

**UNITED STATES OF AMERICA**  
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**  
**REGION 21**

NIJJAR REALTY, INC. dba PAMA MANAGEMENT

Case 21-CA-092054

and

GERARDO HARO, an Individual

**REPLY TO GENERAL COUNSEL'S ANSWERING BRIEF**  
**IN RESPONSE TO RESPONDENT'S EXCEPTIONS**

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Pursuant to Section 102.46(h) of the Board's Rules and Regulations, Respondent Nijjar Realty, Inc. hereby files its Reply to the General Counsel's Answering Brief in response to Respondent's Exceptions to the Administrative Law Judge's Decision in this matter.

Initially, the General Counsel has offered absolutely no evidence or argument whatsoever in response to Respondent's contentions that:

(1) The Board's decision in *D.R. Horton*, 357 NLRB No. 183 (2012), should be overruled, based on the development of the law subsequent to that decision and the Fifth Circuit Court of Appeals' recent decision denying enforcement of the Board's order in that case;

(2) The ALJ erred in construing the Applicant's Statement and Agreement and the Comprehensive Agreement as a single agreement, under circumstances in which the Applicant's Statement contained its own acknowledgement, signature, and integration clauses and **even the General Counsel alleged it to be an entirely separate agreement in the Complaint;**

(3) The Applicant's Statement and Agreement is not unlawful under the Board's decision in *D.R. Horton*, because the Board did not undertake to determine the legality of arbitration agreements that do not contain class-action waivers; and

(4) The ALJ committed prejudicial error by its evidentiary rulings and failure to address an alternative defense asserted by Respondent that provided an independent basis for dismissing the Complaint.

The General Counsel's failure to even address these seminal grounds for overturning the ALJ's Decision should be taken as an admission that there is no valid basis for refuting any of them, and in and of themselves warrant the reversal of the Decision.

With respect to those Exceptions which the General Counsel did address, Respondent offers the following points in reply:

First, With respect to the untimeliness issue under Section 10(b) of the Act, the authority cited by the General Counsel does not require the rejection of that defense. The General Counsel cites to *Lakeside Community Hospital*, 306 NLRB 552 (1992), a case where the employer argued that a complaint was not supported by a timely charge, and thus subject to dismissal under 10(b). Briefly addressing and dismissing the argument in a footnote, the panel in *Lakeside* provided absolutely no factual analysis of the relationship between the untimely complaint and the timely charge. Without any explanation of *why* the complaint and charge were sufficiently related as to save the complaint from being barred by § 10(b), the case does absolutely nothing to assist in the understanding of how the timeliness provision of § 10(b) should apply to this case.

The General Counsel goes on to recite the holdings of *Redd-I, Inc.*, 290 NLRB 1115 (1988), and *Carney Hospital*, 350 NLRB 627, 640 (2007), and asserts that they apply to the present case. It does not, however, address the fact that neither the charge nor the complaint alleges that Respondent “maintained” the agreements within the 10(b) period. Without such an allegation, neither *Redd-I* nor *Carney* can save the untimely allegations.

Moreover, if the General Counsel is correct, then the provisions of its Casehandling manual governing the “Amendment to the Charge” are of no force or effect whatsoever, and can presumably be disregarded in any given case. (See § 10062.5 “Allegations not Contained in Charge” [providing that whether the investigation uncovers evidence of unfair labor practices not specified in the charge, it must be determined whether the charge is sufficient to support the complaint’s allegations covering the apparent unfair labor practices found, and if the allegations of the charge are too narrow “the charging party or its representatives should be apprised of the potential deficiency in the existing charge and given the opportunity to file an amended charge”]; § 10264.1 “Conformity of Charges and Complaints” [providing that the Regional Office should

“normally seek an amended charge to cover all complaint allegations, including discrete categories of independent 8(a)(1) violations,” and that “[I]n any event, the charge must be broad enough, as a matter of law, to support the allegations of the complaint.”] [emphasis provided].) Indeed, the Board has acknowledged for many years that if a charge does not support complaint allegations covering the apparent unfair labor practices found, the charging party should be apprised of the potential deficiency and given the opportunity to file an amended charge. (See *Peterson Construction Corp.*, 128 NLRB’s 969 and 972 (1960).) because the complaint was never amended to allege any allegations as to the improper “maintenance” or “enforcement” of the arbitration agreements in issue in this case, thereby depriving the ALJ and the Board the jurisdiction to consider them under the agency’s own precedent and procedural guidelines.

Second, regarding whether the record supports a finding that the Charging Party engaged in “protected concerted activity,” the General Counsel fails to even address Respondent’s contention that Board law requires that in order to be protected by Section 7, the law requires that conduct be engaged in “with or on the authority of” other employees” and not solely by a the employee himself *even if* the activity was engaged in for the purpose of seeking “to initiate or to induce or to prepare for group action.” (*Mannington Mills*, 272 NLRB 176 (1984).) Once again, the record is crystal clear that Charging Party did not file his class action “with or on the authority” of any other employees, or that any other employees were even aware of it when it was filed. (R.T., pp. 46–47). This merely demonstrates that class claims of this nature in this day and age are largely not the product of the kind of concerted activity that the Act was designed to protect, but rather “gotcha” lawsuits spearheaded by plaintiff employment lawyers who routinely seek to transform an employer’s alleged technical labor law violations into business opportunities to recover large amounts of statutory attorneys’ fees. The Board has

never held that a violation can be established by mere *attorney* (as opposed to employee) conduct of this nature, and should decline to do so in this case.

Third, the General Counsel also failed to even address Respondent's contention that the expeditious procedure for resolving individual employee disputes that is provided by *individual arbitration* in the workplace is no less of a "core concern" of the Act than any others, given the essential role that it plays in resolving workplace disputes on a daily basis. (See *CompuCredit Corp. v. Greenwood* (2012) 132 S.Ct. 665, 669; *D.R. Horton, Inc. v. N.L.R.B.* (5th Cir. 2013) 737 F.3d 344, 361.) Its silence in the face of subsequent Supreme Court authority should once again be taken as an admission that there is no valid argument refuting these defenses, and that *D.R. Horton* should be overruled or at the very least re-examined at this time in light of the substantial legal developments in the law pertaining to the enforcement of arbitration agreements since *D.R. Horton* was decided.

While citing to other interim decisions, the General Counsel also offers no response to the ALJ's Decision in *Countrywide Fin'l. Corp.*, 2013 WL 587589 (JD(SF)-90-13, which expressly acknowledged the Supreme Court's concern that companies would have "less incentive to continue resolving potentially duplicative claims on an individual basis" if faced with inevitable class arbitration. (See *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740, 1750.) It also fails to mention Judge Rosenstein's recent decision in *Chesapeake Energy Corporation* (JD(SF)-78-13, in which he found that a complaint alleging a violation of the Act by implementation a class and collective action waiver could not be sustained in light of Supreme Court's recent decision in *American Express v. Italian Colors Restaurant* (2013) 133 S.Ct. 2304, or other decisions issued since *Horton* was decided holding that the "NLRA bends to

the FAA.” (See *DeLock v. Securitas Services USA, Inc.* (E.D. Ark. 2012) 883 F.Supp.3d 784, 790.)

The General Counsel would obviously prefer that these rulings did not exist, and would like to pretend that they didn't; but they do, and its failure to offer any response at all to the Supreme Court's acknowledgement of the sanctity of individual arbitration under federal law should be fatal to its defense of the ALJ's Decision.

The crux of the General Counsel's position appears to be based on the *D.R. Horton* Board's reference to the right to engage in collective action as a "substantive right" under the statute. (*D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), at p. 9.) In denying enforcement of the Board's order in that case, the Fifth Circuit rejected this contention, and with good reason. (*D.R. Horton, Inc. v. N.L.R.B.*, *supra*, 737 F.3d at 355-356.) It is well established that the class action device is merely procedural in nature, and that no right exists to proceed with a class action under federal law. (*Caley v. Gulfstream Aerospace Corp.* (11th Cir. 2009) 428 F.3d 1359, 1366, 1378; *Watkins v. Wachovia Corp.* (2009) 172 Cal.App.4th 1576, 1589 (“[T]he right of a litigant to employ a [class action procedure] is **independent of the plaintiff's own claim**, ancillary to the litigation of substantive claims.”) (Emphasis provided.)) The General Counsel's failure to acknowledge this infects its entire approach to this case, and completely undermines the rationale for the Board's *D.R. Horton* holding.

Fourth, the “opt out” clause in the “Comprehensive Agreement” is distinguishable from those at issue in the cited cases, because the Agreement specifically stated that it was “not intended to interfere with the Employee's right to engage in protected, concerted activity or to exercise other rights protected under the National Labor Relations Act.” (Comprehensive Agreement, ¶ 2). When combined with the language in paragraph 4 of that Agreement

specifically referencing the employees' right to retain the ability to file class and collective claims, an employee who was aware of their Section 7 rights would reasonable believe that they were not precluded by virtue of anything contained in the Agreement from invoking them. To conclude otherwise merely reflects a paternalistic view that employees cannot read or determine for themselves what freedoms they have; but in any event, such language clearly dispels the notion that Respondent's employees were required to "prospectively" waive the same rights that the Agreement confirmed they fully retained.

Fifth, the General Counsel once again failed to even address Respondent's principal defense in this proceeding, that the Applicant's Statement and Agreement was not unlawful under *D. R. Horton* because it did not contain a class action wavier. Without citing any authority, it argues that the Applicant's Statement and Agreement ("ASA") "implicitly contain[ed] the same prohibition" as a class action waiver, even though such a prohibition was not even remotely addressed or found unlawful by the *D.R. Horton* Board. But this was not even the theory of the case alleged in the General Counsel's Complaint, in which it claimed that Respondent required its employees to sign two arbitration agreements that allegedly precluded them from participating in collective or class litigation to resolve employment disputes. (Complaint ¶¶ 4–5.)

In addition, the General Counsel has no response at all to the fact that *D.R. Horton* did not say one word about an agreements like the ASA that *do not* contain a class action waiver, and that there is accordingly no precedent whatsoever for the ALJ's Decision. It also naively turns a blind eye to the hard reality that employees are ordered to arbitrate employment-related claims on an individualized basis every day as a result of the Supreme Court's decisions, entirely irrespective of whether their arbitration agreements contain a waiver of the right to bring class

claims. (*Kinecta Alternative Financial Solutions, Inc. v. Superior Court* (2012) 205 Cal.App.4th 506, 518–19; *Nelsen v. Legacy Partners* (2012) 207 Cal.App.4th 1115, 1128–29.) It has therefore manifestly failed to articulate *any* legitimate basis in either fact or law for the ALJ’s patently erroneous determination that Respondent’s implementation of the ASA in any way violated the Act, even had the charge or any amended charge had so alleged. Once again, this failure to establish sufficient grounds for a violation of the Act on this basis is fatal to its entire theory of the case, and requires that the Complaint be dismissed.

And finally, the General Counsel has failed to explain why the remedies sought by the Complaint are not unconstitutional or otherwise unwarranted. It cites non-binding ALJ decisions in which the so-called “make whole remedy” and requiring payment of the Charging Party’s legal costs was pursued, but does not deny that it has *not* been pursued in all cases—including *D.R. Horton*, where (as here), there was no authority holding the class action waiver to be illegal at the time the arbitration agreement was entered into. While citing to non-binding ALJ Decisions that imposed the remedy (while completely ignoring the authority cited by Respondent to the contrary), the General Counsel’s argument offers no response at all to Respondent’s claim that imposing this proposed remedy would violate its right to equal protection of the laws based on the clearly unequal application of the law in this instance.

The General Counsel also fails to even address or distinguish the case of *SNE Enterprises, Inc.*, 344 NLRB 673 (2005), which held that it is a “manifest injustice” to impose a monetary remedy on an employer that is found to have violated the Act based on conduct that was lawful at the time the alleged violation occurred. The imposition of *any* of the proposed remedies, and particularly the payment of the Charging Party’s “attorney’s fees” for unsuccessfully opposing Respondent’s petition to compel arbitration (“PTCA”), would therefore

meet with the same fate in the appellate courts as all the other remedies arising out of a Board proceeding in which a statutory violation based on *D.R. Horton* was alleged: *total and complete non-enforcement*.

The mere inclusion of a request for the recovery of the Charging Party's "attorney's fees" in the complaint in fact manifests the agency's complete and total unfamiliarity with wage and hour class actions of this nature. Neither the Charging Party nor *any* purported class action representative in this kind of case *ever* incurs *any* attorneys' fees for legal services rendered, because these lawsuits are uniformly taken on a contingent fee basis and are filed for the primary purpose of requiring *employers* to pay the attorneys' fees awarded by a court as a result of their alleged labor law violations. The fact that these cases are *only filed on a contingent fee basis* accordingly *precludes* any conceivable make-whole relief, ***because employees do not ever incur any attorneys' fees in these kinds of cases to begin with.***

Relying on *J.A. Croson Co.*, 359 NLRB No. 2 (2012), the General Counsel contends that the Supreme Court's decision in *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002) does not preclude an award of attorney's fees to the Charging Party in this case. *J.A. Croson*, which is the most recent case in which the Board has addressed this defense, in fact fully supports Respondent's contentions in this matter. There, the Board ended up denying an award of attorney's fees against a party that pursued a state court lawsuit challenging a union's job targeting program, even when the lawsuit was maintained after the Board found such a program to be protected by the Act. Even though the suit fell within one of the "exceptions" to protected conduct set forth in footnote 5 of the Supreme Court's decision in *Bill Johnson's Restaurants, Inc. v. NLRB* 461 U.S. 731 (1983) because it turned out to be "beyond the jurisdiction of the state courts," the Board refused to award attorneys' fees against the Respondent on the ground that the

action was not preempted *at the time it was filed*. (*Id.* at 7–10.) By the very same reasoning, no attorneys’ fees can conceivably be assessed against Respondent under *BE & K*, because its PTCA was entirely lawful when it was granted by the state court under the FAA at the time, and it thus clearly did not have an “objective that was illegal under federal law” within the meaning of footnote 5 of *Bill Johnson’s* decision.

The General Counsel also fails to even acknowledge the fact that, as Respondent has contended, its right to petition the government “is one of the most precious liberties safeguarded by the Bill of Rights.” (See *BE & K* at 524–25, and *J.A. Croson, supra*, at 12.) As Member Hayes stated in his dissent in the *J.A. Croson* case, the Supreme Court in *BE & K* observed that reasonably-based lawsuits that prove unsuccessful “nevertheless advance first member rights, raise matters of public concern, and promote the evolution of the law”-- and thus do not violate the Act. Once again, if this is so, then *a fortiori successful* lawsuits cannot be violative, especially one founded squarely on the principal that arbitration agreements must be “enforced in accordance with their terms” as the Supreme Court has most recently held. (*J.A. Croson*, at 12–13.) Accordingly, an award of attorneys’ fees against Respondent would be unprecedented and expand the law to where it has never before gone.

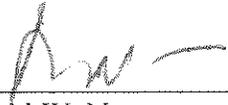
As Member Hayes also acknowledged, the Act must not be transformed into a “means by which to chill vital conduct protected under the First Amendment.” (*Id.* at 13.) The Board would clearly be doing so by imposing the proposed remedy of requiring Respondent to pay Charging Party’s attorneys’ fees in this case by punishing an employer for pursuing a remedy in state court that was fully authorized *and in fact required by federal law*, because the state courts have no choice but to “rigorously enforce” arbitration agreements governed by the Federal Arbitration Act in accordance with their terms. (*American Express v. Italian Colors Restaurant, supra*, 133

S.Ct. at 2309.) The fact that the General Counsel failed to seek an injunction against Respondent's PTCA at the time the action was pending, and that it is too late to do so now because the parties have since settled their disputes over the alleged Labor Code violations and the arbitration proceeding has been dismissed, also weighs heavily against its request for an award of attorneys' fees in this case. (*Id.*)

For all of the foregoing reasons, as well as those set forth in Respondent's Exceptions and Supporting Brief, the ALJ's Recommended Decision should not be adopted, and the Board should overrule its decision in *D.R. Horton* forthwith.

Dated: 7/26/14

Respectfully submitted,



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**PROOF OF SERVICE**

(Code Civ. Proc. § 1013a(3))

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and am not a party to the within action; my business address is 12800 Center Court Drive South, Suite 300, Cerritos, CA 90703.

On February 26, 2014, I served the following document(s) described as: **REPLY TO GENERAL COUNSEL'S ANSWERING BRIEF IN RESPONSE TO RESPONDENT'S EXCEPTIONS** on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

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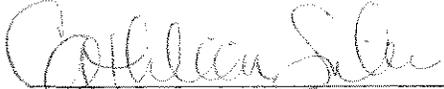
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- BY MAIL:** I am readily familiar with the firm's practice of collection and processing correspondence for mailing. The envelope(s) was deposited with the U.S. postal service that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 26, 2014, at Cerritos, California.

  
Cathleen Siler