litigation in *Gerardo Haro Guadarrama v. Nijjar Realty et al*. The Company asserts Haro was not involved in any group action when he filed his class action lawsuit because, as he testified, he did not even know what a class action lawsuit was, and, did not seek the support of others before filing the suit. The Company's arguments are without merit. The Board in *D. R. Horton Inc.,* held that filing a class action is protected concerted activity. The Board in so holding relied on *Meyers Industries,* 281 NLRB 882, 887 (1986) for the proposition that the actions of a single employee, such as Haro here, are protected, if the employee "seek[s] to initiate or to induce or to prepare for group action." *D. R. Horton, Inc.,* slip op. at 4. The Board further held "an individual who files a class or collective action . . .in court . . .seeks to initiate or induce group action and is engaged in conduct protected by Section 7." The . . . fact Charging Party Haro may not have understood all the ramifications of a class action lawsuit, or even what constituted a class action suit is not controlling. Haro and various coworkers discussed the lawsuit after it was filed. The filing of a class action lawsuit to address wages, hours, and other terms and conditions of employment,

as was the case here, constitutes protected activity, unless done with malice or in bad faith of which there is none demonstrated here.

I find the Company's action of filing its petition to compel Haro and his coworkers to individually arbitrate their classwide wage and hour claims violated Section 8(a)(1) of the Act

CONCLUSIONS OF LAW

1. The Company, Nijjar Realty, Inc., d/b/a Pama Management is, and has been, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. By maintaining mandatory requirements in its employment applications, Comprehensive Agreement and Applicant's Statement of Agreement (CAASA), that waives the right of its employees to maintain class of collective actions in all forums, judicial or arbitral, the Company 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.

3. By enforcing the arbitration provisions set forth in the Comprehensive Agreement and Applicant's Statement and Agreement by asserting them in litigation brought against the Company in *Gerardo Haro Guadarrama v. Nijjar Realty, Inc. et al* by filing a petition to compel plaintiffs to individually arbitrate their class wide wage and hour claims against the Company, the Company 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.

REMEDY

Having found the Company has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative actions designated to effectuate the policies of the Act.

I recommend the Company be ordered to rescind, modify or revise its Comprehensive Agreement and Applicant's Statement of Agreement (CAASA) to clearly inform its employees that the agreement does not constitute a waiver in all forums of their right to maintain employment-related class or collective actions and notify its employees the CAASA forms have been rescinded, modified or revised and provide a copy of the modified or revised agreements to all employees. If the Company has ceased using the CAASA forms it is to review each employee's personnel file, and remove any CAASA documents remaining in the personnel files of its employees and destroy the documents. The Company shall timely notify each employee of the removable and destruction of the CAASA forms.

I recommend the Company be required to reimburse Charging Party Haro for any litigation and related expenses, with interest, todate and in the future, directly related to the Company's filing its petition (*Gerardo Haro Guadarrama v. Nijjar Realty, Inc., et al)* in the Superior Court of California, Los Angeles County. Determining the applicable rate of interest on the reimbursement will be as outlined in *New Horizons for the Retarded*, 283 NLRB 1173

(1987), (adopting the Internal Revenue Service rate for underpayment of Federal taxes). Interest on all amounts due to Charging Party Haro shall be computed on a daily bases as prescribed in *Kentucky River Medical Center*, 356 NLRB 8 (2010),. This remedy is specifically to include any direct legal and other expenses incurred with respect to any State court ordered individual arbitration proceedings. See *Federal Security Inc*., 359 NLRB No. 1, slip op at 14 (2012).

I recommend the Company be required to, upon request, file a joint motion with Charging Party Haro to vacate the State Court Order compelling arbitration, if a motion to vacate can still be timely filed, that the Superior Court of California, Los Angeles County, (*Gerardo Haro Guadarrama v. Nijjar Realty, Inc. et al)* issued on March 6, 2013. See *Federal Security Inc*. supra.

I lack authority to direct the Superior Court of California to vacate its Order; however, the Government has other venues in which it may seek such relief.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Company, Nijjar Realty, Inc. d/b/a Pama Management, El Monte, California, it officers, agents, successors, and assigns, shall

1. Cease and desist form

(a) Maintaining mandatory requirements in its employment application documents, Comprehensive Agreement and Applicant's Statement of Agreement (CAASA) forms, that waives employees' right to maintain class or collective actions in all forums; arbitral and judicial.

(b) Enforcing such agreements by filing petition(s) in any court to compel individual arbitration, pursuant to the terms of the CAASA forms.

(c) In any like or related manner, interfering with, restraining or coercing employees in the exercise of their right under the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Within 7 calendar days after the Board enters its Decision, upon request of Charging Party Haro, file with the Superior Court of California Los Angeles County in *Gerardo Haro Guadarrama v. Nijjar Realty, Inc. et al,* a motion to withdraw its petition to

[6] If no exceptions are filed provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 201.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

compel individual arbitration pursuant to the terms of the CAASA documents and to request the Superior Court vacate its Order of March 6, 2013, compelling arbitration, if such a motion to vacate can still be timely filed.

(b) Reimburse Charging Party Haro for all legal and other expenses incurred in defending the Superior Court of California, Los Angeles petition filed by the Company in *Gerardo Haro Guadarrama v. Nijjar Realty, Inc. et al* including all expenses incurred related to the court's order compelling arbitration to date, and in the future, with interest as described in the remedy section of this decision.

(c) Rescind, modify or revise the Comprehensive Agreement and Applicant's Statement of Agreement to ensure its employees that the CAASA forms do not contain or constitute a waiver in all forums of their right to maintain employment-related class or collective actions.

(d) Notify its employees of the rescinded, modified or revised CAASA forms and provide a copy of the modified or revised CAASA forms to each employee and notified each employee that the original CAASA forms have been removed from their personnel records and destroyed.

(e) Within 14 days after service by the Region, post at its El Monte, California facility, as well as all its California locations, copies of the notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Company's authorized representative, shall be posted by the Company and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as email, posting on an intranet or an internet site, or other electronic means, if the Company customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Company at any time since April 26, 2012.

Dated at Washington, D.C., December 4, 2013.

William Nelson Cates
Administrative Law Judge

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce our Comprehensive Agreement and Applicant's Statement of Agreement (CAASA) forms that waives employees' right to maintain class or collective action in all forums, arbitral and judicial.

WE WILL NOT enforce or attempt to enforce such agreements by filing a petition(s) in any court to compel you to individually arbitrate your wage and hour and other collective action lawsuits or arbitrations.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce employees in the exercise of their rights under the Act.

WE WILL within 7 days after the Board Order, upon request of Charging Party Haro, file a joint motion to vacate the State Court Order issued on March 6, 2013, if such a motion can still be timely filed, in *Gerardo Haro Guadarrama v. Nijjar Realty, Inc. et al Case number BC487199*.

WE WILL reimburse Charging Party Haro any legal and other expenses incurred related to our motion to compel arbitration or any other legal or arbitration action related to that motion, plus interest, as described in the remedy section of this decision.

WE WILL rescind, modify or revise our Comprehensive Agreement and Applicant's Statement of Agreement forms to make it clear to our employees that our CAASA forms do not constitute a waiver in all forums of your right to maintain employment-related class or collective actions.

WE WILL notify our employees we have rescinded, modified or revised our CAASA forms and provide each a copy of the revised or modified CAASA forms.

NIJJAR REALTY, INC.,
d/b/a PAMA MANAGEMENT
(Employer)

Dated: _____ **By _____**
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

888 South Figueroa Street, 9th Floor, Los Angeles, California 90017-5449
(213) 894-5200, Hours: 8:30 a.m. to 5:00 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (213) 894-5184