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

NETWORK CAPITAL FUNDING CORPORATION

and Case 21-CA-107219

ERIK PAPKE, an Individual

ANSWERING BRIEF OF COUNSEL FOR THE GENERAL COUNSEL TO RESPONDENT'S EXCEPTIONS

Jean C. Libby
Counsel for the General Counsel
National Labor Relations Board, Region 21
888 S. Figueroa St., Ninth Floor
Los Angeles, California 90017
(213) 894-5229
Jean.libby@nlrb.gov

Table of Contents

TABLE OF AUTHORITIES

NLRB CASES

CIRCUIT COURT CASE

SUPREME COURT CASES

I. STATEMENT OF THE CASE[1]

In a decision that issued on March 5, 2014, Administrative Law Judge William Nelson Cates ("ALJ") held that Respondent, Network Capital Funding Corporation, violated Section 8(a)(1) of the National Labor Relations Act by maintaining a mandatory arbitration agreement that waives the right of its employees to maintain class or collective action litigation, and by enforcing the mandatory arbitration agreement on June 11, 2013, by asserting the provisions in litigation brought against the Respondent in Erik Papke v. Network Capital Funding Corp., Case No. 30-2013-0063857-CU-OE-CXC in the Superior Court of California, County of Orange. Respondent filed exceptions to all of the ALJ's findings and conclusions. This Brief answers Respondent's exceptions.

II. ISSUES PRESENTED

1. Whether Respondent requires employees as a condition of employment to utilize binding arbitration on an individual basis to resolve employment-related disputes;

2. Whether the complaint allegations are time-barred because Papke signed the Agreement more than six months before the original charge was filed;

3. Whether requiring employees to utilize binding arbitration on an individual basis to resolve employment-related disputes violates § 8(a)(1) of the Act; and

[1] "ALJD" refers to the Administrative Law Judge's Decision. Citations will refer to the page number followed by a reference to the line number(s). The transcript will be referred to as "Tr." followed by a reference to the page number.

4. Whether the Board's decision in D.R. Horton, 357 NLRB No. 184 (2012), enf. denied 737 F.3d 344 (5th Cir. 2013) is invalid because it was not decided by a quorum of at least three constitutionally appointed Board members.

III. STATEMENT OF FACTS

a) **Respondent's Operations**

Respondent, a California corporation, with an office and place of business in Irvine, California, is engaged in the business of providing residential home mortgages throughout the United States. Annually, it derives gross revenues in excess of $500,000, and performs services valued in excess of $50,000 in states other than California. Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (ALJD 3:11-16).

Charging Party Papke worked as a loan officer for Respondent from January 3, 2011, until he resigned on March 13, 2013. (ALJD 7:16-22). As a loan officer, Papke processed loan applications, qualified potential borrowers, and presented the borrowers with loan options. (ALJD 7-16-19).

b) **Papke Signs Agreement**

Papke testified that, along with eight other prospective employees, he attended an orientation program on October 25, 2011, conducted by Steve Azizi, who worked as a loan officer for Respondent as well as the orientation trainer. (ALJD 6:45-7:2). Azizi did not testify at the hearing. At the conclusion of the orientation program, Azizi

distributed a packet of papers to Papke and the other prospective employees. Azizi instructed the group to complete the paperwork and turn it in to him. They all did as instructed. One of the papers Papke signed was a form entitled "Employee Acknowledgment and Agreement" (the "Agreement") which contains, among other things, the following provision:

> 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 it owners, directors, officers, managers, employees, agents), or the Company may have against me, shall be submitted to and determined exclusively by binding arbitration ... The only exception to the requirement of binding arbitration shall be for claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board ... or as may otherwise be required by state or federal law. (ALJD 4:21-6:40).

c) **Papke Is Required to Sign the Agreement.**

Papke testified that when Azizi distributed the Agreement form, Azizi just told him, and the rest of the group, to complete it and turn it back in. There was no discussion, and Papke wasn't given a copy of the form. (ALJD 7:5-7). Papke testified that he couldn't recall that Azizi said anything else. Papke testified that Azizi did not say that employees had a choice about whether to sign the Agreement or that he, Azizi, was willing to negotiate any part of it, or that he was willing to add to or subtract from the form. (ALJD 7:8-12). Papke said that he didn't realize that anything he was presented with was optional. (ALJD 7:40). Papke also said that he did not recall whether Azizi asked if anyone had any questions about the form.

d) **Respondent's Purported Policy.**

Respondent's current Human Resources Manager, Christopher Bales, who has been employed by Respondent since October 15, 2012, testified that Respondent does not have a policy, written or unwritten, that signing the Agreement form is a condition of employment. (ALJD 8:28-31). He also testified that since October 15, 2012, when he began conducting Respondent's orientation programs, no one has either refused to sign the Agreement form or asked to negotiate changes in any of its provisions. (ALJD 8:26).

Although the Agreement form Papke signed on October 25, 2011, states at the beginning that the employee acknowledges receipt of the Employee Handbook, Papke testified that he did not receive a copy of the handbook either when he signed the form or at any time during his employment. (ALJD 7:8). However, Bales testified that he has been conducting orientation programs since he was hired, and that employees are given copies of the employee handbook at the orientation programs he conducts. (ALJD 8:5).

e) **Papke Files A Class-Action Complaint**

About March 18, 2013,[2] Papke filed a class-action complaint against Respondent in state court alleging various violations of the California Labor Code. (ALJD 3:21-25).

f) **Respondent Requests Dismissal of Class Action and Seeks to Compel Individual Arbitration.**

On June 11, Respondent reacted to the class-action complaint by filing a Motion to Compel Arbitration on an Individual basis, Strike the Class Allegations and Stay the

[2] All dates hereafter refer to 2013 unless otherwise indicated.

Proceedings Pending Arbitration. (ALJD 3:26-30). On June 19 Papke requested dismissal of the class-action complaint. That same day the complaint was dismissed. (ALJD 3:31-34).

g) **Papke Files For Class-Action Arbitration**

The following day, June 20, Papke filed a "Demand for Arbitration Before JAMS" of a class-action complaint for various violations of the California Labor Code. (ALJD 3:35-40).

h) **Respondent Seeks to Enjoin Class-Action Arbitration and to Compel Individual Arbitration.**

On June 28, Respondent filed in state court Complaints for Declaratory and Injunctive Relief requesting that the court decide that the claims Papke brought before JAMS should proceed to arbitration on an individual basis, and not as a class action. (ALJD 3:41-45). On October 10, the court granted the relief Respondent requested, finding that Respondent cannot be forced to arbitrate the class action and that Papke's claims must proceed in arbitration on an individual basis. (ALJD 4:1-4). On October 17, Papke appealed to the California Court of Appeal. The appeal has not been decided.

i) **Respondent Revises Agreement Form.**

Sometime in June 2013, while the litigation between Papke and Respondent was being pursued, and three months after Papke quit his employment, Respondent changed the wording of the Agreement form. Bales testified that beginning in June 2013, Respondent began using a different form, which it still uses. With respect to

litigation of employment-related disputes, the current form contains the following provision:

> I and the Company agree to utilize binding arbitration as the sole and exclusive means to resolve all disputes that may arise out of or be related to my employment, including but not limited to the termination of my employment and my compensation. I and the Company each specifically waive and relinquish our respective rights to bring a claim against the other in a court of law and this waiver shall be equally binding on any person who represents or seeks to represent me or the Company in a lawsuit against the other in a court of law. Both I and the Company agree that any claim, dispute, and/or controversy that either I may have against the Company (or it owners, directors, officers, managers, employees, agents), or the Company may have against me, shall be submitted to and determined exclusively by binding arbitration ... The only exception to the requirement of binding arbitration shall be for claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board ... or as may otherwise be required by state or federal law. (ALJD 8:6-24).

IV. ARGUMENT

A. RESPONDENT REQUIRES EMPLOYEES AS A CONDITION OF EMPLOYMENT TO UTILIZE BINDING ARBITRATION ON AN INDIVIDUAL BASIS TO RESOLVE EMPLOYMENT-RELATED DISPUTES.

Although most of the facts in this case are undisputed, one disputed factual issue is whether Respondent, as a condition of employment, requires employees to sign an employee acknowledgment and agreement form. The ALJ concluded that signing the employee acknowledgment and agreement form was a condition of Papke's employment. (ALJD 5:9). In Exceptions No. 1, 3 and 4, Respondent argues that the ALJ erred in concluding that signing the agreement was a condition of Papke's employment and, therefore, involuntary.

Contrary to Respondent's claim that Papke voluntarily waived his right to pursue class-action litigation, the record is replete with evidence supporting the ALJ's conclusion, which the ALJ described in detail, establishing that signing the agreement

was not voluntary. Papke testified that Steve Azizi, the trainer who conducted the orientation and Respondent's agent,[3] instructed Papke and the eight others who attended the orientation program with him to sign the paperwork and return it to Azizi, and they all did. (ALJD 7:7). Papke further testified that the group was not told that they had a choice about whether to sign the form, or that they could negotiate any changes to the form. (ALJD 7:9-11). While Papke could not recall if Azizi asked the group if they had any questions, he was definite in his recollection that Azizi did not say that signing the form was in any way optional. (ALJD 9:10-11). Based on this evidence, the ALJ stated that it would be unreasonable for him to conclude that if an employee did not wish to sign the Agreement, the employee could simply ask to negotiate different terms. Rather, the fact that Respondent did not advise Papke that signing was in any way optional and the fact that no employee ever refused to sign the Agreement, according to the ALJ, demonstrate that signing was a condition of employment, and not voluntary. (ALJD 9:24-10:7).

Bales provided testimony in support of Respondent's claim that signing an employee Acknowledgment and Agreement form is voluntary and not a condition of employment. Bales testified that Respondent does not have a policy, written or unwritten, requiring employees to sign the Employee Acknowledgment and Agreement form as a condition of employment. Bales also testified that Respondent does not have a policy that adverse action will be taken against an employee who refuses to sign such a form. Bales self-serving testimony is not supported by any evidence. And it is

[3] In its brief Respondent in essence argues that it is not liable for Azizi's conduct because the record does not establish that he was a managing agent. However, he was clearly Respondent's agent. As the ALJ correctly noted, Respondent placed Azizi "in a position from which employees could reasonably assume he spoke for the Company." (AJD 9:16-17).

undisputed that Respondent did not communicate to its employees its view that signing the Employee Acknowledgment and Agreement form was in any way optional.

When an employer fails to communicate its interpretation of a policy to its employees, the Board rejects the employer's interpretation and, instead, relies on an employee's reasonable interpretation. In D.R. Horton, Inc., 357 NLRB No. 184, slip op. at 2, n. 2 (January 3, 2012), enf. granted in part and denied in part, D.R. Horton, Inc. v. N.L.R.B., 737 F.3d 344 (5th Cir. 2013), the Board affirmed Administrative Law Judge Cates' finding that Respondent's rule regarding class-action litigation applied to filing Board charges even though the Employer interpreted its rule to not apply to filing Board charges, and instructed its supervisors that the rule did not apply to filing Board charges. However, because the employer did not communicate its interpretation to employees, the Board rejected the employer's interpretation and, instead, relied on how employees would reasonably interpret the rule, and concluded that the rule was unlawful.

Similarly, in this case, because the Respondent did not communicate its purported policy that signing the employee Acknowledgment and Agreement form was not required as a condition of employment, Respondent's purported policy should be rejected and, instead, reliance should be placed on an employee's reasonable interpretation. The undisputed evidence demonstrates that reasonable employees would view signing the form as a condition of employment. As the ALJ correctly noted, Respondent did not advise employees, either verbally or in writing, that signing the form was optional. (ALJD 9:31-10:7). The form itself does not indicate it is optional, and no employee ever refused to sign one.

Moreover, Bales acknowledged that since his employment with Respondent began, which was on October 15, 2012, he did not tell a single employee either that signing the Employee Acknowledgment and Agreement form was not a condition of employment, or that no adverse action would be taken against any employee who refused to sign the form. (Tr. 101-103). He also testified that since he has been employed, no one has either refused to sign the form or attempted to negotiate it. (Tr. 97-98). Moreover, all employees hired after Papke signed the Employee Acknowledgment and Agreement form. Thus, while it is hypothetically possible that Respondent would not have insisted that an employee sign the form if the employee had objected, the record contains no evidence to support that hypothetical possibility. The record evidence overwhelmingly supports the ALJ's conclusion that reasonable employees would believe that Respondent required them, as a condition of employment, to sign the employee Acknowledgment and Agreement form in which they waive their right to pursue class-action litigation for employment-related disputes.

Even if the record contained evidence to support the Respondent's position that signing the form was voluntary and that employees are not required to sign it, which it does not, the record contains substantial evidence to support the ALJ's conclusion that Respondent violated the Act. Regardless of what employees were told, once the form was signed, it became a condition of employment. Thus, once employees signed the form, Respondent was free to preclude them from exercising their § 7 rights to engage in collective legal activity. Respondent aggressively did so here with its motion to

dismiss Papke's class-action complaint followed by its own lawsuit enjoining Papke from pursuing a class-action arbitration.[4]

Current employees can reasonably expect that they will face similar legal action if they breach the agreement. Moreover, the agreement is also a condition of employment for employees who do not sign the agreement because those employees are prevented from acting concertedly with employees who do sign. Thus, even if the record did contain evidence that Papke was not required to sign the employee Acknowledgment and Agreement form as a condition of employment, which it does not, it became a condition of employment when Papke signed it and, for the reasons explained in Part C below, Respondent violated § 8(a)(1) by enforcing it.

B. THE COMPLAINT ALLEGATIONS ARE NOT TIME-BARRED EVEN THOUGH PAPKE SIGNED THE ARBITRATION AGREEMENT MORE THAN SIX MONTHS BEFORE THE CHARGE WAS FILED.

The Complaint alleges that Respondent violated § 8(a)(1) of the Act by, since December 14, 2012, maintaining an employee acknowledgment and agreement form as a condition of employment that requires employees to utilize binding arbitration to resolve all employment-related disputes and by requiring Papke to sign the form as a condition of employment on October 25, 2011. The ALJ concluded that the complaint is not time-barred because Respondent filed a Motion to Compel Arbitration on an Individual Basis, Strike the Class Allegations and Stay the Proceeding Pending Arbitration of Papke's suit on June 11, just 2 days before the charge was filed. In Exceptions Nos. 2 and 3, Respondent asserts that the ALJ erroneously rejected its

[4] See Part C below for the discussion of why § 7 protects an employee's right to engage in class-action litigation of employment-related disputes.

Section 10(b) defense. Respondent argues that the Complaint is time-barred because it arises from Papke's signing the arbitration agreement on October 25, 2011, more than six months before the original charge was filed.

Section 10(b) of the Act requires that a charge be filed within 6 months of the unfair labor practice that is the basis of the charge. Thus, if all of the events giving rise to the charge occurred more than 6 months before the charge was filed, the charge is untimely. However, it is well-established that an employer violates § 8(a)(1) of the Act by maintaining an unlawful rule within 6 months of the filing of a charge, regardless of when the rule was first promulgated. Lafayette Park Hotel, 326 NLRB 824, 825 (1998). Similarly, an employer violates the Act by enforcing an agreement within 6 months of a charge being filed, even if the agreement was not entered into during the § 10(b) period. Teamsters Local 293 (R.L. Lipton Distributing), 311 NLRB 538, 539 (1993).

It is undisputed that the original charge in this matter was filed substantially more than 6 months after Papke signed the Agreement in which he purportedly agreed not to file a class-action lawsuit against Respondent for employment-related claims.[5] Nevertheless, under well-established principles, Respondent's statute-of-limitations defense lacks merit. First, it is noted that the complaint allegations are premised on Respondent's *maintenance* and *enforcement* of the employee Acknowledgment and Agreement form, not the initial promulgation of the form or its execution by Papke. And the record contains undisputed evidence that Respondent has maintained essentially the same form ever since Papke first signed one. Even now, Respondent requires

[5] While the Agreement on its face is silent as to whether arbitration may proceed on a class-action basis, Respondent has explicitly taken the position in litigation with Papke that the Agreement requires arbitration only on an individual basis. Respondent first sought to dismiss Papke's class-action complaint in state court and later obtained a preliminary injunction against Papke's request for class-action arbitration on that basis.

employees to sign an employee acknowledgment and agreement form waiving their right to file employment-related class-action lawsuits and requiring them to arbitrate employment-related claims on an individual basis.[6]

Christopher Bales, Respondent's current human resources manager, testified, without contradiction, that the same form Papke signed was signed by employees until June 2013, when it was replaced by a different form. The charge also was filed in June 2013. While the language in the current form is not identical to the language in the form Papke signed, both versions require employees to waive their right to file class-action lawsuits and to submit their employment-related disputes to binding arbitration.[7]

Not only did Respondent maintain the form during the six months before the charge was filed, but Respondent utilized the form in its defense of Papke's lawsuit within six months of the filing of the charge. As the ALJ noted, the charge in this matter was filed only 2 days after Respondent moved to dismiss Papke's state court lawsuit. On June 11, Respondent responded to Papke's class-action complaint by filing a Motion to Compel Arbitration on an Individual basis, Strike the Class Allegations and Stay the Proceedings Pending Arbitration based on Papke's execution of the Employee Acknowledgment and Agreement form. (ALJD 10:9-26). Although Papke subsequently requested dismissal of that lawsuit, the very next day he filed a demand for class-action arbitration.

Shortly thereafter, on June 28, Respondent reacted to the class-action arbitration demand by filing a lawsuit to enjoin the class-action arbitration and to require the

---

[6] For the reasons explained in part C below, prohibiting employees from litigating an employment-related claim as a class action violates § 8(a)(1) of the Act.

[7] As explained above, while the agreement on its face does not prohibit class-action arbitration, Respondent has taken the position in litigation with Papke that it prohibits class-action litigation in arbitration as well as in court.

arbitration to proceed on an individual basis. By utilizing the Employee Acknowledgment and Agreement Form signed by Papke in its responses to Papke's class-action complaint and class-action arbitration demand, Respondent's litigation conduct demonstrates that the allegations of the Complaint are based on events that occurred within 6 months of the filing of the charge. Compare, Local Lodge 1424 IAM v. NLRB (Bryan Mfg.), 362 U.S. 411 (1960). Thus, the ALJ correctly concluded that the allegations of the complaint are not time-barred.

C. RESPONDENT VIOLATED § 8(a)(1) OF THE ACT BY MAINTAINING, AS A CONDITION OF EMPLOYMENT, A FORM REQUIRING EMPLOYEES TO UTILIZE BINDING ARBITRATION ON AN INDIVIDUAL BASIS TO RESOLVE EMPLOYMENT-RELATED DISPUTES AND BY REQUIRING PAPKE TO SIGN THAT FORM AS A CONDITION OF EMPLOYMENT.

1. The Agreement unlawfully requires employees to relinquish their statutory right to act collectively.

Relying on D.R. Horton, Inc., supra, the ALJ concluded that Respondent violated § 8(a)(1) of the Act by maintaining, as a condition of employment, a form that requires employees to utilize arbitration on an individual basis to resolve employment-related disputes and by requiring Papke to sign its Employee Acknowledgment and Agreement as a condition of employment. In D.R. Horton, Inc., slip op. at 1, the Board held that an employer violates § 8(a)(1) of the Act "by requiring employees to waive their right to collectively pursue employment-related claims in all forums, arbitral and judicial."[8] Thus,

[8] The Board in D.R. Horton, Inc., supra, also found that the arbitration policy at issue there violated the Act by requiring employees to submit all employment-related disputes to arbitration. The Board found that this violated §8(a)(1) of the Act because it would lead employees to reasonably believe that they were prohibited from filing unfair labor practice charges with the Board. Here, both the Agreement form

in D.R. Horton, Inc., supra, the Board definitively held that an employer violates § 8(a)(1) by requiring employees "as a condition of their employment, to sign an agreement that precludes them from filing joint, class or collective claims addressing their wages, hours or other working conditions against the employer in any forum." In Exception No. 6, Respondent argues that D.R. Horton was wrongly decided.

In the instant case, the Agreement that Papke was required to sign does not, on its face, prohibit class-action litigation; however, this is its intent as evinced in both Respondent's Motion to Compel Arbitration on an Individual basis, Strike the Class Allegations and Stay the Proceedings Pending Arbitration and in its Motion for a Preliminary Injunction. In its motion to compel arbitration, Respondent asked the court to end the class action and in its preliminary injunction motion it asked the court to only allow the matter to go to arbitration on an individual basis. (ALJD 13:1-3). And, on October 10, Respondent received a favorable ruling on its request for a preliminary injunction. Although Papke has appealed, the appeal has not yet been decided.

2. No conflict between the FAA and NLRA.

The instant case does not present a conflict between the Federal Arbitration Act (FAA) and the NLRA because, as the Board explained in D.R. Horton, Inc., slip op. at 12, "holding that an employer violates the NLRA by requiring employees, as a condition of employment, to waive their right to pursue collective legal redress in both judicial and arbitral forums accommodates the policies underlying both the NLRA and the FAA to the greatest extent possible." The Board's explanation is sound because Section 2 of

---

Papke signed and the recently revised version expressly exclude from coverage the filing of charges with the Board. Hence, that issue is not presented here.

the FAA "provides that arbitration agreements may be invalidated in whole or in part" for the same reasons any contract may be invalidated, including if they are unlawful or contrary to public policy. D.R. Horton, Inc., slip op. at 11. Inasmuch as the Agreement as enforced is unlawful under the NLRA and against public policy, it should not be enforceable under the FAA.

In D.R. Horton, Inc., supra, the Board also emphasized that finding an arbitration policy, which prohibits collective or class action, unlawful does not conflict with the FAA because the "intent of the FAA was to leave substantive rights undisturbed." Thus, the Agreement, as enforced, is unlawful because it prohibits employees from exercising their § 7 right to engage in concerted activity, a substantive right, which the Supreme Court in Eastex, Inc. v. N.L.R.B., 437 U.S. 556, 567 (1978), held includes "seek[ing] to improve working conditions through resort to administrative and judicial forums."

Respondent argues in Exception No. 6 that the right to pursue class-action litigation is a procedural right grounded in Rule 23 of the Federal Rules of Civil Procedure. However, in D.R. Horton, Inc., supra, the Board held that the right to pursue class-action litigation is a substantive right encompassed in § 7 of the Act and, therefore, not waivable.

Clearly, as was the case in D.R. Horton, Inc., supra, the concern here is not with the FAA or with arbitration. The Board's rulings neither evince nor are they motivated by any hostility to arbitral resolution of disputes. Importantly, the General Counsel does not take the position here that employees cannot be required to arbitrate their work-related disputes. Indeed, the Board has canons of precedent and policy favoring arbitration of labor disputes as an integral aspect of the statutory scheme.

Respondent's enforcement actions, however, are cut from a different cloth entirely in that they prohibit employees from exercising their statutory rights to engage in collective legal action to protest their terms of employment. The illegality here rests not on the requirement that claims be arbitrated, but rather that such claims must be arbitrated individually. When such a requirement is insisted upon, as a condition of employment, it contravenes the essential rights granted by § 7 of the Act.

Here, just like in D.R. Horton, Inc., supra, the Agreement, as enforced by Respondent, requires Respondent's employees to waive their right to engage in concerted activity for mutual aid and protection in that it prohibits all class or collective action in any forum. The FAA makes clear that an arbitration agreement may be set aside on "grounds that exist at law or in equity for the revocation of any contract."[9] Inasmuch as the Agreement, as enforced, requires employees, as a condition of employment, to waive rights guaranteed under the NLRA, Respondent has maintained an agreement that may be revoked and should not be enforced under the FAA.

3. The Supreme Court's Post-D.R. Horton decisions regarding enforcement of arbitration agreements do not override substantive rights under the NLRA.

In Exception No. 7, Respondent relies on CompuCredit v. Greenwood, 132 S.Ct. 655 (2011), which issued after D.R. Horton, Inc., supra, to support its argument that the Agreement and its enforcement are consistent with the FAA, regardless of the apparent conflict with the NLRA. Moreover, Respondent also cites AT&T Mobility v. Concepcion, 313 S.Ct. 1740 (2011), a case in which the Supreme Court overwhelmingly approved of individual arbitration agreements, according to their terms.

[9] 9 U.S.C. § 2.

Such prior pronouncements of the Supreme Court are not necessarily indicators of Respondent's success here – particularly where the case involved credit card privileges. The other case, AT&T Mobility v. Concepcion, supra at 1745-1746, involved a California law that voided waivers of class arbitration of common-law claims under consumer contracts. The Supreme Court held that the State of California's law was preempted by the FAA because it addressed only agreements to arbitrate, as opposed to contracts generally.

In CompuCredit v. Greenwood, supra, the Supreme Court upheld an arbitration agreement waiving the ability to sue in court for alleged violations of the Credit Repair Organization Act, 15 U.S.C. § 1657 *et seq.,* a federal statute regulating the practices of credit repair organizations. The Court rejected the proposition that the Credit Repair and Organization Act contained a substantive right to sue – individually or as a class. The Court affirmed its reasoning, articulated in Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991), and other cases, that an "utterly commonplace" provision in a federal statute creating a private right of action does not prohibit an enforceable agreement to arbitrate such claims. CompuCredit v. Greenwood, supra at 670.

CompuCredit v. Greenwood does not conflict with the Board's reasoning in D.R. Horton, where the Board relied upon the Supreme Court's recognition in Gilmer and Mitsubishi Motors, Inc. v. Soler Chrysler-Plymouth, 473 U.S. 614 (1985) that the FAA does not require arbitration of statutory claims where it means a party will "forgo the substantive rights afforded by statute." D.R. Horton, Inc., slip op. at 9 quoting Gilmer, supra at 26, quoting Mitsubishi Motors, Inc. v. Soler Chrysler-Plymouth, supra at 628. This core principle is not disturbed by the Court's decision in CompuCredit v.

Greenwood– a case where the Court rejected the argument that in the underlying statute there was a substantive right to collective action.

The NLRA is quite different. In D.R. Horton, Inc., slip op. at 9, the Board affirmed the settled principle that a "categorical prohibition of joint, class or collective federal, state or employment law claims in any forum directly violates substantive rights vested in employees [as opposed to labor organizations where perhaps rights may be waived to reach a better bargain] by section 7 of the NLRA." (emphasis added). On that basis, the Board invalidated the arbitration agreement in D.R. Horton, Inc., supra. The Board's reasoning is equally valid here and consistent with the Supreme Court's recent decision in the CompuCredit case. The salient point being that the Board's issue and interest involves the protection of employees' substantive rights, under the Act, to engage in collective action in order to vindicate their § 7 rights, including rights which may be legal or contractual.

Accordingly, the AT&T Mobility and CompuCredit cases are distinguishable from the instant case because of the substantive rights granted in § 7 of the Act.

D. THE BOARD'S D.R. HORTON DECISION IS VALID BECAUSE IT WAS DECIDED BY A QUORUM OF AT LEAST THREE CONSTITUTIONALLY APPOINTED BOARD MEMBERS.

In Exception No. 5 Respondent argues that the Board's D.R. Horton decision, the decision upon which the ALJ's conclusion that Respondent violated § 8(a)(1) is premised, is invalid because Craig Becker, one of the three Board members who participated in the decision, was not constitutionally appointed. Respondent relies on, *inter alia,* Noel Canning v. NLRB, 705 F. 3d 490 (D.C. Cir. 2013), cert. granted, 133 S.Ct. 2861 (June 24, 2013), a case recently argued before the Supreme Court. As the

ALJ noted, the Board has rejected such claims in many cases including Bloomingdales, Inc., 359 NLRB No. 113 (2013). (ALJD 11:23-34). Should the Supreme Court conclude in the Noel Canning case that Member Becker's appointment is invalid, and should the Board thereafter not reaffirm D.R. Horton, then the decisions premised on D.R. Horton will have to be re-evaluated. However, at this point, consistent with Board precedent, as the ALJ noted, Respondent's argument regarding the validity of Becker's appointment should be rejected. (ALJD 11:36-39).

V. CONCLUSION

For all the foregoing reasons, the ALJ's decision that Respondent Network Capital Funding Corporation, violated Section 8(a)(1) of the Act should be affirmed and adopted.

VI. REMEDY

It is respectfully submitted that the following remedy, which was ordered by the ALJ, is the appropriate remedy and should be adopted:

A. That Network Capital Funding Corporation, its officers, agents, successors and assigns be ordered to:

1. Cease and desist from:

(a) Maintaining a mandatory arbitration agreement, that waives employees' right to maintain class or collective actions in all forums, whether arbitral or judicial;

(b) Seeking to enforce such agreement by filings in any court to compel individual arbitration pursuant to the terms of any such agreement;

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

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Within 7 calendar days after the Board enters its Decision, and upon request Charging Party Papke, file with the Superior Court of California, Orange County, a motion to vacate the Court's order compelling arbitration on an individual basis issued by the Court on October 10, 2013.

(b) Reimburse Charging Party Papke for all legal and related expenses incurred to date and in the future, with respect to *Erik Papke v. Network Capital Funding Corporation et al.,* with interest as described in the Remedy section of the Administrative Law Judge's Decision.

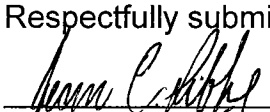
(c) Rescind, modify or revise the Agreement to ensure its employees that the Agreement does not contain or constitute a waiver, in all forums, of their right to maintain employment-related class or collective actions.

(d) Notify its employees in writing of the rescinded, modified or revised Agreement and provide a copy of any modified or revised Agreement to each employee and notify each employee in writing that the original Agreement has been removed from their personnel records and destroyed.

(e) Within 14 days after service by the Region, post at Respondent's facility in Irvine, California, copies of the appropriate notice.

(f) Notify the Regional Director, in writing, within 20 days from the date of the Board's Decision and Order, what steps have been taken to comply with that Order.

Respectfully submitted,



Jean C. Libby
Counsel for the General Counsel
National Labor Relations Board, Ninth Floor
888 S. Figueroa Street, Ninth Floor
Los Angeles, CA 90017-5449

DATED at Los Angeles, California, this 16th day of April, 2014.

STATEMENT OF SERVICE

I hereby certify that a copy of Answering Brief of Counsel for the General Counsel to Respondent's Exceptions was submitted for E-filing to the Executive Secretary of the National Labor Relations Board on April 16, 2014.

The following parties were served with a copy of said document by electronic mail on April 16, 2014:

Lonnie D. Giamela, Attorney at Law
Jimmy E. Johnson, Attorney at Law
Fisher & Phillips LLP
lgiamela@laborlawyers.com
jjohnson@laborlawyers.com

Matthew Righetti, Esq.
John Glugoski, Esq.
Righetti Glugoski, P.C.
Matt@Righettilaw.com
JGlugoski@Righettilaw.com

Respectfully submitted,

Jean C. Libby
Counsel for the General Counsel
National Labor Relations Board

Dated at Los Angeles, California, this 16th day of April, 2014.