UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

KMART CORPORATION, A SUBSIDIARY OF SEARS HOLDINGS CORPORATION,

Respondent **Case 06-CA-091823**

and

RONALD DANIELS, an INDIVIDUAL,

Charging Party.

SEARS HOLDINGS CORPORATION,

Respondent

Case 06-CA-100022

and

RONALD DANIELS, an INDIVIDUAL,

Charging Party.

RESPONDENT'S BRIEF IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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Dated: December 20, 2013

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I. INTRODUCTION

Respondent Kmart Corporation ("Kmart" or "Respondent")[1] submits this brief in support of its exceptions to the decision of Administrative Law Judge ("ALJ") David Goldman, dated November 19, 2013.[2] The ALJ found that Respondent's Arbitration Policy/Agreement ("Agreement") violates the Act based on an audacious expansion of the Board's position in *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012). The Board should reverse the ALJ's decision on this issue and should dismiss the complaint, for the following reasons.

The ALJ's decision was rendered prior to the Fifth Circuit's decision denying enforcement of the Board's order in *D. R. Horton*. *D. R. Horton, Inc. v. NLRB*, --- F.3d ---, 2013 WL 6231617 (5th Cir. Dec. 3, 2013). The Fifth Circuit found that the Board failed to properly accommodate the NLRA and the Federal Arbitration Act ("FAA"). *Id.* at *10-13. The Fifth Circuit noted that the Board is not entitled to any deference when it attempts to interpret statutes other than the NLRA or to accommodate such statutes with the Act. *Id.* at *8, *13 n.10. After conducting a proper accommodation of the NLRA and the FAA, the Fifth Circuit concluded that enforcing class and collective action waivers in arbitration agreements does not violate the NLRA. *Id.* at *13-14.

Respondent urges the Board to accept the Fifth Circuit's decision and to reconsider its position as articulated in *D. R. Horton*. As the Fifth Circuit held, the FAA requires that arbitration agreements be enforced according to their terms. *Id.* at *10. The Supreme Court has

[1] Based on counsel for the General Counsel's failure to prove that Sears Holding Corporation is an employer within the meaning of the Act, the ALJ dismissed the complaint as it relates to Respondent Sears Holding Corporation. (ALJD 4:14-19).

[2] References to the ALJ's Decision will appear as "ALJD _X:Y" where the X represents the page number and the Y represents the line number. References to the parties' Joint Exhibits will appear as "Jt. Ex. __." References to the transcript of the hearing held in this case on June 18, 2013, will appear as "Tr. __." References to the General Counsel's exhibits admitted at the hearing will appear as "G.C. Ex. __." References to Respondent's exhibits admitted at the hearing will appear as "R. Ex. __."

repeatedly upheld the FAA's mandate and the strong federal policy favoring arbitration. As the Fifth recognized, "[i]n every case the Supreme Court has considered involving a statutory right that does not explicitly preclude arbitration, it has upheld the application of the FAA." *Id.* at *17 n.8. The Fifth Circuit found that the NLRA is no different.

There are two exceptions to the FAA's mandate that arbitration agreements be enforced according to their terms, and the NLRA does not meet either exception. First, the Fifth Circuit held that the FAA's savings clause is not a basis for invalidating an arbitration agreement based on the NLRA. Second, the Fifth Circuit held that the NLRA contains no congressional command that overrides the FAA. Quite to the contrary, the Board has acknowledged that arbitration is a "central pillar of Federal labor relations policy and in many different contexts the Board defers to the arbitration process both before and after the arbitrator issues an award." *Id.* at *12. In rejecting the Board's efforts "to distinguish the NLRA from all other statutes that have been found to give way to requirements of arbitration", the Fifth Circuit noted that "[e]very one of our sister circuits to consider the issue has either suggested or expressly stated that they would not defer to the NLRB's rationale and held arbitration agreements containing class waivers enforceable." *Id.* at *14.

If, however, the Board adheres to its position in *D. R. Horton* despite the Fifth Circuit's decision and the many other federal and state court decisions rejecting the Board's position, the ALJ still erred in finding a violation in this case. Unlike the agreement at issue in *D. R. Horton*, Respondent's Agreement affords employees the right to opt out of the Agreement and its class/collective action waiver, without any fear of retaliation. In fact, thousands of employees have exercised their right to opt out of the Agreement, including the Charging Party. The ALJ found that the right to opt out, no matter how thoroughly communicated, is *irrelevant* and found

a violation despite the undisputed evidence that thousands of Respondents' employees understood and exercised their right to opt out without any fear of reprisal.

The ALJ's decision extends far beyond the moorings of the Board's decision in *D. R. Horton*, which was clearly limited to arbitration agreements that are mandated as a condition of employment. The Board did not reach the "more difficult question" of whether an agreement that is not a condition of employment violates the Act. The ALJ disagreed with the Board's assessment, opining that this is "not a difficult case" and that his decision "quite obviously and inescapably" follows from the *D. R. Horton* decision. (ALJD 2:9-12, 10:29-33). However, as another ALJ remarked in a recent decision, if the question presented by an arbitration agreement with an opt out provision "were so simple" then "the Board's comment in *Horton* that voluntary agreements presented a 'more difficult question' would have to be considered gratuitous." *Bloomingdales, Inc.*, JD(SF)-29-13, slip op. at 10 (June 25, 2013).

The ALJ also erred in rejecting Respondent's defense under Section 10(b) of the Act. Even if the Board adheres to its position in *D. R. Horton*, the theory of violation in *D. R. Horton* depends on the circumstances in which the agreement was entered into – was it voluntary or was it a condition of employment? Therefore, in order for the Board to find a violation of the Act in this case, the Board must determine whether the Agreement was voluntarily entered into at the time an employee became bound by it. To the extent employees had the right to opt out of the Agreement outside of the Section 10(b) period and did not exercise that right, the charge is time-barred because it depends on a determination of whether the employee knowingly and voluntarily elected to become bound by the Agreement.

Lastly, the Regional Director did not have authority to issue and prosecute the complaint because the Board did not have a quorum at the time that the Regional Director was appointed.

For all of these reasons, Respondent respectfully requests that the Board dismiss the complaint in its entirety.

II. STATEMENT OF FACTS

A. Kmart's Arbitration Agreement.

1. The Agreement Is a Voluntary Agreement with an Opt Out Provision.

In April 2012, the Agreement was rolled out to all Kmart employees, except for employees who are governed by a collective bargaining agreement. (ALJD 4:23-25; Jt. Ex. 2 at p. 2; Jt. Ex. 3 at p. 2; Tr. 50; 56). The Agreement expressly states that "[a]rbitration is not a mandatory condition of Employee's employment at Company..." (Jt. Ex. 2 at p. 6). The Agreement informs employees, in conspicuous, plain language on the *first page* in bold type, that the Agreement has significant legal effects and that they should consider the entire document:

> **Accordingly, Associate should read this Agreement carefully, as it provides that virtually any dispute related to Associate's employment must be resolved only through binding arbitration. Arbitration replaces the right of both parties to go to court, including the right to have a jury decide the parties' claims. Also, this Agreement prohibits Associate and Company from filing, opting into, becoming a class member in, or recovering through a class action, collective action, representative action or similar proceeding.**

(Jt. Ex. 2 at p. 1). Further, the Agreement repeatedly and conspicuously informs employees both of the importance of the Agreement and that consent to arbitration is not mandatory. (Jt. Ex. 2 at pp. 1; 6-7). Again on the *very first page*, the Agreement states in bold type:

> **If Associate does not wish to be bound by the Agreement, Associate must opt out by following the steps outlined in this Agreement within 30 days of receipt of this Agreement. Failure to opt out within the 30-day period will demonstrate Associate's intention to be bound by this Agreement and Associate's agreement to arbitrate all disputes arising out of or related to Associate's employment as set forth below.**

(Jt. Ex. 2 at p. 1).

In short, employees are plainly informed, on the first page of the Agreement, of the legal significance of the Agreement and its class/collective action waiver, their right to opt out of the Agreement, the 30-day time period for opting out, and that a failure to opt out will demonstrate their consent to the Agreement.

The last page of the Agreement is the "Arbitration Policy/Agreement Opt Out Form" (the "Opt Out Form"), which again clearly states that employees have the right to opt out of the Agreement by returning the Opt Out Form within 30 days:

> **Arbitration Policy/Agreement Opt Out Form**
>
> I have reviewed the Arbitration Policy/Agreement, and I elect to opt out of the Arbitration Policy/Agreement. I understand that there will be no adverse employment action taken against me as a consequence of that decision. I understand that this completed Opt Out Form must be returned within 30 days, as provided in the Arbitration Policy/Agreement. The date of its return will be determined by the date of the postmark on the envelope in which the form is mailed. Alternatively, I may fax the form to the number indicated below, and the date of return will be determined by the date the form is faxed. I will retain a copy of the fax confirmation sheet.
>
> By timely returning this signed and completed Opt Out Form, I understand that the Arbitration Policy/Agreement will not apply to me or Company.

(Jt. Ex. 2 at p. 7). The importance of taking action, if an employee does not wish to be bound by the Agreement, is emphasized on page 6 of the Agreement, which states in bold type:

> **ACTION IS REQUIRED TO PROTECT YOUR LEGAL RIGHTS TO SUE COMPANY IN COURT AND/OR TO PARTICIPATE IN ANY WAY IN A CLASS ACTION, COLLECTIVE ACTION, OR PRIVATE ATTORNEY GENERAL ACTION.**

(Jt. Ex. 2 at p. 6). To further underscore the importance of the Agreement, employees are informed of their right to seek counsel regarding the Agreement: "Employee has the right to

consult with counsel of Employee's choice concerning how this Agreement affects Employee's rights." (Jt. Ex. 2 at p. 6).

2. The Agreement Does Not Preclude Employees from Filing Unfair Labor Practice Charges.

As the ALJ found, the Agreement "expressly excludes from its coverage the filing of charges with the Board and other agencies." (ALJD at 6 n.6; Jt. Ex. 2 at p. 2). Under the heading "What Is Not Covered By This Agreement", the Agreement states as follows:

> This Agreement does not apply to claims for workers compensation, state disability insurance and unemployment insurance benefits. This Agreement also **does not preclude Associate from filing a claim or charge** with a federal, state or local administrative agency such as the Equal Employment Opportunity Commission, the U.S. Department of Labor, **or the National Labor Relations Board**. Further, nothing in this Agreement excuses either party from bringing an administrative claim before a state or federal agency in order to fulfill the party's obligation to exhaust administrative remedies before making a claim in arbitration.

(Jt. Ex. 2 at p. 2) (emphasis added).

3. The Agreement Clearly States That Employees Will Suffer No Retaliation If They Opt Out.

The Agreement, in multiple locations, clearly and unequivocally states that employees will suffer no retaliation if they choose to opt out of the Agreement or otherwise exercise their rights under the Agreement. Section 9 of the Agreement, entitled "Non-Retaliation", states as follows:

> **It is against Company policy for any Associate to be subject to retaliation** because he or she exercises his or her right to assert claims under this Agreement or participates in any way in an arbitration under this Agreement. If Associate believes that he or she has been retaliated against by anyone at Company, Associate should immediately report this by calling Human Resources at 1-888-88Sears or the Ethics Hotline at 1-800-8ASSIST (1-800-827-7478).

(Jt. Ex. 2 at p. 6) (emphasis added).

Then, under the heading "Associate's Right To Opt Out", the Agreement provides that "[a]n Associate who timely opts out as provided in this paragraph **will not be subject to any adverse employment action as a consequence of that decision** and may pursue available legal remedies without regard to this Agreement." (ALJD 5:25-28; Jt. Ex. 2 at p. 6) (emphasis added). This is also made clear in the text of the Opt Out Form, which provides: "I have reviewed the Arbitration Policy/Agreement, and I elect to opt out of the Arbitration Policy/Agreement. I understand that **there will be no adverse employment action taken against me as a consequence of that decision**." (Jt. Ex. 2 at p. 7) (emphasis added).

Thus, upon reading the Agreement, employees are assuaged of any concern that they will suffer any form of retaliation if they exercise their right to opt out.

4. The Agreement Includes Clear and Explicit Instructions About the Procedure for Opting Out.

The Agreement sets forth clear instructions regarding the steps employees must take in order to opt of the Agreement:

> [A]n Associate who does not wish to be bound by the terms of this Agreement may opt out by notifying Company in writing, using the "Arbitration Policy/Agreement Opt Out Form" ("Form") that is attached at the end of this Agreement. If Associate is unable to print it, Associate may also obtain a print-out of the form from Associate' Human Resources representative or manager. The Arbitration Policy/Agreement Opt Out Form must be signed, dated and include Employee ID number. To be effective, the completed Form must be returned to Sears Holdings Legal Intake, 3333 Beverly Road, B6-300A, Hoffman Estates, IL 60179 or fax number 847-286-4511 within thirty (30) days of Associate's receipt of this Agreement (the "Opt-Out Period"). Associate should retain the fax confirmation sheet.

(ALJD 5:21-25; Jt. Ex. 2 at p. 6).

Employees are allowed to submit the Opt Out Form during working hours. (Tr. 80). Employees are allowed to use Kmart fax machines and mailing materials in order to submit the Opt Out Form. (Tr. 53). At the Erie, Pennsylvania store, Human Resources Manager Karen Alward would mail the Opt Out Form on an employee's behalf if he/she so desired. (Tr. 31-33; 80).

B. Kmart's Process for Communicating the Agreement to Its Employees.

1. The Communication Plan for Kmart Employees Nationwide.

When the Agreement was implemented in April 2012, Kmart provided its managers with a communication plan and a list of Frequently Asked Questions ("FAQs") regarding the Agreement. (Jt. Ex. 3; Jt. Ex. 4; Tr. 72; 74-76). The communication plan included guidelines for managers to use in explaining the Agreement to employees, which included a discussion of the process for opting out of the Agreement. (Jt. Ex. 3 at pp. 2-3). The FAQs are also available on-line, on the policies and procedures page of Respondent's intranet. (Tr. 55-56). New hires are notified about the Agreement and the opportunity to opt out of the Agreement during the orientation process. (Tr. 57, 64).

The communication plan and FAQs explain that employees are required to review and acknowledge the Agreement through the My Personal Information ("MPI") portal. (Jt. Ex. 3; Jt. Ex. 4 at p. 1; Tr. 50-51). Each employee has a unique ID and password, which the employee is required to change every 90 days, in order to access the MPI portal. (Tr. 51; 62). The MPI portal is regularly used by employees to access their pay statement and tax information. (Tr. 51). Employees are allowed to use Respondent's computers during work hours to access the MPI portal. (Tr. 51).

When an employee enters the MPI portal to review the Agreement, he or she is brought to a page containing four additional links, labeled: (1) Arbitration Policy/Agreement (PDF); (2)

Arbitration Policy/Agreement (Text); (3) Opt Out Form Action is required to protect your legal rights to sue the Company in court and/or to participate in any way in a class action, collective action or representative action; and (4) Acknowledge receipt of the Arbitration Policy/Agreement. (Tr. 51-52). Employees are able to print out the Agreement and Opt Out Form using Respondent's computers and printers. (Tr. 53). After reviewing the Agreement and Opt Out Form, employees are asked to acknowledge their receipt of the Agreement by clicking on the "Acknowledge receipt of the Arbitration Policy/Agreement" link. (Tr. 52-53; 62-63; G.C. Ex. 4, Decl. of Roberta Kaselitz at ¶ 14 and Exhibit B).

Upon clicking on the Agreement acknowledgment link, employees receive the following message:

> By clicking below, I acknowledge that I have reviewed and agreed to the terms and conditions set forth in the Arbitration Policy/Agreement. I also understand that I may change my mind and opt out of the Agreement within 30 days of today's date by returning the Arbitration Policy/Agreement Opt Out form.

(Tr. 52-53; 62-63; G.C. Ex. 4, Decl. of Roberta Kaselitz at ¶ 15 and Exhibit B). To submit their acknowledgment, the employee is required to click the "yes" button on the screen prior to clicking the "submit" button. (Tr. 52-53; 62-63).

Human Resources representatives are available to answer questions from employees about the Agreement and/or Opt Out Form at all Kmart stores nationwide. (Tr. 56). Human Resources Consultants are also available by phone to answer questions from employees about the Agreement and/or Opt Out Form. (*Id*.) Employees also have the option of contacting a Region Human Resources Director or the Compliance Department with any questions about the Agreement. (*Id*.)

Once an employee completes the acknowledgment in the MPI portal, Respondent's Human Resources Management System, PeopleSoft, is automatically updated to reflect the

employee's receipt and acknowledgment of the Agreement. (Tr. 54; G.C. Ex. 4, Decl. of Roberta Kaselitz at ¶ 15). Respondent then obtains confirmation that the employee received and reviewed the Agreement, and the deadline for opting out is triggered from the date that the employee acknowledges reviewing the Agreement. (Tr. 54; G.C. Ex. 4, Decl. of Roberta Kaselitz at ¶ 18). An employee can opt out without ever acknowledging receipt of the Agreement by printing out and reviewing the Agreement in hard copy. (Tr. 31-33; 36; 80; G.C. Ex. 4 at. 6). If an employee neither acknowledges the Agreement nor opts out by the stated deadline (initially May 1, 2012), Respondent mails the employee a copy of the Agreement along with an Opt Out Form. (Tr. 54; G.C. Ex. 4, Decl. of Roberta Kaselitz at ¶ 21). The PeopleSoft system is updated to reflect that a copy of the Agreement has been sent to the employee. (Tr. 54; 57; G.C. Ex. 4, Decl. of Roberta Kaselitz at ¶ 21).

2. The Communication of the Agreement at the Erie Store.

Because the Charging Party was formerly employed at Kmart's Erie store, the record evidence focuses on the communication and implementation of the Agreement at the Erie store. The Charging Party was a supervisor (a Hard Lines Coach) at the Erie store. (Tr. 35; R. Ex. 3). He exercised his right to opt out of the Agreement. (Tr. 36).

The manager of the Erie store, Herb Thomas, communicated the Agreement to employees during approximately 20 meetings or "huddles." (Tr. 71-73; 83). When employees asked Mr. Thomas what he was going to do, Mr. Thomas responded that he had decided to opt out of the Agreement, "but it was their choice." (Tr. 73). The Human Resources Manager at the Erie store, Karen Alward, participated in some of these meetings/huddles. (Tr. 79; 83-84). When employees asked Ms. Alward what she was going to do, Ms. Alward responded that she had decided to opt out of the Agreement, but "that it would be entirely up to them as to what they want to do." (Tr. 79-80).

The FAQs were posted on the manager's message board in the Erie store, next to the employee lounges. (Tr. 71). A copy of the Agreement was also posted on the bulletin board near the employee lounges in the Erie store. (Tr. 28-29; 39). The Charging Party and another witness called by counsel for the General Counsel, Jennifer Palmer (a Sales Floor Associate), admitted that they saw a copy of the Agreement on the bulletin board near the employee lounges. (Tr. 28-29; 39).

Copies of the Agreement also were available to employees in the meeting/huddles when the Agreement was discussed. (Tr. 81-82). Ms. Alward prepared a list of all employees at the Erie store, in order to keep track of which employees she had spoken to about the Agreement. (Tr. 81-82; 84-87). In addition to speaking with employees, Ms. Alward provided them with a copy of the Agreement before crossing their names off the list. (*Id*.) Jennifer Palmer admitted that she was aware that Ms. Alward used this list to keep track of which employees had been notified about and given a copy of the Agreement. (Tr. 29-30).

All of counsel for the General Counsel's witnesses admitted to having knowledge of the Agreement. Michael Cain, a former Operations Manager at Kmart, admitted that Mr. Thomas and Ms. Alward spoke to him directly about the Agreement and provided him with a copy of the Opt Out Form; he admitted that he signed and submitted the Opt Out Form to Ms. Alward during that same interaction. (Tr. 11-13; 17). Megan Benninghoff, a Sales Associate, admitted that Ms. Alward spoke to her about the Agreement and subsequently provided her with a copy of the Agreement. (Tr. 31-33). Ms. Benninghoff signed and submitted the Opt Out Form to Ms. Alward, who forwarded the form to the Company's legal intake center for processing. (Tr. 31-33; 80). Jennifer Palmer admitted that during a meeting with Ms. Alward regarding an unrelated matter, Ms. Alward explained the Agreement to her and identified the Opt Out Form

attached to the Agreement. (Tr. 26-27). Ms. Palmer subsequently chose to opt out of the Agreement. (Tr. 28; 30). Finally, the Charging Party admitted that managers Ken Bush and Herb Thomas directly provided him with a copy of the Agreement. (Tr. 36). The Charging Party also chose to opt out of the Agreement. (*Id.*)

3. Thousands of Kmart Employees Have Opted Out of the Agreement.

Over 8,500 active, hourly Kmart employees nationwide, as of May 28, 2013, have opted out of the Agreement. (ALJD 5:45-50; Jt. Ex. 1). This represents over 10% of all active Kmart hourly employees who are potentially subject to the Agreement, including those who have not yet acknowledged receipt of the Agreement. (ALJD 5:45-50). If expressed as a percentage of the approximately 54,074 active hourly employees who have acknowledged receipt of the Agreement (but may still be in the 30-day opt out period), the percentage is even higher. (ALJD 5:47-50). Approximately 14% of the 62,599 employees who are in the Opt Out and Completed categories have elected to opt out of the Agreement. (ALJD 6:2-4; Jt. Ex. 1).

At the Erie store, 62% of all active, hourly employees (including those who have not yet acknowledged receipt of the Agreement) have opted out of the Agreement. (J. Ex. 1). All of counsel for the General Counsel's witnesses (Megan Benninghoff, Michael Cain, Jennifer Palmer, and the Charging Party) testified that they made their own independent decision to opt out of the Agreement. (Tr. 17; 22; 30; 33; 36).

Both the Charging Party and Mr. Cain, who were former supervisors at the Erie store, testified that they spoke with 20 to 30 employees about the Agreement. (Tr. 16-18; 37). The Charging Party told employees that he had chosen to opt out of the Agreement. (Tr. 36; 40). In addition, the Charging Party admitted that he "may have told them" that it was "in their best interest to opt out." (Tr. 41).

C. The Charging Party's Prior Unfair Labor Practice Charge Relating to His Termination Was Dismissed.

The Charging Party and Mr. Cain each filed prior unfair labor practice charges, alleging that they were terminated for advising employees to opt out of the Agreement. (R. Exs. 1-3; Tr. 23-25; 37-38; 41). The Regional Director dismissed both of their charges, reasoning as follows:

> While [Charging Party] spoke to employees and suggested to them that they opt out of the Employer's arbitration agreement, the investigation revealed that the Employer did not instruct or encourage [Charging Party] to distribute or promote its arbitration agreement nor did it ask [Charging Party] to instruct employees to not opt out of the agreement. Furthermore, the investigation failed to establish a nexus between [Charging Party]'s conduct in speaking to employees about the arbitration agreement and his termination. Rather, it appears that [Charging Party] was terminated for allowing the unsafe operation of a forklift which was observed by an OSHA investigator. Under these circumstances, it cannot be established that the Employer violated the Act, as alleged.

(R. Exs. 1; 3). The Charging Party and Mr. Cain each filed an appeal of the dismissal of their charges. (R. Ex. 2; Tr. 2425). Their appeals were denied. (R. Ex. 2; Tr. 25).

III. ARGUMENT

A. The Board Should Accept the Fifth Circuit's Decision and Reverse Its Position in *D. R. Horton*.

The ALJ rejected the Respondent's argument that *D. R. Horton* should be overruled because "it represents current Board precedent that I must follow." (ALJD at 6 n.8). Two weeks after the ALJ issued his decision, the Fifth Circuit denied enforcement of the Board's decision and order in *D. R. Horton*. *D. R. Horton, Inc. v. NLRB*, --- F.3d ---, 2013 WL 6231617 (5th Cir. 2013). The Fifth Circuit rejected the three central propositions of *D. R. Horton*: (1) that the right to pursue class or collective action litigation is a substantive right; (2) that the Board's decision does not conflict with the Supreme Court's recent precedent holding that arbitration agreements with class and collective action waivers are lawful and enforceable under the FAA;

and (3) that the Section 7 right to engage in concerted activity trumps the FAA's liberal policy favoring arbitration.

First, the Fifth Circuit held that, in accordance with decades of Supreme Court precedent, the right to participate in class and collective actions is not substantive right. *D. R. Horton , Inc. v. NLRB*, 2013 WL 6231617, at *9. Rather, it is a procedural right that can be waived. The court rejected the argument that the NLRA is *sui generis* in transforming this procedural right into a substantive one. *Id.*

Second, the Fifth Circuit rejected the argument that an arbitration agreement with a class and collective action waiver may be invalidated under the FAA's savings clause because such a waiver violates the NLRA. In making this argument, the Board attempted to distinguish the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), which held that a California statute prohibiting class action waivers in arbitration agreements did not fall within the FAA's savings clause. The Board attempted to distinguish *Concepcion* by arguing that *D. R. Horton* does not disfavor arbitration because it only requires that employees have access to class or collective action proceedings, whether in a judicial or arbitral forum. The Fifth Circuit rejected this argument because, like the statute in *Concepcion*, the Board's interpretation of the NLRA in *D. R. Horton* disfavors arbitration. *D. R. Horton , Inc. v. NLRB*, 2013 WL 6231617, at *11. As the Supreme Court held in *Concepcion*, requiring the availability of class or collective actions "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *Id.* at *10 (citing *Concepcion*, 131 S. Ct. at 1748). Therefore, the FAA's savings clause does not apply because "[r]equiring a class mechanism is an actual impediment to arbitration and violates the FAA." *Id.* at *11.

Third, the Fifth Circuit held that the NLRA does not contain any congressional command that overrides the FAA. *Id.* at *11-14. The Fifth Circuit reviewed the text, legislative history, and purpose of the NLRA for any contrary congressional command and found none. *Id.* at *11-13. There is no inherent conflict between the FAA and NLRA because, as the court observed, arbitration is a "central pillar of Federal labor relations policy and in many different contexts the Board defers to the arbitration process both before and after the arbitrator issues an award." *Id.* at *12. Nor can a conflict be found because class and collective actions provide employees with greater bargaining power. "Mere inequality in bargaining power … is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." *Id.* at *13 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991)).

Accordingly, the Fifth Circuit held that the NLRA does not override the FAA's strong federal policy favoring the enforcement of arbitration agreements. The Fifth Circuit's decision is consistent with the many other federal and state court decisions rejecting *D. R. Horton*, including the Second, Eighth, and Ninth Circuits. *See Richards v. Ernst & Young, LLP*, ---F.3d---, 2013 WL 6405045 (9th Cir. Dec. 9, 2013); *Raniere v. Citigroup, Inc.*, ---F. App'x---, 2013 WL 4046278 (2d Cir. Aug. 12, 2013) (summary order); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013); *Owen v. Bristol Care*, 702 F.3d 1050 (8th Cir. 2013).[3]

1. The Board Should Accept the Fifth Circuit's Decision Because It Involves an Accommodation of the NLRA to the FAA and Other Federal Statutes.

Although the Board generally does not acquiesce to circuit court decisions that conflict with the Board's interpretation of the NLRA, *see, e.g.*, *Arvin Indus, Inc.*, 285 NLRB 753, 757

[3] The Fifth Circuit declined to consider whether *D. R. Horton* was invalidly issued because Member Becker's recess appointment was unconstitutional. *NLRB v. D. R. Horton, Inc.*, ---F.3d---, 2013 WL 6231617, at *2 (5th Cir. Dec. 3, 2013). Noting the D.C. Circuit's holding in *Noel Canning v. NLRB*, 705 F.3d. 490 (D.C. Cir. 2013), the Fifth Circuit determined that it was not required to consider this constitutional issue. 2013 WL 6231617, at *3. Instead, the Fifth Circuit addressed the merits of the case and "le[ft] the constitutional issue for the Supreme Court." *Id.*

(1987), that policy of non-acquiescence is not applicable here. The Fifth Circuit did not quibble with the Board's interpretation of the NLRA. *D. R. Horton, Inc. v. NLRB*, 2013 WL 6231617, at *14 ("We do not deny the force of the Board's efforts to distinguish the NLRA from all other statutes that have been found to give way to requirements of arbitration."). Rather, the Fifth Circuit took issue with the Board's attempts to interpret the FAA and the Norris-LaGuardia Act, two statutes outside the Board's "interpretive ambit." *Id.* at *13 n.10 (rejecting the Board's interpretation of the Norris-LaGuardia Act and holding it is "undisputed" that the Norris-LaGuardia Act "is outside the Board's interpretive ambit").

It is well-established that the Board is not entitled to deference when it interprets other statutes or accommodates them to the NLRA. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002) ("[W]e have accordingly never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA."). The Board itself has acknowledged that it must be mindful of "any conflicts between the terms or policies of the Act and those of other federal statutes," and that when there is a conflict between the policies of the NLRA and another federal statute, the Board must undertake a "careful accommodation" of the two statutes. *D. R. Horton*, 357 NLRB No. 184, slip op. at 8 (citing *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942)). *See also Collyer Insulated Wire*, 192 NLRB 837, 840 (1971) ("[L]abor law as administered by the Board does not operate in a vacuum isolated from other parts of the Act, or, indeed, from other acts of Congress."); *Int'l Harvester Co.*, 138 NLRB 923, 927 (1962), *aff'd*, *Ramsey v. NLRB*, 327 F.2d 784 (7th Cir. 1964) (citing *Southern Steamship*: "the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives").

Because the Fifth Circuit's decision involves an accommodation of the NLRA to other federal statutes, the Board should defer to the Fifth Circuit's decision and reverse its position in *D. R. Horton*.

2. The Board Should Reconsider and Reverse Its Position in *D. R. Horton.*

The Board should reverse its position in *D. R. Horton* because it fails to properly accommodate the NLRA to the FAA. The Supreme Court has made clear that arbitration agreements with class/collective action waivers are enforceable under the FAA, unless another statute contains a congressional command to the contrary. As the Fifth Circuit held, the NLRA contains no such command. The Board's decision in *D. R. Horton* also rests on a flawed interpretation of the Norris-LaGuardia Act, a statute that the Board has no authority to interpret or enforce.

a. The NLRA Must Yield to the FAA and the Strong Federal Policy Favoring Arbitration of Employment Disputes.

The Board in *D. R. Horton* failed to give appropriate deference to the FAA and the strong federal policy favoring arbitration of employment disputes. Enacted in 1925 to combat the "judicial hostility to arbitration agreements," the FAA "place[s] arbitration agreements upon the same footing as other contracts," and incorporate[s] a "liberal federal policy favoring arbitration agreements." *Gilmer*, 500 U.S. at 24-25 (internal citations omitted). Although the Board in *D. R. Horton* recognized that it must make an accommodation between the NLRA and the FAA, the Board failed to properly apply Supreme Court precedent in making that accommodation. Consequently, the Board erred in holding that to the extent the FAA conflicts with the NLRA, "the FAA would have to yield." *D. R. Horton*, 357 NLRB slip op. at 12.

The Supreme Court has made it clear that arbitration agreements must be enforced according to their terms "unless FAA's mandate has been overridden by a contrary congressional

command." *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (internal quotations and citations omitted). *See also Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2309 (2013); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *D. R. Horton, Inc. v. NLRB*, 2013 WL 6231617; *Sutherland v. Ernst & Young*, 726 F.3d at 295.

In order to override the FAA, the "congressional command" must be clear. *CompuCredit Corp*, 132 S. Ct. at 670. When Congress intends to restrict the use of arbitration, it must do so "with a clarity that far exceeds" the generic language regarding the creation of causes of action found in many statutes. *Id.* at 672.

In reviewing the Board's decision in *D. R. Horton*, the Fifth Circuit correctly applied this Supreme Court precedent. The Fifth Circuit considered the NLRA, its legislative history, and its purpose in finding that the NLRA contains no congressional command to override the FAA. *D. R. Horton v. NLRB*, 2013 WL 6231617, at *12. As the Fifth Circuit held, "the text does not even mention arbitration." *Id.* at *12. "Even explicit procedures for collective actions will not override the FAA." *Id.* (citing *Gilmer*, 500 U.S. at 32).

The NLRA is much less explicit about the right to pursue claims on a class or collective action basis than the many other statutes that have been found to lack a congressional command to override the NLRA. Courts have found such a command to be lacking even when the statute explicitly authorizes an action by "one or more employees for and in behalf of himself or themselves or other employees similarly situated." *Sutherland v. Ernst & Young*, 726 F.3d at 296.

For example, in *Gilmer*, the Supreme Court enforced an agreement to arbitrate claims under the ADEA, even though the ADEA specifically provides for a right to a jury trial and further states: "Any person aggrieved may bring a civil action in any court of competent

jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter," 29 U.S.C. § 626(c)(1). *Gilmer*, 500 U.S. at 29 (rejecting argument that "arbitration is improper because it deprives claimants of the judicial forum provided for by the ADEA," because Congress "did not explicitly preclude arbitration or other nonjudicial resolution of claims").

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

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

In reaching the same result, the Second Circuit found it "untenable to contend that compulsory arbitration conflicts with the [Civil Rights] Act's provision for the right to a jury trial," even though there was "express language in the legislative history that suggests a

congressional purpose to preclude mandatory arbitration of Title VII claims." *Desiderio v. NASD, Inc.*, 191 F.3d 198, 205 (2d Cir. 1999). As the court concluded, "we assume, as does the Supreme Court, that the drafters of Title VII and the amendments introduced in the Act were well aware of what language was required for Congress to evince an intent to preclude a waiver of judicial remedies. In construing Title VII, the absence of that language is a meaningful omission." *Id*.

These employment law cases are also consistent with the Supreme Court's accommodation of other statutes with the FAA. For example, in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987), the Court found that nothing in the text, history, or purpose of the Securities Exchange Act of 1934 demonstrated a sufficiently clear congressional intent to override the FAA's mandate in favor of arbitration, even though the statute provides that "[t]he district courts of the United States . . . shall have exclusive jurisdiction of violations of this title . . . , and of all suits in equity and actions at law brought to enforce any liability or duty created by this title…." *Id.* at 227-28; 15 U.S.C. § 78aa (emphasis added).

The Court reached the same result with respect to the Racketeering Influenced Corrupt Organizations Act ("RICO"), which provides that any person injured by a violation of the statute "may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit," 18 U.S.C. § 1964(c) (emphasis added). *McMahon*, 482 U.S. at 239-42. By contrast, the NLRA says nothing about access to any particular forum or procedure for pursuing non-NLRA claims.

More recently, in *CompuCredit*, the Court addressed the Credit Repair Organizations Act ("CROA"), which requires covered organizations to inform customers of their "right to sue" and contains an express "anti-waiver" provision that prohibits requiring consumers to waive any

rights under the statute. 15 U.S.C. § 1679f(a). The Supreme Court reversed a lower court's conclusions that (1) the statute gave consumers the right to bring an action in a court of law, and therefore (2) the "anti-waiver" provision precluded an arbitration agreement waiving that right. 132 S. Ct. at 668-75. In doing so, the Supreme Court laid out the "contrary congressional command" analysis and held that a statute that simply speaks in terms of available court proceedings—using terms like action, class action, or court—does not signify congressional intent to preclude arbitration. "If the mere formulation of the cause of action in this standard fashion were sufficient to establish the 'contrary congressional command' overriding the FAA, valid arbitration agreements covering federal causes of action would be rare indeed. But that is not the law." *Id*. at 670 (citation omitted).

If specific language governing how claims under a statute are to be adjudicated does not evince a sufficiently clear command to override the FAA, it surely follows that the NLRA's general definition of "concerted activities" for "mutual aid or protection" is insufficient. *D. R. Horton, Inc. v. NLRB*, 2013 WL 6231617, at *12. If Congress had intended to engraft onto every employment statute a right to collective litigation, it could and "would have done so in a manner less obtuse…." *CompuCredit*, 132 S. Ct. at 672.

Nor does the legislative history of the NLRA demonstrate a congressional command to override the FAA. The legislative history says nothing specific about employees' use of a particular procedural device to adjudicate claims under other federal or state employment laws. *See Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053 (8th Cir. 2013). In fact, as the Fifth Circuit noted, modern class action procedures were not even adopted in the federal courts until 1966, decades after the Wagner Act was first enacted. *See D. R. Horton, Inc. v. NLRB*, 2013 WL 6231617, at *13. Congress could not possibly have intended for the NLRA to guarantee access

to a procedural mechanism that did not yet exist. *See Italian Colors*, 133 S. Ct. at 2309 (noting that antitrust laws could not contain a contrary congressional command because they predated the adoption of Rule 23).

It is noteworthy that no such congressional command had been recognized by the Board for more than 75 years prior to its decision in *D. R. Horton*. Even the Acting General Counsel, in prosecuting *D. R. Horton*, believed that a waiver of the right to participate in a class or collective action would not violate the NLRA as long as employees retain the right to challenge such a waiver on a concerted basis: "An employer has the right to limit arbitration to individual claims—as long as it is clear that there will be no retaliation for concertedly challenging the agreement." *D. R. Horton*, Acting GC's Reply Br. at 2. The Acting General Counsel's position was consistent with that of the prior General Counsel, who believed that "no issue cognizable under the NLRA is presented" if an arbitration agreement "make[s] clear that the employees' Section 7 rights to challenge those agreements through concerted activity are preserved[.]" GC Mem. 10-06, at 2 (June 16, 2010). The historical absence of any notion that the NLRA prohibits a class or collective action waiver in an arbitration agreement is further evidence Congress did not intend for the NLRA to outlaw such agreements, and certainly not with the requisite clarity to override the FAA. *CompuCredit*, 132 S. Ct. at 672.

In sum, the NLRA's text and legislative history do not contain any indication that Congress intended to override the FAA's mandate to enforce arbitration agreements according to their terms. To the extent that the Board in *D. R. Horton* found that the FAA must yield to the NLRA, despite the absence of any clear congressional command to override the FAA, the Board's decision was contrary to Supreme Court precedent.

b. The Board Cannot Rely on the Norris-LaGuardia Act to Outlaw Arbitration Agreements with Class/Collective Action Waivers.

The Board in *D. R. Horton* also erred in holding that the Norris-LaGuardia Act ("NLGA"), and by implication the NLRA, partially repealed the FAA. *D. R. Horton*, 357 NLRB, slip op. at 5-6, 12. The Fifth Circuit, along with many other federal courts, have rejected the Board's reliance on the NLGA to support its decision in *D. R. Horton* because the NLGA is "outside the Board's interpretive ambit." *D. R. Horton, Inc. v. NLRB*, 2013 WL 6231617, at *13 n.10.

The Board's reliance on the NLGA was based on an unreasonable reading of that statute. Arbitration agreements containing a class or collective action waiver are not a form of "yellow-dog" contract, as the Board held in *D. R. Horton*. *D. R. Horton*, 357 NLRB, slip op. at 5-6. A "yellow-dog" contract is defined as a contract not to join a union or to quit employment if one becomes a member of a union. NLGA § 3(a), (b), 29 U.S.C. § 103(a), (b). *See also Barrow Utils. & Elec. Coop.*, 308 NLRB 4, 11 n.5 (1992) (defining a yellow dog contract as "[a]ny promise by a statutory employee to refrain from union activity or to report the union activities of others...").

It is unreasonable to interpret the NLGA to outlaw arbitration agreements containing a class or collective action waiver, as a form of "yellow-dog" contract, because the NLGA predates Rule 23 as well as the FLSA, Title VII, the ADEA, and the many other employment laws that give rise to modern class and collective actions. The NLGA cannot be read to prohibit procedures that generally did not exist when the law was enacted in 1932. *See D. R. Horton, Inc. v. NLRB*, 2013 WL 6231617, at *13. *See also Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831, 844 (N.D. Cal. 2012); *Jasso v. Money Mart Express, Inc.*, 879 F. Supp. 2d 1038, 1049 (N.D. Cal. 2012).

Furthermore, the Supreme Court has held that the NLGA must give way to the federal policy favoring arbitration. In *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970), the Court considered whether the NLGA prohibited a federal court from enjoining a strike in breach of a no-strike obligation under a collective bargaining agreement when that agreement provided for binding arbitration of the dispute that was the subject of the strike. The Court concluded the NLGA must be accommodated to the Labor Management Relations Act ("LMRA") "and the purposes of arbitration" as envisioned under the LMRA. *Id*. at 250. The Court noted that, through the LMRA, Congress attached significant importance to arbitration as a means of settling labor disputes. *Id.* at 252.

The FAA was re-enacted after the NLGA and the NLRA, and therefore the FAA must prevail even if an irreconcilable conflict could be found between these statutes. The re-enactment date is the relevant date for this analysis. *See Chicago & N. W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 582 n.18 (1971) (looking to re-enactment date of the Railway Labor Act to determine that it post-dated the NLGA and concluding "[i]n the event of irreconcilable conflict" between the two statutes, the former would prevail). "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]." *Owen v. Bristol Care, Inc.*, 702 F.3d at 1053.

For all of these reasons, the Board cannot rely on the NLGA to support its decision in *D. R. Horton*. The Board should take this opportunity to reconsider and reverse its position in light of the Fifth Circuit's decision and the many other courts that have rejected *D. R. Horton*.

B. Even If the Board Adheres to Its Position in *D. R. Horton*, the Board Should Not Find that Respondent's Agreement Violates the Act.

If the Board adheres to its position in *D. R. Horton* despite the overwhelming weight of Supreme Court and Circuit Court precedent to the contrary, the Board should not find the Agreement in this case violates the Act. The holding of *D. R. Horton* was limited to arbitration agreements that are mandated as a condition of employment. The Board clearly did not reach the "more difficult question" of whether an arbitration agreement, like the Agreement in this case, that is not a condition of employment violates the Act:

> [W]e do not reach the more difficult question of . . . whether, if arbitration is a mutually beneficial means of dispute resolution, an employer can enter into an agreement that is not a condition of employment with an individual employee to resolve either a particular dispute or all potential employment disputes through non-class arbitration rather than litigation in court.

357 NLRB at 13 n.28.

The ALJ, however, did not find this question to be "difficult." (ALJD 10:29-33). He held that the Agreement's opt out process was *irrelevant*, regardless of the record evidence showing that the Respondent thoroughly communicated the opt out process to employees, regardless of the stipulation that thousands of employees have opted out of the Agreement, and regardless of the fact that the Agreement clearly provides that employees are entitled to opt out without any fear of retaliation. (ALJD at 6 n.5). The ALJ held that, even assuming that an employee who did not opt out in these circumstances had *voluntarily agreed* to be bound by the Agreement, the Agreement still violates the Act. (ALJD at 8:3-4).

The ALJ's decision rests on the false premise that class or collective action litigation – of claims arising under other statutes – is a Section 7 right that can never be waived by an individual employee. The ALJ equates the right to participate in a class or collective action with

the right to join a union or to strike. (ALJD at 7:14-18).[4] Based on this premise, the ALJ found that a class/collective action waiver is "in no way cured" by the fact that the waiver "is voluntarily agreed to by the employee." (ALJD at 7: 29-30).

The ALJ's decision is an audacious expansion of *D. R. Horton*, which the Board should not endorse. The two core propositions of the ALJ's decision are fundamentally flawed: (1) the right to participate in a class or collective action cannot be equated with the Section 7 right to strike or join a union; and (2) the right to participate in a class or collective action is a waivable right.

1. There Is No Section 7 Right to Pursue Class or Collective Action Litigation.

There is no Section 7 right to pursue class or collective action litigation of non-NLRA claims. Even if the Act protects employees from retaliation when they pursue a claim on a class or concerted basis, that does not mean the entire course of the litigation also is governed by Section 7. The NLRA does not displace the Federal Rules of Civil Procedure and does not dictate that every legal claim that is for "mutual aid or protection" must therefore be litigated as a class or collective action. The Board in *D. R. Horton* recognized that "there is no Section 7 right to class certification." *D. R. Horton*, 357 NLRB No. 184, slip op. at 10. When a class or collective action is filed in federal court, the employees still must prove all of the requirements for class certification under Rule 23 and employers are "free to assert any and all arguments against certification." *Id.* at n.24. The only Section 7 right found by the Board in *D. R. Horton* is the "opportunity to pursue *without employer coercion, restraint or interference* such claims of

[4] The ALJ also mentioned the right to file charges with the Board. But, as the ALJ found, the Agreement in this case, unlike the arbitration agreement in *D. R. Horton*, expressly protects employees' right to file charges with the Board. "Thus, that issue is not presented in this case." (ALJD 6, n. 6).

a class or collective nature as may be available to them under Federal, State or local law." *Id.* (emphasis added).

The Agreement in this case does not contain any threat of "coercion, restraint or interference" if an employee or group of employees files a class or collective action in court. To the contrary, the Agreement specifically provides that employees will suffer no adverse employment action if they exercise their right to opt out, that employees "may pursue available legal remedies without regard to this Agreement," and that associates will not be "retaliated against, disciplined or threatened with discipline as a result of his or her filing of or participation in a class, collective or private attorney general action in any forum." (J. Ex. 2 at pp. 3, 6).

The ALJ characterized the right to participate in class or collective actions as a "substantive right" that is "at the core of Section 7" and "central to the Act's purposes." (ALJD at 7:10-12). These assertions are plainly incorrect. The Supreme Court and the lower federal courts have repeatedly held that a class or collective action is a procedural device, rather than a substantive right protected by the NLRA or any other law. *See D. R. Horton, Inc. v. NLRB*, 2013 WL 6231617, at *9 (citing *Amchem Prods, Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997), and *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980)). *See also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (upholding Rule 23 under the Rules Enabling Act because "it governs only 'the manner and the means' by which the litigants' rights are 'enforced'") (internal citations omitted); *Blas v. Belfer*, 368 F.3d 501, 505 (5th Cir. 2004) ("no substantive right to a class remedy; a class action is a procedural device."). The Supreme Court recently reiterated that Rule 23 of the Federal Rules of Civil Procedure "was designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. at 2309.

Employees' pursuit of a class or collective action cannot be equated with the core rights protected by Section 7 of the Act – the rights to strike, join a union, and bargain collectively. It is well-established that Section 7 rights fall on a spectrum and, at some point, must be balanced against other statutory and common law rights. *See Hudgens v. NLRB*, 424 U.S. 507, 521-23 (1976) (stating that whether Section 7 rights must give way to other legal rights, such as property rights, "largely depend[s] upon the content and the context of the [Section] 7 rights being asserted").

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

Whether a non-NLRA claim is litigated on a class or collective basis has nothing to do with organizing or collective bargaining. Therefore, the right to pursue such a claim falls on the dimmest end of the spectrum of Section 7 rights, if it is even on the spectrum at all.

Because the ALJ incorrectly found that participation in a class or collective action is a "substantive right" under the NLRA, his reliance on *J.I. Case, Co. v. NLRB*, 321 U.S. 332 (1944), is misplaced. The ALJ cites *J.I. Case* for the principle that "individual contracts no matter what the circumstances that justify their execution or what the terms, may not be availed to defeat or delay *procedures prescribed by the National Labor Relations Act.*" (ALJD at 8:22-24) (emphasis added). Class or collective action litigation is not, however, a "procedure prescribed by" the NLRA. It cannot be equated with the Board's representation case procedures or an employer's obligation to recognize and bargain with a union that the Board has certified pursuant to those procedures. Class or collective action litigation is, as stated above, a procedural device that is prescribed by the Federal Rules of Civil Procedure, not the NLRA.

In *J.I. Case*, the Supreme Court was faced with the question of whether an employer could invoke individual employment contracts to excuse its duty to bargain with a certified union as the collective bargaining representative of its employees. *J.I. Case*, 321 U.S. at 334. The Court held that individual employment contracts cannot be used to abridge employees' right to bargain collectively. *Id.* at 337. However, the Supreme Court also held that it did not intend to preclude individual contracts between an employer and his employees in all cases and, in fact, preserved the right of employees to individually contract with employers in some circumstances. *Id.* at 337, 339. Thus, *J.I. Case* must be read in the context of the core, substantive Section 7 right at issue – the right to bargain collectively following certification through a Board-conducted election.

Likewise, the Board's decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175, 175 (2001), *aff'd*, 354 F.3d 534 (6th Cir. 2004), which the ALJ also relied on, involved an agreement that restricted employees' core, substantive Section 7 rights – the rights to organize and strike.

The agreement prohibited employees, during a one-year period following their separation from the employer, from engaging in "any dispute or work disruption with the Company" or from engaging in "any conduct which is contrary to the Company's interests in remaining union-free." *Ishikawa Gasket* does not prohibit agreements that relate only to the procedural device of class or collective action litigation, as opposed to substantive Section 7 rights.

Other cases cited in *D. R. Horton* similarly involved individual employment agreements that purported to restrict substantive Section 7 rights. For instance, the individual employment contracts at issue in *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940), were "procured through the mediation of a company-dominated labor organization" and were a means of displacing a legitimate union representative. *Id.* at 360. Furthermore, in those individual agreements, the employees agreed not to "demand a closed shop or a signed agreement by his employer with any Union." *Id.* The Supreme Court held that these individual agreements "were the fruits of unfair labor practices, stipulated for the renunciation by the employees of rights guaranteed by the Act, and were a continuing means of thwarting the policy of the Act...." *Id.* at 361.

In the same vein, the individual agreements at issue in *J. H. Stone & Sons*, 33 NLRB 1014 (1941), were intended to interfere with employees' rights to organize, strike, and bargain collectively. The Board found that these agreements "were the fruit of the respondents' interference, restraint, and coercion and *had the purpose of defeating unionization of their employees*." *Id.* at 1023 (emphasis added). In enforcing the Board's order in *J. H. Stone*, the Seventh Circuit noted that one of the stated purposes of these agreements was "to prevent strikes and labor troubles" and found that, through the agreement's arbitration provision, the employee "not only waived his right to collective bargaining but his right to strike or otherwise

protest on the failure to obtain redress through arbitration." *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942).

None of these concerns are presented here. Respondent's Agreement does not in any way interfere with employees' substantive Section 7 rights. The Agreement specifically excludes from its coverage any claims under the NLRA and any dispute that is within the scope of a collective bargaining agreement. (J. Ex. 2, at p. 2). Thus, far from interfering with employees' Section 7 rights to organize and bargain collectively, the Agreement specifically recognizes those rights and does not even purport to address claims that could be resolved under a collective bargaining agreement. The Agreement simply does not affect any substantive right governed by the Act.

2. Pursuit of Class or Collective Action Litigation Is a Waivable Right.

The ALJ also erred in concluding that employees cannot waive, except through collective bargaining, the right to participate in a class or collective action. The Supreme Court and the lower federal courts have repeatedly held that employees may waive the right to participate in class or collective actions, even when the right to pursue a class or collective action is specifically recognized in the statute governing the underlying claim. For instance, the Second Circuit has held that employees may waive their right to participate in a collective action under the Fair Labor Standards Act because if an employee must affirmatively opt into any such collective action, then surely the employee has the power to waive the right participate in the collective action as well. *Sutherland v. Ernst & Young*, 726 F.3d at 297. *See also Gilmer*, 500 U.S. at 27 (noting that even if the arbitration rules at issue had not permitted collective actions, the employee still would have been permitted to waive his right to bring Age Discrimination in Employment Act claims in court); *Horenstein v. Mortg. Mkt., Inc.*, 9 F. App'x 618, 619 (9th Cir. 2001) (affirming an order to compel plaintiffs' FLSA claims to arbitration, holding that

"[a]lthough plaintiffs who sign arbitration agreements lack the procedural right to proceed as a class, they nonetheless retain all substantive rights under the statute"); *Vilches v. Travelers Cos.*, 413 F. App'x 487, 494 (3d Cir. 2011) (upholding class action waiver of FLSA and New Jersey wage and hour claims); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005) (enforcing a waiver of class claims with respect to FLSA claims and other claims under federal statutes and compelling arbitration of dispute, holding that "the fact that certain litigation devices may not be available in an arbitration is part and parcel of arbitration's ability to offer 'simplicity, informality, and expedition'") (quoting *Gilmer*, 500 U.S. at 31); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002) (affirming an order to compel plaintiff's FLSA claim to arbitration on an individual basis, finding "no suggestion in the text, legislative history, or purpose of the FLSA that Congress intended to confer a nonwaivable right to a class action under that statute").

The NLRA does not invalidate class/collective action waivers that have been deemed to be lawful under the FAA and the statutes that govern the substantive claims at issue. Under the NLRA, as under the FLSA and other employment statutes, employees have the right to refrain from engaging in collective action. *See NLRB v. Drivers, Chauffeurs, Helpers, Local Union No. 639*, 362 U.S. 274, 279-80 (1960) (holding that the Taft-Hartley Act guaranteed employees the right to refrain from union activities). Therefore, an agreement to arbitrate non-NLRA claims on an individual basis does not present any inherent conflict with the NLRA.

Nor is arbitration any less favored under the NLRA than other statutes. As the Fifth Circuit held in *D. R. Horton*, "courts repeatedly have understood the NLRA to permit and require arbitration." 2013 WL 6231617, at *12. The Fifth Circuit's decision is consistent with more than fifty years of Supreme Court precedent (as well as established Board law) holding that

arbitration is a preferred and mutually beneficial means of resolving workplace disputes. *See United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960) ("[A]rbitration is the substitute for industrial strife."); *Gilmer*, 500 U.S. at 30 (noting that plaintiff's "generalized attacks on arbitration" were "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."); *Olin Corp.*, 268 NLRB 573, 574 (1984) ("It hardly needs repeating that national policy strongly favors the voluntary arbitration of disputes").

The ALJ incorrectly held that the right to participate in class/collective actions can only be waived through collective bargaining. This is clearly contrary to the Supreme Court's decision in *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247 (2009), which held that "[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative." *Id.* at 258. The Act does not preclude employers from entering into individual contracts with employees who are not represented by a union. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937). Individual contracts are lawful and enforceable as long as they do not interfere with employees' Section 7 rights to organize and bargain collectively. *See J.I. Case*, 321 U.S. at 336 ("Care has been taken in the opinions of the Court to reserve a field for the individual contract, even in industries covered by the National Labor Relations Act.").

There can be no question that the Agreement in this case is voluntary. The Agreement clearly states that individual arbitration "is *not a mandatory condition of Associate's employment*" and that an employee who does not wish to be bound by the Agreement may opt out by submitting the Opt Out Form that is attached to the Agreement. (J. Ex. 2 at p. 6) (emphasis added). The Agreement also advises employees of their right to seek outside counsel

regarding the Agreement: "Associate has the right to consult with counsel of Associate's choice concerning how this Agreement affects Associate's rights." (J. Ex. 2 at p. 6).

The Agreement makes clear that an employee will not suffer any retaliation if he/she elects to opt out: "An Associate who timely opts out as provided in this paragraph *will not be subject to any adverse employment action as a consequence of that decision* and may pursue available legal remedies without regard to this Agreement." (J. Ex. 2 at p. 6) (emphasis added). This is repeated in the Opt Out Form itself: "I have reviewed the Arbitration Policy/Agreement, and I elect to opt out of the Arbitration Policy/Agreement. *I understand that there will be no adverse employment action taken against me as a consequence of that decision*." (J. Ex. 2 at p. 7) (emphasis added).

There is absolutely no evidence that any Kmart employee suffered any retaliation as a result of a decision to opt out, or was discouraged in any way from exercising their right to opt out. In fact, management at the Erie store made clear to employees that they, personally, had decided to opt out of the Agreement. (Tr. 73 (Thomas); Tr. 80 (Alward)). The fact that thousands of Kmart employees have taken advantage of their right to opt out of the Agreement demonstrates not only that employees are well aware of the right to opt out, but also that they felt free to exercise it without fear of retaliation. (ALJD 5:45-50). There is no legal or factual basis to invalidate this voluntary, opt out Agreement.

C. The ALJ Erred in Finding that the Charge Is Not Time-Barred under Section 10(b) of the Act.

The charge is time-barred to the extent employees did not opt out of the Agreement, and thereby elected to be bound by it, outside the Section 10(b) period. Section 10(b) precludes the Board from finding a violation where the allegedly unlawful conduct is "inescapably grounded" on events that occurred outside of the Section 10(b) period. *Local Lodge No. 1424 v. NLRB*, 362

U.S. 411, 422 (1960) (*Bryan Manufacturing*) (explaining that "a finding of [a] violation which is inescapably grounded on events predating the limitations period is directly at odds with the purposes of the 10(b) proviso"). *See also Grimmway Farms*, 314 NLRB 73, 74 (1994) (the Board cannot establish necessary elements of a violation on events that occurred outside of the 10(b) period).

The cases cited by the ALJ are not to the contrary. (ALJD 12 n.11). *Lafayette Park Hotel*, 326 NLRB 824 (1998), *Relco Locomotives*, 359 NLRB No. 133 (2013), and *Alamo Cement Co.*, 277 NLRB 1031 (1985), all deal with employer work rules, as opposed to agreements between employers and employees. An individual agreement between an employer and an employee differs from a work rule, at least where the agreement is lawful on its face and would be rendered unlawful only by the circumstances of its execution. The cases cited by the ALJ are distinguishable because they involve agreements that are unlawful on their face, such that the circumstances of their execution were irrelevant to the violation. *See Teamsters Local 29 (R.L. Lipton Distributing)*, 311 NLRB 538 (1993) (holding that super-seniority clause in collective bargaining agreement was unlawful on its face; circumstances of agreement's execution was irrelevant); *Great Lakes Carbon Corp.*, 152 NLRB 988 (1965) (same); *Whiting Milk Corp. (Local 380, Teamsters)*, 145 NLRB 1035 (1964) (same).

This case, unlike the cases cited by the ALJ, involves an agreement that is lawful on its face. The ALJ found otherwise based on the false premise that an employee can never enter into an arbitration agreement with a class/collective action waiver, even if voluntarily. (ALJD at 12:8-14). Any allegation that the Agreement was not voluntarily entered into is time-barred to the extent employees became bound by the Agreement outside the Section 10(b) period.

D. The ALJ Erred in Finding that the Regional Director Had the Authority to Issue the Complaint.

The ALJ improperly rejected, in a footnote, Respondent's argument that the Regional Director lacked authority to issue the complaints in this case. (ALJD at 13 n.13). Because the Board had only two Members, and thus did not have a quorum, when it appointed Regional Director Robert Chester, the Regional Director had no authority to issue the complaints in this case in March and April of 2013.

The Board has delegated its authority to issue complaints to its Regional Directors. 29 C.F.R. § 102.15 ("After a charge has been filed, if it appears to the regional director that formal proceedings in respect thereto should be instituted, he shall issue and cause to be served on all other parties a formal complaint in the name of the Board"). The Board appointed Mr. Chester to the position of Regional Director of the NLRB's Regional Office in Pittsburgh on March 12, 2009. *See* Robert Chester Named Regional Director of NLRB's Pittsburgh, PA Regional Office, Mar. 12, 2009, http://mynlrb.nlrb.gov/link/document.aspx/09031d45801cd5ac (last visited Dec. 20, 2013). Because the Board lacked a quorum on March 12, 2009, the Regional Director's appointment was invalid under *New Process Steel*. Consequently, the complaint that the Regional Director issued against Respondent is invalid and should be dismissed.

IV. CONCLUSION

For all of the foregoing reasons, Respondent respectfully urges the Board to dismiss the complaint in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of December, 2013, a true and correct copy of the foregoing Respondent's Brief in Support of Its 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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