

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.**

SF MARKETS, LLC)	
d/b/a SPROUTS FARMERS MARKETS)	
)	
and)	Case 21-CA-099065
)	
LAURA CHRISTENSEN, an Individual)	
)	
and)	Case 21-CA-104677
)	
JANA MESTANEK, an Individual)	

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

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I. INTRODUCTION

Respondent SF Markets, LLC d/b/a Sprouts Farmers Market (“Sprouts”) submits this brief in support of its Exceptions¹ to the February 18, 2014 decision of Administrative Law Judge (“ALJ”) Ira Sandron (JD(ATL)-06-14).

This case is one of the many cases presently pending before the Board involving the application of its decision in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012) (“*D.R. Horton*”), specifically its effect, if any, on the enforceability of class and collective action waivers in individual arbitration agreements between employers and employees. In *D.R. Horton*, the Board held that an employer violates Section 8(a)(1) of the National Labor Relations Act (the “Act”) by “requiring employees to waive their right to collectively pursue employment-related claims in all forums, arbitral and judicial,” because, the Board opined, “[t]he right to engage in collective action—including collective legal action—is the core substantive right protected by the [Act] and is the foundation on which the Act and Federal labor policy rest.” ALJD 8:8-14, citing *D.R. Horton*, slip op. at 12.²

The ALJ found that Sprouts’ mutual binding arbitration agreements violate the Act, both facially and as applied in two employees’ unique circumstances. In reaching his decision, the ALJ expressly followed the Board’s decision in *D.R. Horton*, stating that “[t]he application of *Horton* is at the core of all of the issues in this case.” ALJD 8:8.

¹ Separately filed this same date.

² Citations to the ALJ’s decision appear herein as “ALJD [page number]:[line number(s)]. Citations to the parties’ Joint Motion to Submit Case on Stipulation, Stipulation of Facts, and Request to Forgo Submission of Short Position Statements appear herein as “Stip., ¶ __”, and exhibits thereto are cited as “Jt. Ex. __.”

The Board should reverse the ALJ's decision and dismiss the complaint for at least the following reasons. First, *D.R. Horton* was decided by an invalidly-constituted Board that lacked the authority to issue the decision in the first instance. In 2010, the Supreme Court held in *New Process Steel v. NLRB, L.P.*, 130 S. Ct. 2635 (2010) that the Board only can issue valid decisions if it is comprised of a quorum of at least three validly appointed Members. The Board lacked this requisite quorum at the time that it decided *D.R. Horton* as Member Becker, one of the three then-serving members of the Board, was appointed to the Board pursuant to an invalid exercise of presidential authority under the Constitution's Recess Appointments Clause, resulting in the Board having only two Members. See *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013) ("*Noel Canning*"). The ALJ erred by disregarding the effect of the Board's lack of a valid quorum at the time it issued *D.R. Horton*, and by instead relying on post-*Noel Canning* Board decisions rejecting a quorum-based defense. ALJD 8:33-43, citing *G4S Regulated Security Solutions*, 359 NLRB No. 101, slip op. at 1, n. 1 (2013). The ALJ erred further when, relying on the same authority, he concluded that the Regional Director who issued the complaint in this matter, who was appointed by this same invalidly-constituted Board, had the authority to do so. ALJD 8:44-45.

Second, *D.R. Horton* was wrongly decided on the merits. The Board "majority" in that case, which consisted of only one of the two properly appointed Members (the other having been recused), failed to give proper deference to the Federal Arbitration Act ("FAA") when it concluded that its interpretation of the Act trumped the FAA. For this very reason, the U.S. Court of Appeals for the Fifth Circuit reversed the Board's decision

and denied (in pertinent part) enforcement of the Board's order. *See D.R. Horton, Inc. v. NLRB*, 737 F.3d 344 (5th Cir. 2013) (petition for rehearing or rehearing *en banc* filed March 13, 2014). Thus, *D.R. Horton* is not valid precedent, and the General Counsel's continued prosecution of complaints pursuant to the doctrine expressed in *D.R. Horton*, but rejected by nearly every court to review it, lacks a legitimate legal foundation.

Third, the ALJ erred when he concluded that Sprouts violated the Act by enforcing its mutual binding arbitration agreements, in one case by refusing to continue to employ an at-will employee who declined to sign the agreement (Christensen) and, in the other, by filing motions in state court to compel individual, non-class arbitration of a former employee's employment-related claims (Mestanek). Sprouts exhibited no animus toward either employee with respect to their putative exercise of rights protected under the Act. To the contrary, Sprouts' actions were entirely consistent with the FAA, which strongly favors arbitration of disputes, including employment-related disputes, and the enforceable terms of those agreements between Sprouts and the employees at issue. Thus, the ALJ's finding that Sprouts' actions violated Section 8(a)(1) of the Act (and his recommended remedies for that finding) is unsupported.

Finally, the ALJ made other errors, discussed below, each separately and independently requiring the reversal of his decision. For all of these reasons, Sprouts respectfully requests that the Board reverse the ALJ and dismiss the complaint in its entirety.

II. STATEMENT OF FACTS

A. Sprouts Farmers Markets

Sprouts is a retailer specializing in the sale of natural and organic foods, vitamins and supplements, and healthy living products. Sprouts presently operates more than 170 stores in nine states, including stores located in Yorba Linda, Seal Beach, and Tustin, California. Stip., ¶3. Since at least January 1, 2012, Sprouts has required that its team members³ agree to mutual binding arbitration agreements as a condition of employment. ALJD 3:43-44. Sprouts revised its form of arbitration agreement in approximately January 2013. ALJD 3:45-4:1.

B. Case 21-CA-099065 (Jana Mestanek)

Sprouts hired Charging Party Jana Mestanek (“Mestanek”) in January 2012 to work at its Yorba Linda, California location. Stip., ¶8. Shortly after her hire, and as a condition of her employment, Mestanek received and signed a “Mutual Binding Arbitration Agreement.” Stip., ¶8; Jt. Ex. 7. This agreement provides that:

The Employee agrees and acknowledges that the Company and Employee will utilize binding arbitration to resolve all disputes that may arise out of the employment context. Both the Company and Employee agree that any claim, dispute, and/or controversy that either the Employee may have against the Company . . . or the Company may have against the Employee, arising from, related to, or having any relationship or connection whatsoever with [Employee] seeking employment by, or other association with the Company, shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act, and following the procedures of the applicable state arbitration act, if any.

³ Sprouts refers to its employees as “team members.”

To the extent permitted by applicable law, the arbitration procedures stated below shall constitute the sole and exclusive method for the resolution of any claim between the Company and Employee arising out of “or related to” the employment relationship. *The parties hereto EXPRESSLY WAIVE their rights, if any, to have such a matter heard by a court or a jury. . .*

Jt. Ex. 7; ALJD 4:15-4:30 (emphasis in original).

The agreement further stated that:

Included within the scope of this agreement are all disputes, whether they be based on the state employment statutes, Title VII of the Civil Rights Act of 1964, as amended, or any other state or federal law or regulation, equitable law, or otherwise, with the exception of claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims brought pursuant to state workers’ compensation statutes, or as otherwise required by state or federal law.

Jt. Ex. 7; ALJD 4:34-40. The agreement also clarified that:

Nothing herein shall prevent, prohibit, or discourage an employee from filing a charge with or participating in an investigation of the National Labor Relations Board (NLRB), the Equal Employment Opportunity Commission (EEOC), or any other state or federal agency . . . Nothing in this Agreement is intended to interfere with the Employee’s rights under the National Labor Relations Act . . .”

Jt. Ex. 7; ALJD 5:4-10 (emphasis in original).

Mestanek’s employment with Sprouts ended in August 2012. Jt. Ex. 2. On November 7, 2012, Mestanek filed a complaint in the Superior Court of Los Angeles County, California on behalf of herself and a putative class of similarly-situated current and former team members, alleging that an entity affiliated with Sprouts (Sunflower Farmers

Market) engaged in violations of certain of California's wage and hour laws (the "Lawsuit"). Stip., ¶9(a); Jt. Ex. 8; ALJD 5:12-14. Mestanek amended the Lawsuit on December 14, 2012 to specifically name Sprouts as an additional defendant. Stip., ¶9(b); Jt. Ex. 9; ALJD 5, n. 4.

On December 17, 2012, Sprouts filed a petition to compel arbitration, seeking an order compelling Mestanek to arbitrate the claims asserted in the Lawsuit. Stip., ¶10; Jt. Ex. 10; ALJD 5:16-17. Sprouts filed this petition in the Superior Court for Orange County, California, and not in the improper venue where Mestanek filed the Lawsuit (Los Angeles County Superior Court), because at all times during her employment with Sprouts, Mestanek worked at Sprouts stores located in Orange County, California. Jt. Ex. 22, at ¶13; Jt. Ex. 26, at ¶ 7.

Sprouts' petition sought an order compelling Mestanek to arbitrate her claims against Sprouts on an individual, non-class basis. Stip., ¶10; Jt. Ex. 10. Mestanek opposed the petition, both on the merits and procedurally through a motion to abate, arguing that her filing of the Lawsuit in the Los Angeles County Superior Court should take precedence over Sprouts' petition later filed in Orange County Superior Court. Stip., ¶¶10-11; Jt. Exs. 11-12, 15-16; ALJD 6:4-7. Following briefing (*see* Jt. Exs. 13-14, 17-19), on March 6, 2013, the Orange County Superior Court granted Mestanek's motion to abate, thereby staying Sprouts' petition pending final resolution of the first-filed Los Angeles County Superior Court action. Stip., ¶12; Jt. Ex. 20; ALJD 6:9-16.

After receiving the Orange County Superior Court's ruling, Sprouts filed a motion to compel arbitration and stay proceedings in the Los Angeles County Superior Court.

Stip., ¶13(a); Jt. Exs. 21-23; ALJD 5:21-23. In that motion, Sprouts asserted that Mestanek and Sprouts mutually agreed to resolve those claims asserted by her against Sprouts in the Lawsuit through binding arbitration. *Id.* Sprouts further argued that the mutual agreement to arbitrate between Mestanek and Sprouts did not provide for class arbitration procedures, and thus Mestanek could pursue only her own individual claims, and not those of any putative class, in arbitration. *Id.*

Following briefing (*see* Stip., ¶¶13(b)-(c); Jt. Exs. 24-27; ALJD 5:25-31), on June 7, 2013, the Los Angeles County Superior Court ruled in Sprouts' favor on its request that Mestanek be compelled to arbitrate her claims against Sprouts, and that she be ordered to do so solely on an individual, non-class basis, rejecting Mestanek's arguments that relied on *D.R. Horton*. Stip., ¶14; Jt. Ex. 28; ALJD 5:33-37.⁴

Despite the Los Angeles County Superior Court's June 2013 ruling, Mestanek did not initiate individual arbitration proceedings against Sprouts. Instead, in April 2013 – prior to the Los Angeles County Superior Court's ruling – Mestanek filed an unfair labor practice charge against SF Markets, LLC and Sunflower Farmers Markets, LLC alleging that “Defendants’ purported arbitration agreement that allegedly applies to all employees violates the NLRA[.]” Stip. ¶2; Jt. Ex. 1. Mestanek's counsel subsequently filed an amended charge against SF Markets, LLC; Sunflower Farmers Markets, LLC;

⁴ Mestanek's Lawsuit additionally alleged claims under California's Private Attorney General Act, Cal. Labor Code § 2698, *et seq.* (“PAGA”). The Los Angeles County Superior Court's Order on Sprouts' motion severed Mestanek's PAGA claim and stayed it, pending decisions from the California Supreme Court on the issue of whether under California law, representative claims under PAGA can be waived in an individual arbitration agreement. Stip., ¶ 14; Jt. Ex. 28.

and Sprouts Farmers Markets, LLC, alleging the same purported substantive unfair labor practice. Stip. ¶12; Jt. Ex. 2.

C. Case 21-CA-104677 (Christensen)

In January 2013, Sprouts revised its team member handbooks, including the dispute resolution policy described therein, and its form of mandatory binding arbitration agreement. Stip., ¶15; Jt. Ex. 29-30; ALJD 3:44-4:7. Sprouts required team members employed at that time to agree to the terms therein as a condition of continued employment, and to sign an acknowledgement thereof. *Id.*

On January 16, 2013, Sprouts presented Christensen, then employed at its Tustin, California store, with the revised team member handbook, which incorporated the terms of the revised form of arbitration agreement, and an acknowledgement form for receipt of that revised handbook. Stip., ¶16; ALJD 6:20-23. Sprouts also presented Christensen with the revised form of arbitration agreement. Unlike the form of agreement that Mestanek signed, which contained no provisions specifically addressing class and collective action procedures, the revised arbitration agreement presented to Christensen contained an explicit waiver of the ability to assert claims on a class or collective action basis. (*Compare* Jt. Ex. 7 with Jt. Ex. 29.) That is, in addition to stating that arbitration was the “sole and exclusive method for the resolution of” any of the arbitrable claims described in the Agreement, the revised agreement stated:

Except as otherwise required under applicable law, the Company and Employee expressly intend and agree that (1) class action, collective action, and representative action procedures shall not be asserted, nor will they apply, in any arbitration proceeding pursuant to this Agreement; (2)

neither the Company nor the Employee will assert any class action, collective action, or representative action claims against the other in arbitration or otherwise; and (3) the Company and the Employee shall only submit their own respective, individual claims in arbitration and will not seek to represent the interests of any other person . . .

Jt. Ex. 29; ALJD 7:32-39. However, as before, the revised agreement explained that:

Nothing herein shall prevent, prohibit, or discourage an employee from filing a charge with, or participating in an investigation by, the National Labor Relations Board (NLRB), the Equal Employment Opportunity Commission (EEOC), any state or local fair employment practices or civil rights agency . . ., or any other administrative agency or governmental body possessing jurisdiction over employment-related claims . . . Nothing in this Agreement is intended to interfere with the Employee's rights to act collectively for mutual aid and protection under the National Labor Relations Act[.]"

Jt. Ex. 29; ALJD 7:16-28 (emphasis in original).

Sprouts advised Christensen that her signature on the acknowledgement form and her agreement to the terms of the revised arbitration agreement were conditions of her continued employment with Sprouts. Stip., ¶¶16, 18(a)-(b); ALJD 7:41-44. Christensen refused to sign the acknowledgment form, and thereby refused to agree to the terms of the revised arbitration agreement. Stip., ¶19(a); ALJD 8:1-4. In light of her voluntary decision not to sign the acknowledgment form and not to agree to the terms of the revised arbitration agreement – each of which were a condition of her continued employment – Sprouts deemed Christensen to have voluntarily resigned her employment. Stip., ¶19(c). The parties agree that Christensen's decision not to sign the acknowledgment form and thereby to refuse to agree to the terms of the revised

arbitration agreement was the sole reason her employment with Sprouts ended. Stip., ¶19(d); ALJD 8:3-4.

On February 25, 2013, Christensen filed an unfair labor practice charge alleging that Sprouts “interfered with, restrained, and coerced its employees by requiring its employees to execute an ‘acknowledgement of receipt of California team member handbook supplement,’ which supplement requires individual arbitration of most employment claims against the Employer.” Stip. ¶¶2, 18-19; Jt. Ex. 1. She further alleged that Sprouts “discharged” her “because she did not execute this ‘acknowledgement.’” *Id.*

On July 31, 2013, the Regional Director consolidated Mestanek and Christensen’s unfair labor practice charges, and issued the Complaint. Jt. Ex. 4. The parties submitted the matter to the ALJ on a stipulated record, and following briefing submitted by the parties, on February 18, 2014, the ALJ issued his decision, finding that Sprouts violated the Act in all regards alleged by the General Counsel. This appeal follows.

III. ARGUMENT

A. The ALJ Disregarded Pertinent Procedural Issues That Affect The Enforceability Of *D.R. Horton*, As Well As The Viability Of The Complaint In This Case.

1. Former Member Becker’s purported recess appointment to the Board was unconstitutional, and therefore the Board lacked the required “three participating members” when it decided *D.R. Horton*.

Sprouts asserted three procedural grounds supporting its argument that *D.R. Horton* and the complaint in this matter were invalidly issued, each of which the ALJ superficially, and erroneously, disposed of.

The first procedural ground that Sprouts raised relates to the composition of the Board at the time it issued its decision in *D.R. Horton*, which issue is presently under review by the Supreme Court in *NLRB v. Noel Canning*, No. 12-1281 (argued January 3, 2014). Section 3(a) of the Act states that the Board “shall consist of five . . . members, appointed by the President by and with the advice and consent of the Senate.” See 29 U.S.C. § 153(a). Except where the five-member Board delegates its powers to any group of three or more members, at least “three members of the Board” are required in order to “constitute a quorum of the Board.” See 29 U.S.C. § 153(b).

In 2010, the Supreme Court was asked to decide whether the aforementioned three-member quorum requirement is merely an “easily surmounted technical obstacle[] of little to no import,” or an indispensable requirement in order for the Board to act. See *New Process Steel, LP v. NLRB*, 560 U.S. ___, 130 S. Ct. 2635, 2644-2645 (2010) (“*New Process*”). Some pre-*New Process* Board history is helpful to frame the issue. In 2007, an existing vacancy and the impending expirations of two purported recess appointments threatened to leave the Board with only two duly-appointed Members at year-end. *Id.* at 2638. Anticipating the loss of these Members, three then-Board Members delegated authority to act on behalf of the Board to the two Members anticipated to remain at the end of the year, thus entrusting them to act as a two-member “quorum” of a three-member delegee panel.

During the 27-month period that this arrangement existed, the two-member “quorum” issued nearly 600 decisions, including two decisions sustaining unfair labor practice complaints against the employer in *New Process*. *Id.* at 2639. *New Process*

challenged these decisions, arguing that the Board lacked authority to act when it was comprised of fewer than three duly-appointed members. Relying on the plain language of Section 3(b) of the Act, the Supreme Court agreed with New Process and concluded that the Board lacked authority to delegate its jurisdiction to a two-member delegee panel when it was comprised of fewer than three members. Specifically, the Court held that the Board may exercise its powers under the Act only when it has a lawful quorum, that is, that “three participating members” of the Board are required “‘at all times’ for the Board to Act.” *Id.* at 2640.

D.R. Horton, the Board decision on which the ALJ exclusively relied, issued on January 3, 2012. On that date, the Board lacked a three-member quorum, as it was comprised of only two validly-appointed Members: Chairman Pearce and Member Hayes, both of whom the Senate confirmed on June 22, 2010. *See Noel Canning, supra*, at 498-99 (discussing the Board’s composition over the relevant time period). The third Member on the *D.R. Horton* decision was Member Craig Becker, whom the President purported to “recess” appoint to the Board on March 27, 2010 during a 17-day intrasession “recess” of the Senate. Member Becker’s term expired on January 3, 2012, the same date on which the Board issued the *D.R. Horton* decision.⁵ The following day, the President recess appointed Member Sharon Block to the Board to fill the position that

⁵ *See* <http://nlrb.gov/who-we-are/board/craig-becker> (last visited March 14, 2014); *see also* 156 Cong. Rec. D355 (daily ed. March 26, 2010).

became vacant when Member Becker's putative recess appointment expired. *Noel Canning*, 705 F.3d at 498.⁶

Later, however, the D.C. Circuit Court of Appeals determined that the President's attempted recess appointments of Member Block and two other recess-appointed Board Members (Terence Flynn and Richard Griffin) in order to fill then-existing vacancies were unconstitutional under the Recess Appointments Clause of the Constitution. *See Noel Canning*, 705 F.3d at 499-500; 506-07. Specifically, the court held that the President's authority to appoint Board Members pursuant to the Recess Appointments Clause is limited to appointments made during *intersession* recesses (that is, the period between sessions of the Senate when the Senate is by definition not in session and therefore unavailable to receive and act upon nominations from the President), thus rendering the President's attempted *intrasession* appointments (that is, breaks in Senate business during a Congressional Session) of Members Block, Flynn, and Griffin unconstitutional. *Id.* According to *Noel Canning*, because the President's post-January 3, 2012 appointments of Members Block, Flynn, and Griffin were unconstitutional, the decisions issued by the Board after their appointment were invalid for want of a quorum, pursuant to 29 U.S.C. § 153(b) and *New Process*.

The conclusion reached in *Noel Canning* regarding the President's appointments of Members Block, Flynn, and Griffin - that purported intrasession recess appointments are invalid and thus those appointees fail to count towards the quorum required for the Board to Act - applies equally to the purported appointment of Member Becker and the

⁶ *See also* 158 Cong. Rec. S582-83 (daily ed. Feb. 13, 2012).

Board's decision in *D.R. Horton* on January 3, 2012. On that date, the Board consisted of only three purported Members – Chairman Pearce, Member Hayes, and Member Becker. Like Members Block, Flynn, and Griffin, Member Becker received his Presidential appointment during the Senate's March 2010 *intrasession* break, not during an *intersession* recess within the meaning of Article II, Section 2 of the Constitution. See, e.g., *NLRB v. New Vista Nursing & Rehab'n*, 719 F.3d 203, 218 (3d Cir. 2013) ("*New Vista*") ("[Member Becker] was appointed during [a 17-day] *intrasession* break that began on March 26, 2010, and ended on April 12, 2010."). Therefore, it follows that: 1) "Member Becker was invalidly recess appointed to the Board during the March 2010 *intrasession* break[;]" 2) "the delegee group [of Members] had fewer than three members when it issued the" *D.R. Horton* decision; 3) the delegee group "acted without power and lacked jurisdiction when it" issued the decision; and 4) because the Board did not consist of three duly-appointed and confirmed Members as of January 3, 2012, *D.R. Horton* is void *ab initio*. *New Vista*, 719 F.3d at 244; *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 952 (D.C. Cir. 2013) (assuming that Member Becker's March 27, 2010 recess appointment was constitutionally invalid).⁷

⁷ See also *NLRB v. Enterprise Leasing Co. Southeast, LLC*, 722 F.3d 609, 660 (4th Cir. 2013) (quoting *Noel Canning*, 705 F.3d at 507):

[T]he President's three January 4, 2012 appointments to the Board were not made during an *intersession* recess because Congress began a new session on January 3, 2012. Consequently, 'these appointments were invalid from their inception.' Because the Board lacked a quorum of three members when it issued its 2012 unfair labor practices decisions . . . , its decisions must be vacated.

Moreover, even if Member Becker's 2010 appointment had been constitutionally valid – which it was not – his appointment nonetheless expired before the Board issued its decision in *D.R. Horton* on January 3, 2012. Therefore, regardless of whether Member Becker's intrasession appointment was valid, *D.R. Horton* is still void because it was decided by a Board after Member Becker's purported appointment had expired, and thus plainly at a time when the Board lacked the requisite quorum. Indeed, in point of fact, *D.R. Horton* was decided by only one Member, as the only other Member then on the Board did not participate in the case. See *D.R. Horton*, at n. 1.

As discussed above, the President appointed Member Becker to the Board on March 27, 2010 during an intrasession “recess” during the Second Session of the 111th Congress.⁸ The Recess Appointments Clause of the Constitution provides that “[t]he President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions *which shall expire at the End of their next Session.*” U.S. Const., art. II, § 2, cl. 3 (emphasis added).

The “next Session” following Member Becker's purported March 27, 2010 recess appointment was the First Session of the 112th Congress. On December 30, 2011, the Senate convened a *pro forma* session during which the acting Senate President *pro tempore* adjourned the Senate until it was to “reconvene for the Second Session of the 112th Congress at 12 noon” on January 3, 2012. See 157 Cong. Rec. S8793 (daily ed. Dec. 30,

⁸ See Press Release, White House, President Obama Announces Recess Appointments to Key Administrative Positions (March 27, 2010), available at <http://whitehouse.gov/the-press-office/president-obama-announces-recess-appointments-key-administration-positions> (last visited March 14, 2014).

2011). According to the Congressional Record, “[t]hereupon, the Senate, at 11 and 34 seconds a.m. [on December 30, 2011], adjourned until Tuesday, January 3, 2012, at 12 noon.” *Id.* Member Becker’s recess appointment therefore ended at approximately mid-day on December 30, 2011, upon the adjournment of the First Session of the 112th Congress. Thus, regardless of the circumstances or validity under which Member Becker was recess appointed to the Board, the Board unquestionably lacked a quorum on January 3, 2012 after the adjournment of the First Session of the 112th Congress (on December 30, 2011) when it issued its decision in *D.R. Horton. New Vista*, 719 F.3d at 234 (noting that the term of a recess-appointed officer expires “at the End of [the Senate’s] next Session,” either when the Senate adjourns *sine die* or automatically at noon on January 3 in any given year) (citing U.S. Const. art. II, § 2, cl. 3).

Because the Board lacked a quorum at the time it decided *D.R. Horton* – whether because Member Becker was not validly appointed pursuant to the Recess Appointments Clause or because his appointment, even if valid, had expired as of the date of the decision’s issuance – *D.R. Horton* is not a valid decision, and cannot form the basis for the finding of any violation alleged in the Complaint.

As noted above, Sprouts raised each of these issues with the ALJ. The ALJ, however, ignored Sprouts’ arguments and the principles set forth in *New Process* and *Noel Canning*, instead deferring to the Board’s later-issued decisions that it can, and, apropos to this case, did, validly issue decisions even when those decisions are decided by a purported delegate panel of three Board Members, at least one of whom was invalidly appointed in violation of the Recess Appointments Clause. ALJD 8:25-42, citing *G4S Regulated Sec.*

Solutions, slip op. at 1, n. 1 (2013), and *Belgrove Post Acute Ctr.*, 359 NLRB No. 77, slip op. at 1, n. 1 (2013). In other words, notwithstanding directly on-point Supreme Court authority requiring a valid quorum for the Board to act, the Board has said repeatedly that, because the issue regarding the validity of recess appointments “remains in litigation, and pending a definitive resolution, the Board is charged to fulfill its responsibilities under the Act.” *G4S Regulated Sec. Solutions*, slip op. at 1, n. 1; see also *Bloomingtondale’s Inc.*, 359 NLRB No. 113 (2013).

This circular attempt to legitimize the Board’s actions – “our actions are valid because we say they are valid” – is legally untenable. Far beyond simply interpreting the Act itself, in making this broad pronouncement, the Board has attempted to interpret (or worse, has elected to just ignore) the Recess Appointments Clause of the Constitution and the careful and thoughtful decisions of a number of federal circuit courts of appeal. The Board’s opinions in *G4S Regulated* and *Belgrove Post Acute Ctr.*, and the ALJ’s adherence to those determinations in this case – specifically that the Board could act notwithstanding its improper composition – are not entitled to deference. To the contrary, the Board instead should defer to the federal courts’ interpretations of federal laws other than the Act. See *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144, 122 S. Ct. 1275, 152 L. Ed.2d 271 (2002); see also *Electrical Workers Local 48 (Kingston Constructors)*, 332 NLRB 1492, 1500-01 (2000) (deferring to the court’s interpretation of Davis-Bacon Act); *PCC Structurals, Inc.*, 330 NLRB 868, 871 (2000) (deferring to the court’s interpretation of the Americans with Disabilities Act).

The Board erred in *G4S Regulated* and *Belgrove Post Acute Ctr.* by concluding that it had authority to act during the period of its improper composition, and the ALJ erred in relying on that determination. At a minimum, the ALJ should have deferred ruling in this case until the Supreme Court decides *Noel Canning*, answering definitively whether *D.R. Horton* was even validly issued in the first instance.

2. Because the Board lacked a valid quorum at the time it appointed Olivia Garcia as the Regional Director of Region 21, it lacked the authority to delegate its authority to her, and, consequently, Regional Director Garcia's complaint against Sprouts, issued pursuant to that purported delegation, is void.

On January 6, 2014, Sprouts moved the ALJ to dismiss the complaint on the grounds that Region 21 Regional Director Olivia Garcia's appointment was invalid, and thus she lacked the authority to issue the complaint in this matter. ALJD 2:9-10. The ALJ declined to consider Sprouts' motion on its own, instead electing to consider it in the context of the overall merits of this case. In his decision, the ALJ rejected Sprouts' argument concerning Ms. Garcia's authority to issue the complaint. Sprouts submits that in so doing, the ALJ erred.

On January 6, 2012, the Board, acting pursuant to its authority under 29 U.S.C. §§ 153(b), 160(b) and 29 C.F.R. § 102.15, appointed Ms. Garcia as the Regional Director of Region 21 and invested in her the putative authority to act as the Board's agent, including to issue complaints alleging violations of the Act.⁹ However, as discussed above, as of January 6, 2012, the Board lacked a three-member quorum. *See Noel Canning*,

⁹ See Press Release, "Olivia Garcia named Regional Director in Los Angeles," January 6, 2012, available at <http://www.nlr.gov/news-outreach/news-story/olivia-garcia-named-regional-director-los-angeles> (last visited March 14, 2014).

705 F.3d at 499-514; *New Vista*, 719 F.3d at 218, 244. That is, because the President's purported January 4, 2012 intrasession recess appointments of Members Block, Flynn, and Griffin were invalid, *Noel Canning*, 705 F.3d at 499-514, the Board lacked "three participating members," and thus did not have the authority under the Act to *itself* issue a complaint, much less to delegate that authority to a delegee such as a Regional Director. Accordingly, all purported actions taken under the guise of this "delegated authority" were void *ab initio*. *Noel Canning*, 705 F.3d at 493, 514; *New Vista*, 719 F.3d at 244.

On this issue, Sprouts cited case law to the ALJ directly on point, establishing that the Board's authority to delegate its authority ceases to exist once the Board loses its quorum. See *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 473 (D.C. Cir. 2009), *cert. denied*, 130 S. Ct. 3498 (Jun. 28, 2010) ("In the context of a board-like entity, a delegee's authority . . . ceases the moment that vacancies or disqualifications on the board reduce the board's membership below a quorum."); *Frankl v. HTH Corp.*, 650 F.3d 1335, 1354 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1821 (Mar. 26, 2012). However, the ALJ casually dismissed this argument, stating, without analysis or citation to any authority that, "[i]f the Board was properly constituted, ergo it had the authority to appoint the Regional Director who issued the complaint in this matter." ALJD 8:44-45. This conclusion, however, fails for the same reason that the Board's self-interested interpretation of its authority to issue decisions (including *D.R. Horton*) through invalidly-appointed members fails: absent a three-member quorum, the Board is not

empowered to act *at all*.¹⁰ *New Process*, 130 S. Ct. at 2640. Accordingly, the ALJ erred by rejecting Sprouts' argument that Ms. Garcia lacked authority to act on behalf of the Board because the Board lacked a quorum on the date that she was appointed, and still lacked a quorum on the date that she issued the complaint in this case.

3. The Acting General Counsel lacked authority to issue the complaint in this matter because his appointment was invalid under the Federal Vacancies Reform Act.

Sprouts also moved to dismiss the complaint because it was issued pursuant to authority delegated by former Acting General Counsel Lafe Solomon, whose appointment violated the Federal Vacancies Reform Act, 5 U.S.C. § 3345 *et seq.* ("FVRA"), which permits the appointment of an officer of an executive agency only under specific circumstances that were not satisfied here.

To be duly appointed as Acting General Counsel in compliance with the FVRA, Mr. Solomon must first have served as "first assistant" to the departing General Counsel. 5 U.S.C. § 3345(b). Ronald Meisburg retired from the General Counsel position on June 20, 2010, and Mr. Solomon assumed the Acting General Counsel position effective June 21, 2010. Prior to this appointment, Mr. Solomon served as the director of the NLRB's Office of Representation Appeals for over 10 years. As Mr. Solomon had never served as first assistant to the General Counsel, he could not be validly appointed to the Acting General Counsel position under the FVRA. *See Hooks ex rel. NLRB v. Kitsap Tenant Support Servs.*, Case No. C13-5470 BHS, 2013 WL 4094344 (W.D. Wash. Aug. 13, 2013) (rejecting

¹⁰ Indeed, Sprouts submits that the ALJ's syllogism works the other way too: if the Board was *not* properly constituted, ergo it did *not* have the authority to appoint the Regional Director who issued the complaint in this matter.

argument that Mr. Solomon had validly delegated authority to a regional director to initiate legal action because his appointment was improper).

As with Sprouts' other procedural arguments, the ALJ summarily rejected this argument, once again relying entirely on unpublished Board authority. ALJD 9:1-6, citing *UHS-Corona, Inc. d/b/a Corona Reg'l Med. Ctr.*, Case 21-CA-110919, 2014 WL 101770, at 1 n. 1 (Jan. 9, 2014). The *Corona* decision that the ALJ cited to relied on and itself cited to *Muffley v. Massey Energy Co.*, 547 F. Supp. 2d 536, 542-43 (S.D. W. Va. 2008), *aff'd* 570 F.3d 534, 536 n. 1 (4th Cir. 2009). Both *Corona* and *Muffley* involved the Acting General Counsel's authority to exercise the Board's Section 10(j) authority, not the authority to issue complaints for purported Section 8(a)(1) violations. In fact, the *Muffley* court specifically distinguished the case from delegations of power that were "judicial in nature." 547 F. Supp. 2d at 541. Thus, neither of the cases relied on by the ALJ held that Mr. Solomon was authorized to issue complaints, or to delegate authority to do so.¹¹ Accordingly, the ALJ's erred in rejecting Sprouts' position on this issue.

B. The Board's Decision In *D.R. Horton*, And The ALJ's Reliance Thereon, Was Erroneous And Should Be Rejected, As That Decision Is Inconsistent With The Strong Federal Policy Favoring Enforcement of Arbitration Agreements.

Even assuming that the Board's *D.R. Horton* decision did not suffer from the fatal procedural defects discussed above, it was incorrectly decided on the merits, and therefore the ALJ's reliance on it to find violations in this matter should be rejected.

¹¹ In addition, the Board's determination that the FVRA does not stand as an obstacle to Mr. Solomon's authority to act is not entitled to deference, as it exceeds consideration of the Act itself. *See, e.g., Hoffman Plastic Compounds*, 535 U.S. at 144.

Section 2 of the FAA provides that “[a] written provision in any . . . contract . . . to settle by arbitration a controversy thereafter arising out of such contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. 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 incorporates a “liberal federal policy favoring arbitration agreements.” *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). The Supreme Court has since reaffirmed the “liberal federal policy favoring arbitration agreements” on many occasions. *See, e.g., CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (“*CompuCredit*”); *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1745 (2011) (“*Concepcion*”).

Recent Supreme Court decisions demonstrate its commitment to arbitration, including that agreements to arbitrate must be enforced according to their terms, including, if applicable, barring class and collective actions where the parties did not expressly consent thereto. For example, in *Stolt-Nielsen S.A. v. Animal Feeds Int’l Corp.*, 130 S. Ct. 1758 (2010), the Court was asked to determine whether an agreement to arbitrate, which was silent as to the availability of class arbitration procedures, supported one party’s *post hoc* demand for class-wide arbitration. 130 S. Ct. at 1773-74. Applying the foundational principle that courts and arbitrators must give effect to the contractual rights and expectations of parties, which may generally be structured as the parties see fit, the Supreme Court concluded that a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding

that the party agreed to do so. *Id.* at 1775. Indeed, imposing class arbitration on a party that had not expressly agreed to such procedures was, in the Court's opinion, "fundamentally at war with the foundational FAA principle that arbitration is a matter of consent." *Id.*

The *Stolt-Nielsen* Court noted: "class-action arbitration changes the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator." *Id.* The Court explained further that submitting disputes to class arbitration absent the parties' agreement would eviscerate the lower costs, greater efficiency and speed, and ability to choose expert adjudicators to resolve specialized disputes that are the hallmarks of bilateral arbitration. *Id.* Moreover, the Court observed, class arbitration binds not only the parties to the arbitration agreement, but seeks to resolve the disputes of dozens, hundreds, or possibly thousands of persons who are not parties to the arbitration agreement. *Id.* at 1776. Such a result would be utterly inconsistent with the principle that arbitration is a matter of consent.

The Supreme Court also has struck down state laws that attempt to impose unbargained-for terms on parties to arbitration agreements, such as class and collective arbitration procedures, absent their consent. For example, in *Concepcion*, cellular telephone consumers sought to evade a provision in their consumer arbitration agreements waiving the class-wide arbitration of claims. The putative plaintiff class argued that a California rule of law announced in *Discover Bank v. Superior Court*, 36 Cal. 4th 148, 162-63, 30 Cal. Rptr. 3d 76, 113 P.3d 1100, 1110 (2005), allowed any party to a

consumer contract to demand class-wide arbitration *ex post*. Discover Bank argued that the state rule of law was inconsistent with the FAA, and was therefore preempted.

The Court agreed. Extending its decision in *Stolt-Nielsen*, the Court held that a state rule imposing class arbitration on parties absent their consent “is inconsistent with the FAA,” and therefore preempted. *Concepcion*, 131 S. Ct. at 1750-51, 1753. Although the Court recognized that the FAA’s savings clause preserves generally applicable contract defenses, “nothing in [the FAA] suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA’s objectives.” *Id.* at 1748. Thus, because “[t]he overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms,” the Court held that “[r]equiring the availability of class-wide arbitration,” absent the consent of the parties, “interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” *Id.*

Despite these unambiguous decisions establishing beyond dispute that the FAA compels arbitration on the terms agreed to by the parties unless a federal statute unambiguously provides otherwise, the Board issued its controversial decision in *D.R. Horton*. Rejecting on-point Supreme Court precedent holding that efforts to impose class-wide arbitration on parties absent their consent are “inconsistent with the FAA” and therefore preempted, the Board nonetheless concluded in *D.R. Horton* that an employer violates Section 8(a)(1) of the Act by imposing, as condition of employment, a mandatory arbitration agreement that precludes employees from “filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial.”

Although mentioned by the Board in passing in *D.R. Horton*, the Board dismissed the relevance of *Concepcion* and other Supreme Court authority on the rationale that those cases did not involve employment-related arbitration agreements or employees' rights under the Act. However, the Board's unabashed refusal to adhere to the FAA's mandate to enforce all arbitration agreements – including, without limitation or distinction, arbitration agreements between employers and employees – according to their terms, cannot be reconciled with either *Stolt-Nielsen*, *Concepcion*, subsequent Supreme Court cases (including *Italian Colors*, discussed below), or the FAA itself. See 9 U.S.C. § 2 (FAA applies to “any ... contract ... to settle by arbitration a controversy,” without carving out employment disputes) (emphasis added).

The Board's (and its ALJs') continued reliance on *D.R. Horton*, beyond its procedural defects and that it was wrongly decided in the first instance, is particularly troubling in light of subsequent Supreme Court decisions such as *CompuCredit*, 132 S. Ct. at 669. In that case, the Supreme Court held that in order for a federal statute to override the FAA, and thus claims thereunder to be non-arbitrable, a contrary “congressional command” must be clear on the face of the statute. *Id.* at 670. That is, 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.

The Board concluded in *D.R. Horton* that the NLRA's guarantee of employees' right to engage in concerted activity triggers the savings provision in the FAA and thus that to the extent the FAA conflicts with the Act, “the FAA would have to yield.” *D.R. Horton*, *supra*, slip op. at 12. However, in reviewing the Board's decision in *D.R. Horton*, the Fifth

Circuit concluded that the NLRA does not contain any statutory language or legislative history supporting that it was (or is) intended to prohibit or restrict arbitration of employee claims, or to otherwise be carved out of the scope of the FAA's broad expanse. Indeed, the Fifth Circuit noted that "the text [of the Act] does not even mention arbitration," and, consistent with the Supreme Court's decision in *Stolt-Nielsen*, "[r]equiring a class mechanism is an actual impediment to arbitration and violates the FAA." *D.R. Horton v. NLRB*, 737 F.3d at 360. The Fifth Circuit therefore rejected the Board's argument that there is a clear conflict between the FAA and the NLRA, and found no inherent conflict with, and no plain and indisputable congressional command in, the Act that would override the FAA and exempt from enforcement arbitration agreements that bar the use of class or collective action procedural devices. *Id.* at 360-62.

In reaching this decision, the Fifth Circuit joined its sister circuits that similarly concluded that the Act does not override the FAA's strong federal policy favoring the enforcement of arbitration agreements, even those that require employees to waive class and collective action procedures. *See Ranieri v. Citigroup, Inc.*, --- Fed. App'x ---, 2013 WL 4046278 (2d Cir. Aug. 12, 2013) (summary order); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290 (2d Cir. 2013) ("We decline to follow the decision in *D.R. Horton*. Even assuming that *D.R. Horton* addressed the more limited type of class waiver present here, we still would owe no deference to its reasoning."); *Owen v. Bristol Care*, 702 F.3d 1050 (8th Cir. 2013); *Richards v. Ernst & Young, LLP*, --- F. 3d ---, 2013 WL 6405045 (9th Cir. Dec. 9, 2013) ("[T]he overwhelming majority of the district courts to have considered the issue have determined that they should not defer to the NLRB's decision in *D.R. Horton* because it

conflicts with the explicit pronouncements of the Supreme Court concerning the policies undergirding the Federal Arbitration Act[.]”). Moreover, the Fifth Circuit’s decision is consistent with the large and continually growing body of decisional law finding that federal statutes generally lack a congressional command to override the NLRA. *See, e.g., Sutherland*, 726 F.3d at 290 (FAA); *Gilmer*, 500 U.S. at 29 (no contrary congressional command in Age Discrimination in Employment Act, despite the act’s provision for right to jury trial); *American Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2311 (2013) (no clear contrary congressional command in federal antitrust laws mandating invalidation of prohibition against class arbitration of claims); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 227-28, 239-42 (1987) (no clear congressional command in Securities Exchange Act of 1934 or in Racketeering Influenced Corrupt Organizations Act to override FAA); *EEOC v. Luce, Forward, Hamilton & Scripps*, 345 F.3d 742, 750 (9th Cir. 2003) (*en banc*) (no contrary congressional command in Title VII such that claims thereunder are non-arbitrable, despite the statute’s provision for a jury trial).

The Supreme Court articulated the high standard required to prove a contrary congressional command, which, if evident, would exempt statutory claims thereunder from the FAA, in *CompuCredit*, 132 S. Ct. at 670-672. The issue in that case was whether the federal 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, fell within the savings provision of, and thereby overrode, the FAA. The Court rejected the argument that the anti-waiver provision in the CROA could be read to

preclude arbitration, and held that Congress' intent to override the FAA must be clear, intentional, and manifest. "If the mere formulation of the cause of action in 'terms like action, class action, or court,' 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 (internal citation omitted).

These well-settled principles leave little doubt that the Board simply was incorrect in its conclusion in *D.R. Horton* that the NLRA trumps the FAA, as the Act does not evince a sufficiently clear congressional command to override the FAA. The Act does not expressly preclude arbitration of employment disputes or state that class and collective adjudication of claims via arbitration is required, nor does it provide that arbitration agreements that limit procedural litigation mechanisms, such as class and collective actions, are prohibited. Indeed, the Act is completely silent on whether it precludes arbitration agreements that include a class waiver.

Apparently conceding the Act's complete silence in this regard, the Board instead has relied on the Act's general definition of "concerted activities" for "mutual aid or protection" as its purported justification for declaring unlawful that which the Supreme Court has resoundingly endorsed as completely lawful. This language - which in no way implicates any restrictions on the freedom to agree to arbitration - is insufficient to evidence an intent to trump the FAA. *D.R. Horton, Inc.*, 737 F.3d at 360 (noting that "much more explicit language has been rejected in the past" to infer a congressional command against application of the FAA); *CompuCredit*, 132 S. Ct. at 673 (federal

statute's silence on the subject of arbitration must lead to enforcement of the arbitration agreement in accordance with its terms; only an unambiguous statement in the statute compels setting the agreement aside); *Richards*, 734 F.3d at 871 ("Congress . . . did not expressly provide that it was overriding any provision in the FAA when it enacted the NLRA or the Norris-LaGuardia Act."). 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 672.¹²

Although the contrary congressional command must be plain from the statute's language itself, even the legislative history behind the NLRA fails to demonstrate an intent to override the FAA through its enactment. The Supreme Court and the lower federal courts repeatedly have held that a class or collective action is a procedural device, rather than a substantive right. See *D.R. Horton*, 737 F.3d at 357, 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); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407 (2010) (Rule 23 "governs only the manner and the means by which the litigants' rights are enforced") (internal citations omitted). The legislative history of the NLRA says nothing about employees' use of a particular *procedural* device to adjudicate claims

¹² Congress certainly knows how to do so when it wants to. See *CompuCredit*, 132 S. Ct. at 672. For example, Section 26 of the Commodity Exchange Act expressly provides that "[n]o pre-dispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this section." 7 U.S.C. § 26(n). See also 15 U.S.C. § 1226(a)(2) (providing that when a motor vehicle franchise contract includes an agreement to arbitrate a controversy arising out of or related to the contract, arbitration may be used only if all parties consent in writing to use arbitration *after* the controversy arises).

under other federal or state employment laws. *Owen*, 702 F.3d at 1053. Indeed, modern class action procedures were not even adopted in the federal courts until 1966, more than 30 years after the Act's enactment. *D.R. Horton*, 737 F.3d at 362. Therefore, Congress could not possibly have intended for the Act to guarantee access to a procedural litigation mechanism that did not yet exist. *Italian Colors*, 133 S. Ct. at 2309 (noting that antitrust laws predated the adoption of Fed. R. Civ. P. 23 and thus could not have contained a contrary congressional command).

Furthermore, since Congress has not amended the Act at any time since its passage in 1935 to prohibit, or to even suggest an intent to limit, class and collective action waivers, it stands to reason that such a result was never intended by Congress. In fact, Congress *reenacted* the FAA “twelve years after the NLRA.” *Owen*, 702 F.3d at 1053. “The decision to reenact the FAA suggests that Congress intended its arbitration protections to remain intact even in light of the earlier passage of three major labor relations statutes [including the FLSA].” *Id.*¹³

The Board's attempt to transmogrify what are no more than procedural devices relating to how claims may be heard in the courts and to declare the right to proceed on

¹³ In addition, a prior General Counsel stated that “no Section 7 right is violated when an employee possessed of an individual right to sue enters such a *Gilmer* agreement as a condition of employment[.]” GC Mem. 10-06, at 6 (June 16, 2010). Thus, not only did Congress not intend for the Act to stand as an obstacle to employers' enforcement of mandatory arbitration agreements, but even the NLRB's former General Counsel believed that to be true. Consistent with that understanding, the ALJ who initially heard *D.R. Horton* acknowledged “the absence . . . of direct Board precedent” and was “not aware of any Board decision holding that an arbitration clause cannot lawfully prevent class action lawsuits or joinder of arbitration claims.” *D.R. Horton, Inc. & Michael Cuda*, No. 12-CA-25764, JD(ATL)-32-10, slip op. at 5 (Jan. 3, 2011).

a class and collective litigation basis to be a substantive right also runs afoul of the Rules Enabling Act, 28 U.S.C. § 2072(b). Under that statute, Congress authorized the courts to promulgate rules of procedure, but explicitly stated that any such rules “shall not abridge, enlarge, or modify any substantive rights.” *Id.* Accordingly, the “right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.” *Deposit Guar. Nat’l Bank*, 445 U.S. at 332. *See also Italian Colors*, 133 S. Ct. at 2309 (Rule 23 did not create an “entitlement to class proceedings for the vindication of statutory rights”).

Despite the Supreme Court’s clear confinement of class actions to the realm of court procedure, the Board, in derogation of the Rules Enabling Act, has attempted to elevate that which is purely procedural into a substantive entitlement under the NLRA, while simultaneously reducing the FAA to a disfavored nullity. This violates the clear congressional directive that arbitration agreements be enforced in accordance with their terms. The Board has no authority or legal justification to interfere with that congressional objective, and the ALJ’s decision, plainly flouting that objective, should be rejected.

For these reasons, the Board’s decision in *D.R. Horton*, its continued prosecution of such claims notwithstanding the Fifth Circuit’s decision, and the ALJ’s contention that he was bound by *D.R. Horton* unless and until it is reversed by the Supreme Court or by the Board itself are erroneous. The ALJ’s decision is facially inconsistent with Supreme Court authority “enunciating the general principal (sic) that the FAA was designed to promote arbitration.” ALJD 9:35-37.

The ALJ additionally erred in holding that the Supreme Court had not addressed the issue of mandatory arbitration provisions that cover class and/or collective actions vis-à-vis the Act, and thus had not overruled *D.R. Horton*. ALJD 9:44-10:4. Though the Supreme Court has not yet taken on an appeal from *D.R. Horton* or other case applying the Board's incorrect interpretation of the Act, it has conclusively established that a federal statute will only be read to trump the FAA where it plainly and unambiguously states its preclusive effect. See *Gilmer*; *Shearson/American Express*; *Italian Colors*; *CompuCredit*.¹⁴ Ignoring this binding authority on the thinnest of reeds – that the cases did not themselves specifically involve the Act – without looking to the substantive principles of law announced therein that are plainly and fully applicable to this case constituted error by the ALJ, to which Sprouts excepts.

C. The ALJ Erred In Adhering To The Board's Decision In *D.R. Horton* Under The Guise Of Following The Board's Non-Acquiescence Policy.

Though the ALJ conceded “that neither the NLRA's statutory text nor its legislative history contained a congressional command against application of the FAA and that, in the absence of an inherent conflict between the FAA and the NLRA's

¹⁴ On February 24, 2014, the Supreme Court issued its decision in *CarMax Auto Superstores California v. Fowler*, No. 13-439, -- U.S. -- (Feb. 24, 2014). The Supreme Court vacated the decision of a California state court which held that the trial court should apply certain factors to determine whether a pre-employment arbitration agreement containing a class-action waiver is enforceable. The Supreme Court remanded the case to the state court for further consideration in light of its decision in *Italian Colors*. Thus, although the Supreme Court has not yet had the opportunity to review *D.R. Horton* (or a similar case) and the impact, if any, of the Act on the enforceability of class and collective action waivers in employment agreements, it has, just this term, confirmed that its analysis in *Italian Colors* applies equally in the employment context as in the commercial context.

purpose, a [binding arbitration agreement] should be enforced according to its terms,” (ALJD 9:10-16, citing *D.R. Horton*, 737 F.3d at 361-63), he claimed to be “constrained to follow Board precedent that has not been reversed by the Supreme Court or by the Board itself.” ALJD 9:18-20, citing *Pathmark Stores*, 342 NLRB 378, 378 n. 1 (2004).

The ALJ rationalized his decision to uncritically follow Board precedent, notwithstanding the evolution of the law in this area, on the Board’s self-described “non-acquiescence policy.” Under this policy, the Board chooses not to give due regard to federal circuit courts of appeal decisions that conflict with the Board’s interpretation of the Act. See *Arvin Indus., Inc.*, 285 NLRB 753, 757 (1987). It is not necessary to engage in a debate as to whether that policy in the larger context is in fact good policy – even though Sprouts submits it is not. Rather, the issue here is whether the ALJ’s “non-acquiescence” in this case resulted in error. In addition to the arguments discussed above, because the Board did not merely interpret the Act in *D.R. Horton*, but went well beyond it to conclude that the Act trumps the FAA, Sprouts submits that, under the circumstances of this case, it was error for the ALJ to simply acquiescence to *D.R. Horton*, and instead should have analyzed the issues under the current state of the law (as two other ALJs, discussed below, correctly did).

The Board in *D.R. Horton* construed a statute well outside its “interpretive ambit,” *D.R. Horton*, 737 F.3d at 362, n. 10, and its interpretation of the FAA is not entitled to deference. See *Hoffman Plastic Compounds, Inc.*, 535 U.S. at 144, 147 (“[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 . . . [W]here

the Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's Remedy may be required to yield.").

As the Supreme Court explained in *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942):

The Board has not been commissioned to effectuate the policies of the [Act] so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task.

Even the Board has recognized that "labor 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." *Collyer Insulated Wire*, 192 NLRB 837, 840 (1971). That principle is particularly on-point here, as the NLRB has no expertise in the process or rules by which individual claimants may seek to have a court address their claims on a broader basis. *See, e.g., Nelsen v. Legacy Partners Residential, Inc.*, 207 Cal. App. 4th 1115, 1117 (2012) ("[T]he interplay of class action litigation, the FAA, and section 7 of the NLRA [] falls well outside the Board's core expertise in collective bargaining and unfair labor practices.").

Because the Board exceeded its interpretive authority when it decided *D.R. Horton*, and erroneously concluded that the Act creates a non-waivable right to adjudicate, in a single forum, common claims arising under other laws and rules of civil procedure, there was no basis, and it was error, for the ALJ to adhere to that decision under the guise of non-acquiescence. No matter how stridently the Board believes that its *D.R.*

Horton rationale promotes its policy objectives, it cannot ignore the plain language of the FAA, or decisions from the Supreme Court, in its efforts to further its agenda.¹⁵

D. The ALJ Erred By Failing To Recognize And Apply Distinguishing Factual Characteristics Between *D.R. Horton* And The Instant Case.

The ALJ applied the Board's decision in *D.R. Horton* to this case and viewed that decision as case-dispositive, even though Sprouts' arbitration agreements plainly were not at issue in that decision and there are several unique characteristics of Sprouts' agreements that are distinguishable from the agreement at issue in *D.R. Horton*.

First, the ALJ focused only on what he declared to be the "relevant part[s]" of the two versions of Sprouts' arbitration agreements, specifically the provisions requiring that most employment-related disputes be brought in individual arbitration. ALJD 4:12; 6:22. By focusing on these provisions only, the ALJ overlooked relevant language in the agreements carving out as excluded claims any "claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board." ALJD 4:36-40; 7:15-29. The ALJ also ignored provisions in the agreements which specifically

¹⁵ Despite the policy of non-acquiescence, at least two ALJs have correctly rejected *D.R. Horton*, finding that its reasoning cannot be sustained in light of intervening Supreme Court precedent. See *Chesapeake Energy Corp.*, JD-78-13, Case 14-CA-100530 (Nov. 8, 2013) (finding that *D.R. Horton* cannot survive the Supreme Court's decision in *Italian Colors*); accord *Haynes Building Services, LLP*, JD(ATL)-03-14, Case 31-CA-093920 (Feb. 7, 2014). The two ALJs who issued their decisions in *Chesapeake* and *Haynes* properly acted as judges, exercising their authority to interpret the scope and validity of *D.R. Horton* and to determine that no remedies should be imposed on the employers therein for developing and implementing mandatory arbitration agreements – rather than simply "acquiescing" to *D.R. Horton*. Thus, Sprouts further excepts to the ALJ's conclusion that it was beyond his jurisdiction to decide the issues presented by Sprouts relating to the appropriate remedies for Sprouts' purported Section 8(a)(1) violations, or whether those remedies violate Sprouts' constitutional rights and/or are beyond the Board's authority. ALJD 3:14-18.

provide that they are not intended to prevent, prohibit, or discourage a team member from filing a charge with the Board or other state or federal agencies. ALJD 5:1-10; 7:15-29.

The NLRA-carve out discussed above makes Sprouts' agreements factually distinguishable from the one at issue in *D.R. Horton*, which could reasonably have been interpreted as prohibiting the filing of a charge with the Board or other agencies. Indeed, the Fifth Circuit affirmed the portion of *D.R. Horton* finding a Section 8(a)(1) violation by virtue of that agreement's lack of clarity regarding employees' rights to petition the Board. But no reasonable person construing Sprouts' agreements could mistakenly conclude that they preclude filing charges with the Board, as they explicitly state that team members can do so and were in no way meant to interfere with their rights under the Act. Far from interfering with team members' Section 7 rights, such as to organize and bargain collectively, the agreements specifically recognize those rights, exclude such claims from coverage, and thus do not affect any substantive right governed by the Act. It is for this reason that the General Counsel did not even pursue a separate violation on the theory that the agreements interfered with any employees' access to the Board. ALJD 9:15-16, n. 22.

The ALJ's failure to recognize the significance of the NLRA-carve out in Sprouts' agreements, and how that carve out differentiates those agreements from the agreement in *D.R. Horton*, resulted in his mistaken conclusion that the Sprouts agreements do not fall within the exception stated in *D.R. Horton*. ALJD 10:7-38. Although the Board generally concluded in *D.R. Horton* that "employers may not compel employees to waive

their NLRA right to collectively pursue litigation of employment claims in all forums, arbitral and judicial,” it further concluded that, “[s]o long as the employer leaves open a judicial forum for class and collective claims, employees’ NLRA rights are preserved without requiring the availability of class-wide arbitration.” *D.R. Horton*, slip op. at 16.

Focusing on the language in the agreements explicitly or implicitly barring team members from pursuing class or collective actions on their own behalf, the ALJ disregarded the fact that Sprouts’ agreements do not prevent team members from filing charges with the NLRB, the EEOC, or other federal or state agencies that, in turn, can bring class or collective claims for relief on behalf of Sprouts’ team members. ALJD 10:43-44; 11:1-2. Thus, although the agreement barred Mestanek (and would have barred Christensen, had she agreed to be bound by the agreement) from pursuing class or collective action on behalf of herself and similarly situated team members, a state or federal agency (such as the California Department of Labor Standards Enforcement) could hear a complaint filed by a team member and bring a collective action on his or her behalf and on behalf of similarly situated team members, if applicable. Therefore, contrary to the ALJ’s conclusion, the agreements at issue in this case preserve employees’ right to have employment-related disputes heard in a judicial forum. An administrative agency’s decision to pursue enforcement of covered claims on behalf of employees is an adequate substitute for class or collective action litigation brought by the team members themselves. *See generally Gilmer*, 500 U.S. at 28 (“An individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action.”) By

protecting employees' right to file administrative charges, the agreements do not foreclose the pursuit of group-wide remedies. The agreements thus satisfy the requirements for the *D.R. Horton* exception to apply, and the ALJ's rejection of Sprouts' "exception" argument out of hand constituted error.

E. The ALJ Erred By Finding That Sprouts' Opposition to Mestanek's State Court Class Action Lawsuit Was Unlawful.

In addition to finding that Sprouts' adoption and dissemination of the arbitration agreements was unlawful, in that they do not permit team members to pursue class or collective actions in either an arbitral or judicial forum, the ALJ concluded that Sprouts also violated Section 8(a)(1) by filing motions in California state court to compel Mestanek to arbitrate her claims on an individual basis. ALJD 11:14-20. The ALJ made no findings that Sprouts engaged in any action intending to dissuade Mestanek from engaging in protected activity, or in retaliation for having done so. Rather, he concluded that this separate Section 8(a)(1) violation was analogous to "fruit flowing from a poisoned tree," in that Sprouts attempted to enforce its purportedly unlawful agreement. *Id.*

The ALJ's conclusion on this issue should be rejected because it is derivative of his equally erroneous finding that the agreements themselves are unlawful. As discussed above, nothing in the text or legislative history of the Act suggest that it was meant to override the FAA or create a substantive right to class or collective action. Moreover, even if the Act did create such a right, the Supreme Court and federal appellate and district courts have consistently and repeatedly held that employees may waive the right

to bring claims on a class or collective action basis, even when the right to pursue a class or collective action is specifically recognized in the statute governing the underlying claim. For example, in *Sutherland*, 726 F.3d at 297, the Second Circuit held that employees may waive their right to participate in a collective action under the FLSA because, if an employee must affirmatively opt into any such collective action, then surely he has the power to waive the right to participate therein. Likewise, in *Owen*, 702 F.3d at 1054, the Eighth Circuit held that an employee's statutory right to pursue a wage claim "as part of a collective action . . . could be waived in favor of individual arbitration."¹⁶

Mestanek therefore had the ability to, and did in fact, waive her right to participate in a class or collective action of her state wage and hour claims. Even if Mestanek genuinely, but mistakenly, believed that pursuing her wage and hour claims via collective action was a substantive right protected under Section 7, even *that* right is waivable. See generally *NLRB v. Drivers, Chauffeurs, Helpers, Local Union No. 639*, 362 U.S. 274, 279-80 (1960) (the Act guarantees the right of employees *not* to participate in protected activity); *Lee v. NLRB*, 393 F.3d 491, 494-95 (4th Cir. 2005) (by its terms, Section 7 protects those employees who choose *not* to participate in protected activities). Having freely and voluntarily entered into the agreement to individually arbitrate her

¹⁶ See also *Gilmer*, 500 U.S. at 27 (employees can waive the right to bring ADEA actions in court); *Vilches v. Travelers Cos.*, 413 Fed. App'x 487, 494 (3d Cir. 2011) (upholding class action waiver of FLSA and state wage and hour claims); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005) (enforcing waiver of class FLSA claims, 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").

employment-related claims, Mestanek validly waived her purported protected Section 7 right to engage in collective action.

Finally, the ALJ's conclusion that Sprouts violated the Act by moving to compel arbitration violates constitutional due process principles. In essence, the ALJ's order not only results in Sprouts' prior court activity being declared an unfair labor practice, but it would also prospectively deprive Sprouts of the right to assert objections in any judicial forum to any of its team members' attempts to engage in class or collective actions. This remedy exceeds the Board's and the ALJ's authority. If enforced, it would prohibit Sprouts from exercising its due process rights to assert that its arbitration agreements are lawful and enforceable in court. *Mullane v. Centr. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The right to be heard in the courts and to petition the courts for relief to which a party believes it is entitled is a fundamental principle protected by the First Amendment of the Constitution. *See Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 741 (1983) ("the right of access to the courts is an aspect of the First Amendment right to petition...").

Although Sprouts presented this constitutional argument to the ALJ, he summarily dismissed it, claiming that Sprouts "cites no cases that have held lawful on . . . these grounds an employer's seeking to enjoin an employee's lawsuit based on an unlawful [arbitration agreement] (as *Horton* dictates). I decline to be the first judge to do so." ALJD 11:10-13. While the ALJ may be correct that no court to date has addressed the right of a petition to seek redress specifically with respect to the interpretation of *D.R. Horton*, Sprouts cited applicable Supreme Court precedent protecting the rights of employers to

petition the courts for redress in the context of labor law disputes such as this one. *See, e.g., BE&K Constr. v. NLRB*, 536 U.S. 516, 526 (2002) (the *Noerr-Pennington* doctrine, which immunizes citizens from petitioning the government for a redress of grievances, extends to parties petitioning the courts regarding alleged labor law violations, unless the lawsuit is both objectively and subjectively baseless); *Bill Johnson's*, 461 U.S. at 746 (the Board “must not deprive a litigant of his right to have genuine state-law legal questions decided by the state judiciary”).

Pursuant to *BE&K Construction* and its progeny, “even an improperly motivated lawsuit may not be enjoined ... as an unfair labor practice unless such litigation is baseless.” *Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus.*, 508 U.S. 49, 59 (1993); *Bill Johnson's*, 461 U.S. at 747 (“[T]he filing of a meritorious lawsuit, even for a retaliatory motive, is not an unfair labor practice.”). Indeed, the Sixth Circuit Court of Appeals recently held that a lawsuit constitutes an unfair labor practice only when the claims asserted therein “sink to the level that no reasonable litigant could have expected to succeed on the merits of the case.” *NLRB v. Allied Mechanical Servs., Inc.*, 734 F.3d 486, 492 (6th Cir. 2013).

In this case, there can be no genuine dispute that Sprouts’ petition and motion to compel Mestanek to individually arbitrate her claims was not “baseless” or “retaliatory,” as it was filed in the California state courts *before* any unfair labor practice charge was filed, and the ALJ did not find a make any finding or comment on any evidence suggesting that Sprouts had an unlawful objective for filing the motion and petition – of which there is none. *Bill Johnson's*, 461 U.S. at 737 n. 5. Moreover, not only did Sprouts

have reason to believe that its claims had merit, but the trial court *agreed* with Sprouts and compelled Mestanek to individually arbitrate her claims. Having prevailed in all respects in its state court litigation activities, Sprouts cannot be accused of pursuing its motion and petition to compel without a reasonable expectation of success. *Allied Mechanical Servs., Inc.*, 734 F.3d at 492-93 (holding that, even though claims were ultimately dismissed, the employer “had reason to believe that it could have succeeded on the merits of the case”).

By choosing not to consider and decide this issue while ordering Sprouts not to take actions in court to enforce its arbitration agreements, the ALJ imposed upon Sprouts relief beyond his or the Board’s authority. As it stands presently, the ALJ’s decision would prevent Sprouts from exercising its right to file *any* lawsuit to interpret and enforce its arbitration agreements, and thus constitutes a permanent injunction on Sprouts’ ability to petition the courts for a redress of grievances. Thus, not only did the ALJ err by finding that Sprouts had not cited authority in support of its arguments, but he erred further by entering an order that deprives Sprouts of a fundamental constitutional right. Accordingly, the ALJ’s decision, including that Sprouts should be required to withdraw its legal process in the pending state court action and pay Mestanek’s fees and costs related to those proceedings, must be rejected.

The ALJ’s decision also is invalid to the extent it declares Sprouts’ actions vis-à-vis enforcement of Mestanek’s agreement unenforceable, pursuant to the doctrine of *res judicata*. In *NLRB v. Heyman*, 541 F.2d 796 (9th Cir. 1976), the Ninth Circuit held that the Board was bound, per *res judicata*, by the decision of a federal district court regarding the

existence of an agreement between an employee and employer. Although the Board had authority to adjudicate an unfair labor practice premised on the existence of an agreement, “the Board’s authority does not supplant the jurisdiction of the courts.” *Id.* at 799. “An implicit collateral attack, launched through the filing of charges premised on the contrary, may not be entertained by the Board under the guise of different policy considerations.” *Id.*

As in *Heyman*, the ALJ here declared unenforceable an agreement that the California Superior Court already has deemed enforceable. This is impermissible. The Board is bound by the Superior Court’s decision that, under the FAA, Mestanek’s arbitration agreement is enforceable. *Cf. Bill Johnson’s*, 461 U.S. at 749, n. 15 (explaining that, even where the Board is not bound by *res judicata*, the Board should defer to a prior decision by a court on the same issue).¹⁷

F. The ALJ Erred In Concluding That Sprouts Violated The Act By Telling Christensen She Had To Sign Or Acknowledge Its Mutual Binding Arbitration Agreement As A Condition Of Continued Employment and That Sprouts Violated The Act By Terminating Christensen For Her Voluntary Decision Not To Do So.

The ALJ concluded that Sprouts violated Section 8(a)(1) of the Act by telling Christensen that she had to sign its mutual arbitration agreement, which was a standard term and condition of employment, or face termination, and by terminating Christensen for her refusal to sign the agreement. ALJD 11:14-21. The parties do not dispute that the

¹⁷ Sprouts also excepts to the ALJ’s finding that it requested him to consider “[w]hether any issues regarding Sprouts’ motion to compel should be dismissed on mootness grounds,” and his conclusion that Sprouts purportedly withdrew this issue by not addressing it in its motion to dismiss or its brief, as Sprouts never presented that issue in the parties’ joint motion and stipulation. *Stip.*, at pp. 11-12.

sole reason Christensen's employment at Sprouts ended was her refusal to execute the acknowledgement with respect to the arbitration agreement. ALJD 8:1-4. There is no contention that Christensen engaged, or attempted to engage, in protected concerted activity, other than her opposition to the revised arbitration agreement (to the extent that constitutes protected concerted activity, which Sprouts denies), or that she raised any concerns regarding the terms and conditions of her employment *but for* the arbitration agreement, or that she attempted to file or join in a class or collective action. Thus, the sole issue for the ALJ was whether requiring a team member to agree to a binding arbitration agreement containing a waiver of class and collective actions violates the Act.

The answer to this question is a definitive "no." Section 8(a)(1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed in Section 7." 29 U.S.C. § 158(a)(1). However, even if the General Counsel is correct, and Christensen's separation from employment was an involuntary termination by Sprouts based on her refusal to sign off on the arbitration agreement, the agreement itself did not interfere with Christensen's Section 7 rights or violate the Act. *Cf. Supply Technologies, LLC*, 359 NLRB No. 38 (2012) (arbitration policy could be read as requiring arbitration even of NLRB charges, or at least of waiving the right to any remedy obtained by the agency, therefore facially discouraging employees from exercising Section 7 rights). Therefore, Sprouts was free to present the arbitration agreement to Christensen as a condition of employment and continued employment.

Moreover, Christensen did not refuse to agree to the terms of the arbitration agreement because she was concerned that the agreement interfered with her right to file

a charge with the Board or that it interfered with her Section 7 rights. Rather, her separation was due solely to her refusal to agree to arbitrate her claims, and only her claims, on an individual basis, which is lawful. *California Almond Growers Exchange d/b/a Blue Diamond Growers*, 353 NLRB No. 6 (2008). Because the only basis for the ALJ's decision that Sprouts violated Christensen's Section 7 rights was his application of *D.R. Horton*, which itself is procedurally defective and was wrongly decided, his finding on these issues should be reversed.

G. The ALJ's Order, Imposing Onerous And Unjustified Relief, Must Be Rejected.

Sprouts excepts from the ALJ's remedy and recommended order. ALJD 12:1-14:25. Each of the recommendations in the ALJ's order flows from his finding that Sprouts violated the Act by maintaining and seeking to enforce its arbitration agreements with employees. However, because those findings and the order are predicated on the Board's flawed decision in *D.R. Horton*, the ALJ's recommendations - which include, without limitation, an award of back pay to Christensen, payment of attorneys' fees and costs to Mestanek, rescission of its existing arbitration agreements, and forcing Sprouts to withdraw its opposition to Mestanek's class action - must also be rejected and reversed.

IV. CONCLUSION

The continued prosecution of employers, like Sprouts in this case, based on the procedurally defective and now-overruled *D.R. Horton* decision, as if the weight and authority of the overwhelming judicial consensus to the contrary were meaningless, should stop. An extensive body of jurisprudence, including Supreme Court decisions, firmly support that employers and employees may enter into bilateral agreements to

arbitrate certain employment-related claims, that these agreements may require employees to bring any such claims in arbitration and only on an individual, non-class basis, and that employers may condition their agreement to employ employees, or to continue to employ them, on the employees' agreement to resolve disputes under this framework. Therefore, Sprouts urges the Board to reject the ALJ's decision and recommended order, to reconsider the Board's thoroughly discredited position in *D.R. Horton*, and to decide this matter based on the *real world* state of the law, which includes decisions from the Supreme Court, numerous federal appellate courts, and other federal and state courts supporting Sprouts' position in this case. Refusing to do so would be tantamount to declaring the authority of the Board to be superior to that of courts with unquestionably greater authority.

For all of the foregoing reasons, Sprouts respectfully requests that the Board reject the decision of the ALJ and dismiss the complaint in its entirety.

RESPECTFULLY SUBMITTED this 18th day of March, 2014.

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**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.**

SF MARKETS, LLC)	
d/b/a SPROUTS FARMERS MARKETS)	
)	
and)	Case 21-CA-099065
)	
LAURA CHRISTENSEN, an Individual)	
)	
and)	Case 21-CA-104677
)	
JANA MESTANEK, an Individual)	

CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that he filed the foregoing RESPONDENT’S BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE’S DECISION via the NLRB’s E-Filing System and served copies on the following parties via electronic mail on March 18, 2014 pursuant to Section 102.114 of the Board’s Rules and Regulations:

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