UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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| **NETWORK CAPITAL FUNDING CORPORATION** | ) | |
| | ) | Case No. 21-CA-107219 |
| **and** | ) | |
| **ERIK PAPKE, An Individual** | ) | |

**RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ALJ'S DECISION DATED MARCH 5, 2014**

Comes now the Respondent, Network Capital Funding Corporation ("Network Capital"), pursuant to Section 102.46(b) of the Board's Rules and Regulations, as amended, and files the following brief in support of its exceptions to the Decision issued by Administrative Law Judge ("ALJ") William Nelson Cates on March 5, 2014 ("Decision"):

## I. STATEMENT OF THE CASE

On June 13, 2013, Charging Party Erik Papke ("Papke") filed charge 21-CA-107219 with the National Labor Relations Board ("NLRB" or "the Board") against Network Capital. Decision, p. 2. On August 14, 2013, Papke filed a First Amended Charge, which newly included additional factual allegations related to the alleged wrongful conduct. Decision, p. 2.

On August 30, 2013, the Board's Regional Director for Region 21 ("Regional Director") issued a Complaint and Notice of Hearing against Network Capital based upon the original charge submitted on June 13, 2013. Decision, p. 2. On September 13, 2013, Network Capital filed its Answer to this original complaint. In pertinent part, the Answer denied (1) that Network Capital required Papke to agree to individually arbitrate claims against the company as a

condition of employment; and (2) that even had Network Capital conditioned employment in such a manner, it did not violate the NLRA. Decision, p. 3 [Exhibit 3(a) referenced therein].

On December 9, 2013, the Regional Director filed an Amended Complaint and Notice of Hearing based upon Papke's Amended Charge ("FAC"). Decision, p. 3. On December 23, 2013, Employer filed its Answer to the FAC, making the same pertinent denials. Decision, p. 3 [Exhibit 3(b) referenced therein].

The hearing on this matter took place before the ALJ on December 16, 2013, in Los Angeles, California. Decision, p. 1. The ALJ issued his decision on March 5, 2014, finding the following:

1. Network Capital conditioned Papke's employment upon his executing the arbitration agreement in question;
2. Network Capital's enforcement of the arbitration agreement in question inhibited and interfered with its employees' Section 7 rights;
3. Papke's claims are not barred by the applicable statute of limitations;
4. The Board's decision in *D.R. Horton, Inc.* 357 NLRB No. 184 (2012) is not invalid due to the Board's purported lack of quorum at the time of issuing that decision;
5. The United States Supreme Court's decisions in *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011) and *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665 (2012) do not invalidate the Board's decision in *D.R. Horton*; and
6. *D.R. Horton* remains enforceable in this matter despite both the Ninth Circuit Court of Appeals in *Richards v. Ernst & Young*, 374 F.3d 871, 873-874 (9th Cir. 2013), and the District of Columbia Circuit Court of Appeals in *Noel Canning v.*

*NLRB*, 705 F.3d 490 (D.C. Cir. 2013) – the two circuits with authority over this matter – both finding *D.R. Horton* invalid.

## II. STATEMENT OF FACTS

Network Capital is a corporation engaging in the business of home loans. FAC, ¶ 2; Decision, p. 3. Papke was an employee of Network Capital. FAC, ¶ 5(a). On or about October 25, 2011, Network Capital and Papke executed an arbitration agreement ("the Arbitration Agreement"). FAC, ¶ 5(a); Decision, p. 3. In pertinent part, the Arbitration Agreement reads:

> I further agree and acknowledge that the Company and I will utilize binding arbitration to resolve all disputes that may arise out of or be related to my employment in any way. Both the Company and I agree that any claim, dispute, and/or controversy that either I may have against the Company ..., or the Company may have against me, shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act, in conformity with the procedures of the California Arbitration Act..... I understand and agree to this binding arbitration provision, and both I and the Company give up our right to trial by jury of any claim I or the Company may have against each other.

Decision, p. 5.

More than a year after executing this agreement, on or about March 13, 2013, Papke filed a class action civil complaint against Network Capital in the Superior Court of California, County of Orange ("the State Court"), Case No. 30-2013-0063857-CU-OE-CXC. FAC, ¶ 5(b); Decision, p.3. On June 11, 2013, Network Capital moved the State Court to compel the Charging Party to prosecute his claims individually in arbitration pursuant to the Arbitration Agreement. FAC, ¶ 5(b); Decision, p. 3. On June 19, 2013, the Charging Party voluntarily

dismissed the State Court case; and thereafter filed an arbitration demand on the same claims. Decision, p. 3.

The FAC does not make any factual allegations in reference to any matter after the time Papke filed his arbitration demand. FAC.

## III. SPECIFICATION OF QUESTIONS RAISED

1. Did Network Capital require Papke and other employees to execute the arbitration agreement in question as a condition of employment? (Exception #1.)
2. Is Papke's claim barred by the applicable statute of limitations? (Exception #2.)
3. Are the allegations set forth in the operative complaint impossible? (Exception #3.)
4. Did Papke waive his claim? (Exception #4.)
5. Is the Board's *D.R. Horton* decision invalid for failing to have a quorum at the time it issued its decision? (Exception #5.)
6. Do arbitration agreements with class action waivers violate Section 7 of the Act? (Exception #6.)
7. Is the Board's *D.R. Horton* decision invalid based upon the decisions of the United States Supreme Court and analyses of the Circuit Courts of Appeal? (Exception #7.)

## IV. ARGUMENT AND CITATION TO AUTHORITY

### A. The ALJ Erred Finding that Executing the Arbitration Agreement Was a Condition of Employment (Exception #1)

The Regional Director failed to proffer any evidence satisfying its burden that Papke was required to sign the Arbitration Agreement as a condition of his employment. At the hearing, Papke testified that a trainer provided him a packet of employment-related documents to sign

during an initial orientation, including a W-2 form, I-9 form, the Arbitration Agreement, and other similar documents. Papke admits that (1) the trainer did not instruct him that the Arbitration Agreement was mandatory, (2) he did not ask the trainer if the terms were negotiable, and (3) he signed the agreement without even reading it. Transcript, pp. 55:10-58:5, 62:5-63:9. Nowhere in the record is there any evidence that the trainer was a managing agent of Network Capital. Papke admits that he never questioned Human Resources about the agreement, never filed any internal complaints during his employment regarding the agreement, never sought to negotiate the arbitration agreement, and in fact never paid any attention to a document he was signing. Transcript, pp. 62:5-63:20, 64:17-23, 65:17-66:1, 66:20-68:12. Network Capital further offered evidence from its Human Resources Director that employees during Papke's employment were not obligated to sign the arbitration agreement and that there were no policies or procedures during that time that would have resulted in disciplinary action against an employee for refusing to sign the agreement. Transcript., pp. 90:5-92:4, 97:9-98:1, 99:6-101:7. Accordingly, with absolutely no evidence of any kind, the Regional Director has significantly failed to carry its burden of proof that Network Capital required Papke to sign the Arbitration Agreement as a condition of his employment.

B. The ALJ Erred Finding that the Statute of Limitations Had Not Run on This Matter (Exceptions #2, #3)

Paragraph 4 of the FAC provides that Network Capital has "[s]ince about December 14, 2012, ... maintained ... an "Employee Acknowledgement and Agreement...." FAC, ¶ 4. The pleadings then allege that Network Capital required Papke to sign that very agreement as a condition of his employment on "[a]bout October 25, 2011" – approximately 14 months *before* the form ever purportedly existed. Based upon this logical impossibility alone, the ALJ should have dismissed the FAC as Network Capital requested in its briefing.

Regardless, the Employer does admit that the Charging Party signed an arbitration agreement of some kind on October 25, 2011. Decision, p. 3. However, to the extent that signing this agreement in any way violated the Act, (1) Papke did not file his original accusation in this matter until June 13, 2013, and (2) the FAC does not allege that any employees signed the allegedly unlawful agreement other than Papke. FAC, ¶¶ 4-5. The statute of limitations expires for any alleged NLRA violation six months after the purported violation. 29 U.S.C. § 160, subd. (b). Accordingly, any claim arising from Papke signing the Arbitration Agreement is time-barred.

C. The ALJ Erred Finding that Papke Has Not Waived His Claim Is In Error (Exception #4)

In *D.R. Horton,* 357 NLRB No. 184 (2012), the Board held that class action waivers *involuntary* compelled as a condition of employment violated the Act. *D.R. Horton*, however, did not address *voluntary* waivers. Indeed, the United States Supreme Court, Circuit Courts of Appeals, and the Board itself have all found that voluntary waivers of collective bargaining rights are valid – such as voluntary waivers of the right to strike. *See e.g., NLRB v. Sands Mfg.,* 306 U.S. 332 (1939); *Consolidated Edison Co. v. NLRB,* 305 U.S. 197, 237 (1938); *Shirley-Herman Co. v. Int'l Hod Carriers,* 182 F.2d 806, 809 (2nd Cir. 1950); *Arlan's Dep't Store, Inc.,* 133 NLRB No. 56 (1961). Therefore, even to the extent that *D.R. Horton* is still good law, it does not control the instant matter.

The FAC alleges only two acts of wrongdoing by Network Capital: (1) the signing of the Arbitration Agreement in 2011; and (2) seeking to enforce the agreement in 2013 by way of a motion to compel arbitration. FAC, ¶ 5. Again, the first purported wrongful act is barred by the statute of limitations. As for the second, again, the Regional Director cannot establish that Papke's signing of the Arbitration Agreement was involuntarily compelled. Therefore, Network

Capital did not violate the Act by seeking to enforce a voluntary waiver of rights. *Sands Mfg.*, 306 U.S. at 332; *Consolidated Edison*, 305 U.S. at 237. Moreover, Papke has already voluntarily waived any argument that Network Capital violated the Act by seeking to compel arbitration of his claims. After Network Capital filed its motion to compel arbitration in the State Court, Papke voluntarily dismissed his civil complaint and filed an arbitration demand on the same claims. The dismissal was not initiated by an order to compel, but rather by a voluntary choice of Papke. Decision, p. 3 [Exhibit 7 referenced therein]. None of the established precedent analyzing the progeny of *D.R. Horton* examines a case where a charging party voluntarily dismisses the civil litigation where the alleged infringement of rights occurred. By voluntarily waiving the arbitration, rather than being forced via an order to compel, Papke has waived this claim.

D. The ALJ Erred Enforcing *D.R. Horton* Since the Board Issued the Decision Without a Quorum (Exception #5)

The NLRA establishes that the Board is composed of up to five members, appointed by the president and confirmed with the advice and consent of the Senate. 29 U.S.C. § 153(a). Section 153(b) of the Act authorizes the NLRB to "delegate to any group of three or more members any or all of the powers which it may itself exercise." 29 U.S.C. § 153 (b). These delegee groups must "maintain a membership of three in order to exercise the delegated authority of the Board." *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635, 2644 (2010). In addition, Section 153(b) includes a "quorum" requirement in relation to the number of members who must be present to exercise the Board's powers for either the Board itself or a properly constituted delegee group. *See id.* at 2642-43. To have a quorum, a delegee group must have at least two of its members present and the Board must have at least three of its five members present. 29 U.S.C. § 153(b).

The Board issued its *D.R. Horton* decision on January 3, 2012. *D.R. Horton* at 1. At that time, the NLRB had only three purported members — Mark Pearce, Brian Hayes, and Craig Becker. These three members also comprised the delegee group which heard the case. *D.R. Horton* at 1. However, both the District of Columbia and Third Circuit Courts of Appeals have recently determined that Mr. Becker was unlawfully appointed to the Board. *Noel Canning v. NLRB*, 705 F.3d 490, 499-514 (D.C. Cir. 2013); *NLRB v. New Vista Nursing & Rehabilitation,* 719 F.3d 203, 218-221 (3rd Cir. 2013). Accordingly, neither the NLRB as a whole, nor the delegee group that considered the *D.R. Horton* matter, satisfied the quorum requirements at the time the Board issued its decision. Nor did the delegee group maintain the necessary three members to exercise the Board's authority.[1]

Whenever the Board acts without a quorum or jurisdiction, its actions are invalid and unenforceable. *Noel Canning*, 705 F.3d at 514; *New Vista Nursing*, 719 F.3d at 244. Accordingly, the *D.R. Horton* decision is invalid.

E. The ALJ Erred Finding that Prohibiting Class Actions Violates Section 7 (Exception #6)

Class action waivers do not preclude employees from engaging in other avenues of collective redress. An employer limiting some, but not all means by which employees can engage in protected activity does not violate the Act. *NLRB v. Steelworkers*, 357 U.S. 357, 363-364 (1958); *Guardian Indus. Corp. v. NLRB*, 49 F.3d 317, 318 (7th Cir. 1995). As recently discussed in *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053-1054 (8th Cir. 2013), class action waivers which merely require employees to file personal civil actions in arbitration on an individual basis "do[] not preclude an employee from filing a complaint with an administrative

[1] In addition, only two purported members of the delegee group voted to authorize the *D.R. Horton* decision. *D.R. Horton* at 14. Craig Becker was one of those purported members. *D.R.*

agency such as the Department of Labor ..., the Equal Employment Opportunity Commission, the NLRB, or any similar administrative body. Further, nothing in the [arbitration agreements] preclude[] any of these agencies from investigating and, if necessary, filing suit on behalf of a class of employees." Indeed, the Arbitration Agreement in this matter expressly provides that it does not apply to administrative complaints made to the Board or other administrative agencies. Decision, p. 3 [Exhibit 4 referenced therein]. Finally, class action waivers do not prohibit employees from coordinating their individual arbitrations by use of the same attorney, pooling litigation funds, and sharing information and evidence.

Tellingly, only a few years ago, the Board's own General Counsel issued "GC Memo 10-06" which determined that class action waivers did not violate the Act, so long as they did not preclude employees from collectively challenging the validity of the waiver itself (i.e., so long as they provided for alternative means of concerted action). Office of the General Counsel, Memorandum GC 10-06 (June 16, 2010). This determination was based upon the same United States Supreme Court precedent underlying the federal court decision which have expressly rejected *D.R. Horton*. *Id.* GC Memo 10-06 remained the position of this Board until it issued the *D.R. Horton* decision with a single valid vote. Whereas arbitration agreements which merely require employees to file personal civil actions in arbitration on an individual basis do not prohibit all forms of concerted action, they do not violate the NLRA.

In addition, the *D.R. Horton* decision is premised in large part upon its finding that the Act provides employees an unwaivable substantive right to collective litigation. However, the authority to prosecute class actions is not provided by the NLRA, but rather by Federal Rule of Civil Procedure 23 and the collective action procedures of substantive labor laws. F.R.C.P. Rule

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*Horton* at 14. Accordingly, the *D.R. Horton* decision also fails to maintain a majority vote of valid members authorizing the decision.

23; see e.g., 29 U.S.C. § 216, subd. (b) (availability of class action procedures for alleged violations of Federal Labor Standards Act). The United States Supreme Court has expressly determined that the ability to seek class actions pursuant to these federal laws "is a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guaranty National Bank v. Roper* 445 U.S. 326, 332 (1980). The Court has further held that the right to exercise such class procedures is in fact waivable. *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011). In other words, contrary to *D.R. Horton*, the right to class actions is not an unwaivable, substantive right, but rather an optional procedural vehicle.

F. The ALJ Erred Finding that *D.R. Horton* Controls this Matter (Exception #7)

The ALJ opined that, "I … am bound by Board precedent unless and until the Supreme Court or the Board directs otherwise." Decision, p. 13. However, as correctly determined by ALJ Bruce D. Rosenstein, in *Chesapeake Energy Corporation and its Wholly Owned Subsidiary Chesapeake Operating, Inc.*, Case No. 14-CA-100530, the United States Supreme Court has done just that with its latest arbitration-related decisions. In fact, to date, three federal Circuit Courts of Appeals have reviewed the Board's *D.R Horton* decision, and all three have rejected its substantive analysis. In *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1052-1055 (8th Cir. 2013), the Eighth Circuit Court of Appeals declined to follow *D.R. Horton* because (1) the United States Supreme Court expressly held in *CompuCredit Corp. v. Greenwood,* 132 S.Ct. 665, 669 (2012) that the FAA requires governing bodies to enforce arbitration agreements according to their terms absent a contrary Congressional command; and (2) such a command does not exist in relation to the NLRA. Similarly, in a per curiam decision, the Ninth Circuit Court of Appeals found that "*D. R. Horton* ... conflicts with the explicit pronouncements of the Supreme Court concerning the policies undergirding the [FAA]. ... [T]he Supreme Court recently reiterated that courts must vigorously enforce arbitration agreements according to their terms ... unless the

FAA's mandate has been overridden by a contrary congressional command. ... Congress, however, did not expressly provide that it was overriding any provision in the FAA when it enacted the NLRA or the Norris- LaGuardia Act." *Richards v. Ernst &Young*, 734 F.3d 871, 873-874 (9th Cir. 2013) (internal quotations and citations omitted).

Finally, the Fifth Circuit Court of Appeal recently heard the direct appeal of the *D.R. Horton* decision. *D.R. Horton v. National Labor Relations Board,* 737 F.3d 344 (5th Cir. 2013). Like its sister courts, the Fifth Circuit rejected *D.R. Horton*, emphatically holding that "[t]he use of class action procedures ... is not a substantive right." *Id.* at 357. The Fifth Court further held that "[t]he NLRA should not be understood to ... override[e] application of the FAA." *Id.* at p. 362. "The issue here is narrow: do the rights of collective action embodied in this labor statute make it distinguishable from cases which hold that arbitration must be individual arbitration? *See* [*AT&T Mobility LLC v.*] *Concepcion*, 131 S.Ct. [1740] at 1750-53. We have explained the general reasoning that indicates the answer is "no." We add that we are loath to create a circuit split. Every one of our sister circuits to consider the issue has either suggested or expressly stated that they would not defer to the NLRB's rationale, and held arbitration agreements containing class waivers enforceable." *Id.* at 362.

These decisions[2] are consistent with over a dozen federal District Court decisions to consider the matter. *Carey v. 24 Hour Fitness USA, Inc.*, 2012 WL 4754726, at *2 (S.D. Tex. Oct. 4, 2012); *Tenet HealthSystem Phila., Inc. v. Rooney*, 2012 WL 3550496, at *4 (E.D. Pa. Aug. 17, 2012); *Delock v. Securitas Sec. Servs. USA, Inc.*, 2012 WL 3150391, at **2-6 (E.D. Ark. Aug. 1, 2012); *Luchini v. Carmax, Inc.*, 2012 WL 2995483, at *7 (E.D. Cal. July 23, 2012); *Spears v. Mid-America Waffles, Inc.*, 2012 WL 2568157, at *2 (D. Kan. July 2, 2012) *De*

[2] The Second Circuit Court of Appeals has also signaled a refusal to follow *D.R. Horton*. *Sutherland v. Ernst &Young, LLP*, Case No. 12-304, * 11 fn. 8 (2nd Cir. Aug. 9, 2013).

*Oliveira v. Citicorp. N. Am., Inc.*, 2012 WL 1831230 at *5 (M.D. Fla. May 18, 2012); *Coleman v. Jenny Craig, Inc.*, No. 11cv1301, slip op. at 4-5 (S.D. Cal. May 15, 2012); *Morvant v. P.F. Chang's China Bistro, Inc.*, 2012 WL 1604851, at **8-12 (N.D. Cal. May 7, 2012); *Jasso v. Money Mart Express, Inc.*, 2012 WL 1309171, at **7-10 (N.D. Cal. Apr. 13, 2012); *Brown v. Trueblue, Inc.*, 2012 WL 1268644 (M.D. Pa. Apr. 16, 2012); *Johnmohammdadi v. Bloomingdale's Inc.*, No. 11-6434, slip op. at 2 (C.D. Cal. Feb. 29, 2012); *Palmer v. Convergys Corp.*, 2012 WL 425256 (M.D. Ga. Feb. 9, 2012); *Sanders v. Swift Transp. Co. of Az., LLC*, 2012 WL 523527 (N.D. Cal. Jan. 17,2012); *LaVoice v. UBS Fin. Servs., Inc.*, 2012 WL 124590, at *6 (S.D.N.Y. Jan. 13, 2012).

## V. CONCLUSION

As set forth above, the ALJ based its decision upon *D.R. Horton*; but both the District of Columbia and Ninth Circuit Courts of Appeals have already determined that *D.R. Horton* is invalid. Based upon the location of the underlying charge, the District of Columbia and Ninth Circuit Courts of Appeals are the federal courts with jurisdiction over this matter. Thus, the Decision is not enforceable, and should be reversed.

Respectfully submitted this 27th day of March, 2014.

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**UNITED STATES OF AMERICA**
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**REGION 21**

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 27, 2014, I e-filed the foregoing **RESPONDENT'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ALJ'S DECISION DATED MARCH 5, 2014** using the Board's e-filing system, and immediately thereafter served it by electronic mail upon the following:

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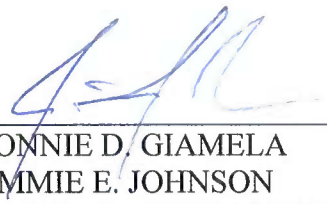

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