**THE UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**DIVISION OF JUDGES**
**SAN FRANCISCO BRANCH OFFICE**

**COVENANT CARE CALIFORNIA, LLC**
**and COVENANT CARE LA JOLLA, LLC**

**and** **Case 21-CA-090894**

**LERMA VERA, an Individual**

**Robert MacKay, Esq., Oakland, CA**
**for the General Counsel**
**Ross H. Friedman, Esq., Morgan,**
**Lewis & Brocius, LLP, Chicago, IL**
**for the Respondents**
**Lee R. Feldman, Esq., The Feldman**
**Law Firm, Los Angeles, CA,**
**for the Charging Party**

## DECISION

## Statement of the Case

**Gerald A. Wacknov, Administrative Law Judge:** This matter is based on a stipulated record. The initial charge in this matter was filed on October 9, 2012. Since the submission of this matter to me on July 15, 2013, briefs have been received on about August 21, 2013 from Counsel for the General Counsel (General Counsel), and counsel for the Respondents. Upon the stipulated record, and in consideration of the briefs submitted, I make the following:

## Findings of Fact

### I. Jurisdiction

At all material times Respondent Covenant Care California, LLC and Respondent Covenant Care La Jolla, LLC have been California corporations with places of business located in Aliso Viejo, California and La Jolla, California, respectively, and are engaged in operating skilled-nursing and rehabilitation centers. In the conduct of their business operations each Respondent annually derives gross revenues in excess of $250,000 and purchases and receives goods valued in excess of $5,000 directly from points outside California. It is admitted

and I find that each Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the National Labor Relations Act (Act), and a health care institution within the meaning of Section 2(14) of the Act.

## II. Alleged Unfair Labor Practices

### A. Issues

The principal issues in this proceeding are whether the Respondent has violated and is violating Section 8(a)(1) of the Act by maintaining a dispute resolution agreement, entitled Mutual Arbitration Agreement (Agreement), requiring individual mandatory arbitration and precluding employees from engaging in concerted activity by filing collective class actions; by attempting to enforce the Agreement in state court litigation; and by including language in the Agreement that restricts employees from disclosing the matters concerning arbitration proceedings with other individuals.

### B. Facts

The facts are not in dispute. The stipulation of facts entered into by the parties to this proceeding, together with the Agreement and other accompanying exhibits, in pertinent part, are as follows: Lerma Vera, the Charging Party, a former employee of the Respondents, worked for the Respondents until August 1, 2011, and was required to sign the Agreement as a condition of employment with the Respondents at the La Jolla, California facility on or about September 11, 2008. The Agreement by its terms requires employees to resolve all current and future employment-related disputes exclusively through individual arbitration proceedings, and to keep confidential the existence, content, and outcome of all arbitration proceedings. The Agreement provides that it should not be interpreted to restrict the filing of charges or complaints with the National Labor Relations Board or any other federal, state or local administrative agency. At all material times, and since at least April 10, 2012, signing the Agreement has been a required condition of employment for Respondents' employees. Since at least September 7, 2012, Respondents have enforced provisions of the Agreement by moving to compel arbitration and to dismiss or stay state court proceedings in a class-action wage-and-hour complaint filed by Vera. Respondents' foregoing motion was litigated in the Superior Court of California, County of San Diego, and was granted by the Court on February 5, 2013. The court's determination is currently upon appeal.

### Analysis and Conclusions

*D.R. Horton, Inc.,* 357 NLRB No, 184 (2012) is the controlling Board decision in this matter. It is currently pending review before the Fifth Circuit Court of Appeals, having been argued on February 5, 2013. While the Respondent maintains that *D. R Horton* was wrongly decided, I am required to follow it unless reversed by the Supreme Court. *Waco, Inc.,* 273 NLRB 746, 749 fn. 14 (1984); *Los Angeles New Hosp.*, 244 NLRB 960, 962 fn. 4 (1979), enforced 640 F2d 1017 (9th Cir. 1981); *Pathmark Stores, Inc*., 342 NLRB 378, fn. 1(2004).

The Board determined in *D. R. Horton* that as a condition of employment "employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in all forums arbitral and judicial." 357 NLRB No. 184, slip op. at p. 12 (2012). As the Respondent has stipulated herein, the Agreement does precisely that.[1] Accordingly, the Agreement is facially unlawful.

The complaint also alleges that the Agreement interferes with employees Section 7 right to share and discuss wages, hour and other terms and conditions of employment with each other.[2] The Respondent argues that the language only applies to the actual proceedings before the arbitrator, and does not restrict employees from discussing issues underlying the arbitration, such as wage and hour matters. However, the actual proceedings before the arbitrator and the result of the arbitration, I find, are relevant matters which employees are entitled to collectively discuss and evaluate before bringing individual arbitration claims on their own behalf. Accordingly, I find this restriction is unlawful as alleged. Double Eagle Hotel & Casino, 341 NLRB 112, 114-115 (2004), enfd. 414 F. 3rd 1249 (10th Cir. 2005), cert denied 546 U.S. 1170 (2006); Phoenix Transit System, 337 NLRB 510 (2002), enfd. per curiam, 63 F. App'x 524 (D.C. Cir. 2003).

The Respondent maintains the charge is time-barred by Section 10(b) of the Act, having been filed more than six months after September 11, 2008, the date Vera was required to sign the Agreement. Because, the Agreement is facially invalid, currently remains in effect, and, in addition, the Respondents are currently attempting to enforce it against Vera before the San Diego County Superior Court, it is clear that the charge is not time-barred. *Control Services*, 305 NLRB 435, 435 fn. 2, 442 (1991), enfd. mem. 961 F2d 1568 (3rd Cir. 1992); *The Guard Publishing Co.,* 351 NLRB 1110, 1110 fn.2 (2007). Cf*. Local Lodge No. 1424 v. NLRB*, 362 U.S. 411 (1960).

The Respondent maintains that the complaint is barred by the First Amendment to the extent it seeks to prevent the Respondent from petitioning a state court to dismiss Vera's class-action wage-and-hour suit. The Board has determined that the Agreement is facially invalid and unlawful. Accordingly, a Board order requiring the Respondent to withdraw its opposition to Vera's claim in state court is compatible with established precedent*. Bill Johnson's Restaurants,* 461 U.S. 731, 737, fn. 5 (1983); *Loehmann's Plaza,* 305 NLRB 663, 671 (1991*); Federal Security, Inc.,* 336 NLRB 703 (2001), remanded on other grounds, 202 WL31234984 (D.C. Cir. 2002).

The Respondent maintains the Agreement is not unlawful because it specifically permits employees to file charges or complaints with other administrative agencies. The gravamen of the violation herein is the restriction of employee's rights to engage in concerted activity by, as a condition of employment, collectively pursuing litigation of employment claims in all forums arbitral and judicial. Here, the Respondent is attempting to limit those rights by permitting only charges or complaints before administrative agencies. I find the Respondent's argument to be without merit.

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[1] The Agreement expressly provides: "In exchange and consideration of your continuing employment, you and Covenant agree to resolve any and all claims arising out of or relating to your employment application or candidacy for employment, or if hired, any claim related to your employment or employment termination, to final and binding arbitration before a neutral arbitrator."

[2] The Agreement provides as follows: "The proceedings before the arbitrator and any award or remedy shall be of a private nature and kept confidential."

The Respondent maintains the Board did not have the authority to decide *D. R. Horton* due to the recess appointment issue regarding the composition of the Board. *See Noel Canning V. NLRB*, 705 F.3d 490, 2013 WL 276024 (D.C. Cir. Jan. 25, 2013). This matter is currently being litigated in other forums. The Board has noted that that until the matter is ultimately decided it shall continue to fulfill its responsibilities under the Act. *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. 1, fn. 1(March 13, 2013).

## Conclusions of Law and Recommendations

1. The Respondents are employers engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and health care institutions within the meaning of Section 2(14) of the Act.

2. The Respondents have violated Section 8(a) (1) of the Act as alleged.

## The Remedy

Having found that the Respondents have engaged in certain unfair labor practices, I recommend that they be required to cease and desist therefrom and from in any other like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act. It is also recommended that the Respondents reimburse Vera for attorney fees and litigation expenses directly related to opposing the Respondents' unlawful petition to compel individual arbitration. See *Bill Johnson's Restaurants*, supra, at 747. I shall also recommend the posting of an appropriate notice, attached hereto as "Appendix," at the locations where the Agreement has been in effect.

## ORDER[3]

The Respondents, Covenant Care California, LLC and Covenant Care La Jolla, LLC, their officers, agents, successors, and assigns, shall:

1. Cease and desist from:

   (a) Maintaining the Mutual Arbitration Agreement that requires employees to waive their right to maintain class or collective action in all forums, whether arbitral or judicial.

   (b) Maintaining a provision in the Mutual Arbitration Agreement that restricts the right of employees to share information regarding arbitration proceedings.

   (c) Restricting the right of employees to engage in concerted activity by

[3] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

attempting to enforce unlawful arbitration agreements in judicial forums.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action, which is necessary to effectuate the purposes of the Act:

(a) Rescind or revise the Mutual Arbitration Agreement that requires employees to waive their right to maintain class or collective action in all forums, whether arbitral or judicial.

(b) Advise all employees, by all means that employees are customarily advised of matters pertaining to their terms and conditions of employment, that the Agreement has been rescinded or revised and that employees are no longer prohibited from bringing and participating in class action lawsuits against the Respondents.

(c) Withdraw all objections filed in judicial forums to the right of employees to engage in class or collective action, and reimburse the Charging Party for attorney fees and litigation expenses directly related to opposing the Respondents' unlawful petition to compel individual arbitration.

(d) Within 14 days after service by the Region, post at all locations where notices to employees are customarily posted, and transmit to employees by all means that employees are customarily advised of matters pertaining to their terms and conditions of employment, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 21, after being duly signed by Respondents' representative(s), shall be posted and electronically transmitted to employees immediately upon receipt thereof, and shall remain posted for 60 consecutive days thereafter. Reasonable steps shall be taken by Respondent to ensure that the posted notices are not altered, defaced, or covered by any other material.

(e) Within 21 days after service by the Regional Office, file with the Regional Director for Region 21 sworn certifications of responsible officials on forms provided by the Region attesting to the steps that Respondents have taken to comply.

Dated at Washington, D.C. December 20, 2013

Gerald A. Wacknov
Administrative Law Judge

**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

WE WILL NOT maintain a mandatory arbitration agreement that waives the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT maintain an arbitration agreement that restricts the right of employees to share information regarding arbitration proceedings.

WE WILL rescind or revise the aforementioned arbitration agreement to make it clear to employees that the agreement does not constitute a waiver of their right in all forums to maintain class or collective actions.

WILL NOT interfere with the right of employees to engage in concerted activity by attempting to enforce unlawful arbitration agreements in judicial forums and WE WILL withdraw all objections thereto.

WE WILL notify employees of the rescinded or revised agreement, including providing them with a copy of the revised agreement or specific notification that the agreement has been rescinded.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

**COVENANT CARE CALIFORNIA, LLC and**
**COVENANT CARE LA JOLLA, LLC**

_____
(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, CA 90017-5449
(213) 894-5200, Hours: 8:30 a.m. to 5 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.