UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

J.P. MORGAN CHASE & CO. and CHASE INVESTMENT SERVICES CORP., now doing business as J.P. MORGAN SECURITIES, LLC,	)	
Respondents	)	
and	)	Case No. 02-CA-098118
ROBERT M JOHNSON, JENNIFER ZAAT-HETELLE, SCOTT VAN HOOGSTRAAT, AND PETER PICCOLI,	)	
Charging Parties	)	

RESPONDENTS J. P. MORGAN CHASE & CO. AND J.P. MORGAN SECURITIES, LLC'S BRIEF IN SUPPORT OF THEIR EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION

J.P. Morgan Chase & Co. and J.P. Morgan Securities, LLC ("Respondents") except to the Administrative Law Judge's ("ALJ") decision finding that the Respondents' Binding Arbitration Agreement ("BAA") violates the Act under *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012). This case involves four Charging Parties (Robert Johnson, Jennifer Zaat-Hetelle, Scott VanHoogstraat, and Peter Piccoli) who are seeking to litigate Fair Labor Standards Act ("FLSA") claims against the Respondents in a collective action in the United States District Court for the Southern District of New York ("District Court"). The Charging Parties filed the subject unfair labor practice charge on February 11, 2013, after the Respondents filed a motion to compel arbitration of the Charging Parties' FLSA claims pursuant to the BAAs they entered into in 2009 and 2010.

After the ALJ issued his decision on August 21, 2013, the District Court issued a decision granting Respondents' motion to compel arbitration and rejecting the Charging Parties' argument that the BAA is unenforceable under *D. R. Horton*. *Lloyd v. J.P. Morgan Chase & Co.*, 2013 WL 4828588, at *6 (S.D.N.Y. Sept. 9, 2013). The District Court's decision followed recent decisions of the Second Circuit which also have rejected *D. R. Horton* and held that an arbitration agreement that waives an employee's right to litigate FLSA claims in a collective action is enforceable under the Federal Arbitration Act ("FAA"). *Sutherland v. Ernst & Young LLP*, --- F.3d ---, 2013 WL 4033844 (2d Cir. Aug. 9, 2013); *Raniere v. Citigroup Inc.*, 2013 WL 4046278 (2d Cir. Aug. 12, 2013) (summary order).

The Board should defer to these decisions, which are binding on the Charging Parties as parties to the *Lloyd* case. The Board has no authority to interpret the FAA or the FLSA and, as the District Court held in *Lloyd*, "this Court owes no deference to decisions by the NLRB, insofar as they interpret or attempt to reconcile the FAA with the NLRA. *See Hoffman Plastic*

Compounds, Inc. v. NLRB, 535 U.S. 137, 144 (2002)." The District Court's decision is entirely consistent with Board precedent deferring to court or other agency interpretations of other federal statutes, as discussed below. This principle of deference is rooted in the Supreme Court's decision in *Southern Steamship Co. v. NLRB*, 316 U.S. 31 (1942), which held that "the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives." *Id.* at 47. Deference is all the more necessary when, as here, a federal court has interpreted other federal statutes in deciding the very same issue in a case involving the very same Respondents and the very same Charging Parties as are now before the Board.

The District Court's decision also directly undermines the ALJ's holding that the Respondents' filing of a motion to compel arbitration in the District Court was not protected by the First Amendment. Respondents have a First Amendment right to petition the federal courts, which includes the right to file a motion to compel arbitration of the Charging Parties' claims under the FLSA. The remedy ordered by the ALJ in this case – requiring the Respondents to withdraw the motion to compel arbitration that the District Court has now granted – would violate Respondents' First Amendment rights.

The District Court's decision also undercuts the ALJ's finding that the complaint is not time-barred under Section 10(b) of the Act. The ALJ found that Counsel for the Acting General Counsel's statements at trial were an implicit withdrawal of any allegation concerning the Charging Parties' entering into the BAAs in 2009 and 2010, which occurred well outside the Section 10(b) period. To the extent that Counsel for the Acting General Counsel had not withdrawn those allegations, the ALJ found that they must be dismissed as time-barred. ALJD at 6. Although these predicate allegations were found to be time-barred, the ALJ found that the

complaint was not time-barred insofar as it rested on the allegation that the Respondents enforced the BAAs during the Section 10(b) period by filing the motion to compel arbitration in the District Court. The act of filing a motion to compel arbitration in the District Court, which is protected by the First Amendment, cannot resurrect allegations that are otherwise time-barred. Nor can the motion to compel arbitration be deemed to have an "unlawful objective," as the ALJ found, especially when the District Court has now granted the motion and rejected the Charging Parties' argument that the BAA is unlawful and unenforceable under *D. R. Horton*. Accordingly, the Board should find that the complaint allegations are barred by Section 10(b) and the First Amendment.

If the Board proceeds to consider the merits of the complaint, the Board should find that the BAA is distinguishable from the mandatory arbitration agreement at issue in *D. R. Horton* because (1) it does not prohibit employees from participating in a class or collective action to challenge the enforceability of the BAA; (2) it provides that employees may seek a temporary restraining order or a preliminary injunction in order to preserve the status quo pending resolution of a claim through the BAA; and (3) it does not preclude employees from filing charges with the Board or other administrative agencies. The Board should, in any event, take this opportunity to reconsider its decision in *D. R. Horton*. The decision is a legal nullity because the Board did not have a valid quorum when it decided *D. R. Horton*. According to the recent decisions of the D.C. Circuit and the Third Circuit, Member Becker's recess appointment was constitutionally invalid. *See NLRB* v. *New Vista Nursing & Rehab.*, 719 F.3d 203 (3d Cir. 2013); *Nat'l Assoc. of Mfrs. v. NLRB*, 717 F.3d 947, 952 (D.C. Cir. 2013). And even if Member Becker's recess appointment had been valid, the Board still did not have authority to issue its decision in *D. R. Horton* because only two members participated in the decision.

Furthermore, *D. R. Horton* has been overwhelmingly rejected by the many courts that have considered it since January 2012, including the District Court in *Lloyd* and every Circuit Court that has considered it. Courts have rejected *D. R. Horton* because the Board's decision is contrary to Supreme Court precedent holding that arbitration agreements with class and collective action waivers are lawful and enforceable under the FAA. *D. R. Horton* rests on the flawed premise that employees have a Section 7 right to litigate *non-NLRA* claims on a class or collective action basis. This premise is a vast and unwarranted expansion of much narrower principles in cases that directly affected core Section 7 rights – the rights to organize and bargain collectively. There is no evidence that the BAA, or similar arbitration procedures with class/collective action waivers, have any impact on employees' rights to organize or bargain collectively.

II. STATEMENT OF FACTS

A. <u>Chase And The Charging Parties.</u>

The Charging Parties were employed by Chase Investment Services Corp. ("CISC"), which was merged into J.P. Morgan Securities, LLC in October, 2012. Stip. 5, 10.[1] Robert Johnson was employed by CISC as a Financial Advisor at several branches in Dallas, Texas from June 2010 to June 2011. *See* Mem. of Law in Support of Mot. for Conditional Certification, *Lloyd v. J.P. Morgan Chase & Co.*, No. 11-9305-LTS, Dkt. No. 63 at pp. 3-4 (S.D.N.Y. Jan. 14, 2013). Jennifer Zaat-Hetelle was employed by CISC at two branches in Huntington Beach, California, from August 2009 to March 2011. *Id.* Scott VanHoogstraat was employed by CISC at the Mesa, Arizona and Indianapolis, Indiana branches from March 2010 to August 2011. *Id.*

[1] References to the parties' Stipulation of Facts will appear as "Stip. __". References to the joint exhibits attached to the Stipulation of Facts will appear as "Stip. Ex. __" .

Peter Piccoli was employed by CISC at several branches in Florida from June 2010 to November 2011. *Id.*

The ALJ erred in finding that J.P. Morgan Chase & Co. and CISC, or J.P. Morgan Securities, LLC, are joint employers. ALJD at 2. There was no evidence introduced at trial that would support a joint employer finding and, contrary to the ALJ's finding, Respondents made no admission of joint employer status. The case was submitted to the ALJ through a stipulation that intentionally did not make any representations regarding the joint employer issue. Paragraph 9 of the stipulation was carefully negotiated to provide the Board with a remedy against J.P. Morgan Chase & Co. if a violation is found, but without any admission or stipulation of joint employer status.

B. <u>The Arbitration Agreement.</u>

All four Charging Parties signed the Company's Binding Arbitration Agreement ("BAA") in 2009 or 2010. Johnson signed the BAA on June 28, 2010; Zaat-Hetelle signed on August 31, 2009; VanHoogstraat signed on March 31, 2010; Piccoli signed on June 21, 2010. ALJD at 3.

The BAA covers "all legally protected employment-related claims . . . which arise out of or relate to my employment or separation from employment with JPMorgan Chase . . . including, but not limited to, . . . [violations of] the Fair Labor Standards Act of 1938…." ALJD at 4. Covered claims must be submitted to and resolved by final and binding arbitration in accordance with this Agreement." *Id.* Claims under the NLRA are specifically excluded from the BAA: "This Agreement does not cover, and the following claims are not subject to arbitration under this agreement: . . . (c) any claim under the National Labor Relations Act." *Id.*

The BAA contains a class/collective action waiver for covered claims, which provides:

> **4. CLASS ACTION/COLLECTIVE ACTION WAIVER:** All Covered Claims under this Agreement must be submitted on an individual basis. **No claims may be arbitrated on a class or collective basis.** Covered Parties expressly waive any right with respect to any Covered Claims to submit, initiate, or participate in a representative capacity or as a plaintiff, claimant or member in a class action, collective action, or other representative or joint action, regardless of whether the action is filed in arbitration or in court. Furthermore, if a court orders that a class, collective, or other representative or joint action should proceed, in no event will such action proceed in the arbitration forum. Claims may not be joined or consolidated in arbitration with disputes brought by other individual(s), unless agreed to in writing by all parties.

ALJD at 4-5. The arbitrator is expressly granted authority to "grant any remedy or relief that would have been available to the parties had the matter been heard in court," including "attorneys' fees as provided or limited by applicable law." ALJD at 5.

C. <u>The Federal Court Litigation.</u>

In October and November 2012 – a year or more after the Charging Parties' employment with Chase Investment Service Corporation ended – the Charging Parties joined a collective action lawsuit against Respondents alleging violations of the Fair Labor Standards Act. *Lloyd v. J.P. Morgan Chase & Co.*, No. 11-9305-LTS (S.D.N.Y.). ALJD at 5. On January 14, 2013, Respondents moved to compel Plaintiffs to arbitrate their claims pursuant to the terms of the BAA. *Id.* The Charging Parties filed an opposition to Respondents' motion to compel, relying in part on the Board's decision in *D. R. Horton*. *Lloyd v. J.P. Morgan Chase & Co.*, No. 11-9305-LTS, Dkt. No. 78 at pp. 10-22 (S.D.N.Y. Mar. 29, 2013). In addition, the Charging Parties filed the charge that led to the complaint in this case.

After the ALJ issued his decision, Judge Laura Taylor Swain of the United States District Court for the Southern District of New York granted Respondents' motion to compel arbitration as to all of the Charging Parties. *Lloyd v. J.P. Morgan Chase & Co.*, 2013 WL 4828588, at *6 (S.D.N.Y. Sept. 9, 2013). The District Court previously granted a motion to compel arbitration

filed by Respondents pursuant to the BAA in a related case involving another charging party, Tiffany Ryan, who withdrew her unfair labor practice charge on the eve of trial in this case. ALJD at 2-3. In *Ryan*, as in *Lloyd*, the District Court found that the BAA is lawful and enforceable and rejected the Board's decision in *D. R. Horton*. *Ryan v. J.P. Morgan Chase & Co.*, 924 F. Supp. 2d 559 (S.D.N.Y. 2013). The Ryan charge and complaint was withdrawn and severed from this case at the opening of the trial. ALJD at 2. Therefore, the Ryan charge and complaint are not before the Board and any reference to Ryan or her former employer, JPMorgan Chase Bank, N.A., should be removed from the case caption.[2]

III. ARGUMENT

A. The Board Is Bound By The District Court's Decision That The Charging Parties Are Required To Arbitrate Their FLSA Claims And Should Defer To The District Court's Accommodation Of The FAA, The FLSA, And The Act.

The Board is bound by the District Court's holding in *Lloyd* that the BAA is enforceable under the FAA and that the Charging Parties are required to arbitrate their FLSA claims pursuant to the BAA. *Lloyd* involved the same Charging Parties, the same Respondents, and the same BAAs at issue here. In opposing Respondents' motion to compel arbitration in *Lloyd*, the Charging Parties argued that the BAA is unenforceable under *D. R. Horton*. The District Court specifically rejected this argument and, following the Second Circuit's decision in *Sutherland v. Ernst & Young LLP*, --- F.3d ---, 2013 WL 4033844 (2d Cir. Aug. 9, 2013), held that, under the FAA, the BAA is enforceable and that the Charging Parties' right to pursue their FLSA claims as a collective action is a waivable right. *Lloyd v. J.P. Morgan Chase & Co.*, 2013 WL 4828588, at *6 (S.D.N.Y. Sept. 9, 2013).

[2] On the morning of the trial, the parties revised the stipulation to omit Ryan and JPMorgan Chase Bank, N.A. based on the withdrawal and severance of the Ryan charge. The ALJ's decision erroneously includes Ryan and JPMorgan Chase Bank, N.A. in the case caption.

In *NLRB v. Heyman*, 541 F.2d 796 (9th Cir. 1976), the Ninth Circuit held that the Board was bound, according to the principles of res judicata, by the decision of a federal district court holding that no collective bargaining agreement existed between the parties. While the court recognized that the Board had authority to adjudicate an unfair labor practice premised on the existence of an agreement, it held that "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 contract, may not be entertained by the Board under the guise of different policy considerations." *Id.* Noting that "[t]he Board's authority … does not extend in the first instance to contract litigation, nor does the Board itself have requisite jurisdiction … to waive a judicial doctrine such as res judicata," the court held that the Board was bound by the district court's holding that no contract existed between the parties. *Id.* at 800. Similarly, in *Donna-Lee Sportswear Co.*, 541 F.2d 33 (1st Cir. 1987), the First Circuit held that the Board was collaterally estopped from disturbing a district court's decision that no collective bargaining agreement existed between the parties in subsequent proceedings before the Board. *Id.* at 33.

Similar to *Heyman* and *Donna-Lee*, this case involves the enforceability of individual agreements between the Charging Parties and the Respondents. More importantly, it involves the interpretation of two statutes – the FAA and the FLSA – that the Board has no authority to interpret. While the Board retains jurisdiction to hear Charging Parties' unfair labor practice claims, the Board is bound by the district court's decision that, under the FAA, the BAA is enforceable and that the Charging Parties can be compelled to arbitrate their FLSA claims pursuant to the FAA. The Board cannot second-guess the District Court's interpretation of the FAA and the FLSA.

The Board should also defer to the district court's accommodation of the FAA, the FLSA, and the Act. The Supreme Court has held, repeatedly, that neither the Board's interpretation of other statutes, nor its accommodation of other statutes and the Act, is entitled to any deference. *See Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002); *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 529 n.9 (1984); *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942). Even in these cases involving core Section 7 rights – the right to strike, the right to bargain collectively, or the right not to suffer discrimination as a result of union activity – the Supreme Court held that the Board's interpretation of the NLRA must yield to other statutes.

In *Southern Steamship*, the Board found that the employer, a shipping company, had unlawfully discharged several members of a ship's crew for participating in a strike to protest an unfair labor practice. 316 U.S. at 38. The Board ordered that the discharged employees be reinstated with backpay. *Id.* The Supreme Court agreed that an unfair labor practice had occurred, but held that it was an abuse of the Board's discretion to order reinstatement because, by engaging in the strike while aboard a ship away from its home port, the crewmen had engaged in a mutiny, which was a crime under federal law. In holding that the Board had exceeded its authority, the Supreme Court explained "that the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives." *Id.* at 47.

In *Bildisco*, the Court held that, due to the requirements of the Bankruptcy Code, a debtor-in-possession does not commit an unfair labor practice by unilaterally changing terms of a collective bargaining agreement. 465 U.S. at 532-33. The Court held that "[w]hile the Board's interpretation of the NLRA should be given some deference, the proposition that the Board's interpretation of statutes outside its expertise is likewise to be deferred to is novel. We see no

need to defer to the Board's interpretation of Congress's intent in passing the Bankruptcy Code." *Id.* at 528 n.9.

Similarly, in *Hoffman Plastic*, the Supreme Court held that the Board had exceeded its authority to order backpay to an employee who was discovered to be an undocumented immigrant. 535 U.S. at 150-51. The Court reasoned that allowing such an award "would unduly trench upon explicit statutory prohibitions critical to federal immigration policy…." *Id.*

Thus, the Supreme Court has made it abundantly clear that the Board cannot interpret the NLRA without regard to other federal statutes. The Board must accommodate its interpretation of the NLRA to the purposes and policies of other federal statutes. And in doing so, the Board is not entitled to any deference in interpreting statutes other than the NLRA.

The Board itself has recognized that it must defer to federal courts' interpretation of other federal laws:

> We agree … that in light of the decisions of the Labor Department and the courts of appeals, requiring the payment of MRP dues as a condition of employment on Davis-Bacon projects is inimical to public policy under *Detroit Mailers.* ***The Labor Department and the courts, not the Board, have the responsibility to enforce the Davis-Bacon Act***. They have concluded that the collection of dues for job targeting programs on Davis-Bacon projects violates the Davis-Bacon Act. Moreover, the Labor Department has indicated, and the Ninth Circuit has expressly held, that even the direct payment of dues for such programs, as opposed to deductions pursuant to checkoff, is unlawful under Davis-Bacon. ***As a matter of comity we shall defer to those rulings***.

Electrical Workers Local 48 (Kingston Constructors), 332 NLRB 1492, 1500-01 (2000) (emphasis added); *see also PCC Structurals Inc.*, 330 NLRB 868, 871 (2000) (deferring to court and EEOC interpretations of the Americans with Disabilities Act).

These principles of deference apply with even greater force here, where the District Court has issued a decision that interprets the FAA, the FLSA, and the NLRA in a case involving the

very same parties and the very same agreements as are at issue here. The courts, not the Board, have the authority to determine whether an arbitration agreement with a class/collective action waiver is enforceable under the FAA and whether the right to pursue a collective action under the FLSA is a waivable right. Now that a federal court has decided those specific issues, in a case involving the same parties and the same arbitration agreements as are at issue here, the Board should defer to that decision, as well as to the decisions of the many other courts that rejected *D. R. Horton* (as discussed in Section III.E.2, *infra*). *See Bill Johnson's v. NLRB*, 461 U.S. 731, 749 n.15 (1983) (explaining that even where the Board is not bound by res judicata, there is no reason why the Board should not defer to a prior decision by a court on the same issue).

B. <u>The ALJ Did Not Properly Analyze The Section 10(b) Issues In This Case.</u>

While the ALJ granted Respondents' Section 10(b) defense in part, he erred in his analysis of the Section 10(b) defenses that he rejected. Section 10(b) states that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board . . . ." 29 U.S.C. § 160(b).

Each of the Charging Parties entered into the BAA outside the Section 10(b) period. Charging Party Zaat-Hetelle entered into the BAA on August 31, 2009; VanHoogstraat entered into the BAA on March 31, 2010; Piccoli entered into the BAA on June 21, 2010; Johnson entered into the BAA on June 28, 2010. Stip. 11. The charge was filed on February 11, 2013, more than two years after any of the Charging Parties entered into the BAA and more than a year after their employment with Chase Investment Service Corp. ended at various dates in 2011. *See* Mem. of Law in Support of Mot. for Conditional Certification, *Lloyd v. J.P. Morgan Chase & Co.*, No. 11-9305-LTS, Dkt. No. 63 at pp. 3-4 (S.D.N.Y. Jan. 14, 2013).

The ALJ found that Counsel for the General Counsel withdrew any allegation that requiring the Charging Parties to enter into the BAA as a condition of their employment constitutes a violation of the Act. ALJD at 6. To the extent Counsel for the General Counsel did not withdraw those allegations, the ALJ found that they are time-barred and dismissed them pursuant to Section 10(b). *Id.*

Although the ALJ correctly dismissed the allegations outside the Section 10(b) period, he erred in finding that maintenance and enforcement of the BAA constituted a violation of the Act within the Section 10(b) period. ALJD at 7-8. The ALJ found that the BAA is unlawful on its face because employees are required to enter into it as a condition of employment and, therefore, mere maintenance of the BAA, even in the absence of an affirmative effort to enforce it, constitutes a violation within the Section 10(b) period. ALJD at 8.

What the ALJ overlooked in this analysis is that the Charging Parties were not employed by the Respondents at any time during the Section 10(b) period. Their employment ended at various dates in 2011. Therefore, not only did they each enter into the BAA outside the Section 10(b) period, the consideration of continued employment also occurred outside the Section 10(b) period. The only allegation that occurred within the Section 10(b) period is the allegation concerning the Respondents' enforcement of the BAA through their motion to compel arbitration of the Charging Parties' FLSA claims.

Respondents' motion to compel arbitration cannot revive the "legally defunct unfair labor practice" allegation concerning entering into the BAA or conditioning it on the Charging Parties' continued employment. *Local Lodge No. 1424 v. NLRB*, 362 U.S. 411, 416-17 (1960) (*Bryan Manufacturing*). As the Supreme Court held in *Bryan Manufacturing*, "a finding of violation which is inescapably grounded on events predating the limitations period is directly at odds with

the purposes of the § 10(b) proviso." *Id.* at 422. The allegation that Respondents' motion to compel arbitration violates the Act necessarily depends on events that occurred more than a year before the charge was filed in February 2013 – the Charging Parties' entering into the BAAs in 2009 or 2010 and their continued employment until various dates in 2011.

With respect to any other employees of Respondents, there is no evidence or stipulation as to when those other employees entered into the BAA, whether they continued to be employed by the Respondents within the Section 10(b) period, and whether the Respondents have made any effort to enforce the BAA against them within the Section 10(b) period. Therefore, while the Respondents stipulated that, since August 31, 2009, employees have been required to enter the BAA upon hire, that stipulation does not obviate any Section 10(b) issue with respect to the Charging Parties or any other employees. Indeed, in entering into this stipulation, the parties did not concede the relevance of any fact recited in the stipulation. The parties agreed that any arguments as to relevance would be made in their briefs.

Unlike the work rules or collective bargaining agreements at issue in the cases cited by the ALJ, the BAA is an individual agreement entered into between the employee and Respondents. Therefore, it is necessary to determine whether a particular employee entered into the BAA during the Section 10(b) period, whether the employee continued to be employed during the Section 10(b) period, and whether there has been any subsequent effort by the Respondents to enforce the BAA during the Section 10(b) period. The ALJ erred in dismissing these issues. Of course, neither entering into nor enforcing the BAA is an unfair labor practice, regardless of whether it occurred during the 10(b) period, because, as set forth in Sections III.D-E, *D. R. Horton* (1) is distinguishable from the present case; (2) was not decided by a valid quorum of the Board; and (3) was wrongly decided.

C. **<u>The Complaint Allegation Concerning Respondents' Motion To Compel Arbitration Is Barred By The First Amendment.</u>**

The ALJ erred in finding that Respondents violated the Act by filing a motion to compel arbitration in the District Court. That finding violates Respondents' First Amendment right to petition the District Court in defense of the Charging Parties' claims under the FLSA. The Supreme Court has recognized that "the right of access to the courts is an aspect of the First Amendment right to petition…." *Bill Johnson's v. NLRB*, 461 U.S. 731, 741 (1983). This applies to litigation in both state and federal courts. *See BE & K Constr. Co. v. NLRB*, 536 U.S. 516 (2002) (applying *Bill Johnson's* in the context of federal litigation). Under *Bill Johnson's*, litigation loses this First Amendment protection only if it is objectively baseless and subjectively undertaken with an improper motive. *Bill Johnson's*, 461 U.S. at 747 ("[T]he filing of a meritorious law[]suit, even for a retaliatory motive, is not an unfair labor practice"); *see also BE & K Constr.*, 536 U.S. at 537 ("[T]he implication of our decision today is that, in a future appropriate case, we will construe the [Act] … to prohibit only lawsuits that are *both* objectively baseless *and* subjectively intended to abuse process.") (Scalia, J., concurring) (emphasis in original); *BE & K Constr.*, 329 NLRB 717, 721 (1999) (acknowledging that the Board cannot enjoin a lawsuit unless it is both objectively baseless and subjectively undertaken with a retaliatory motive).

The ALJ acknowledged that Respondents' motion to compel arbitration was not "objectively baseless." ALJD at 11-12. He relied, however, on footnote 5 of *Bill Johnson's* in finding that the motion falls outside the scope of the First Amendment's protection because it has an "unlawful objective" under federal law. *Id.* at 12-13. The ALJ erred in reaching this conclusion.

As acknowledged by the ALJ and set forth in Section III.E.2, *infra*, the overwhelming majority of federal courts to have *D. R. Horton* have rejected the proposition that mandatory arbitration agreements containing a class or collective action waiver are unlawful or unenforceable. The Supreme Court has repeatedly made clear that these types of agreements are lawful and enforceable under the FAA, most recently in June of this year. *See Am. Express Co. v. Italian Colors Rest.*, 133 S.Ct. 2304, 2312 (2013) (enforcing arbitration agreement including class and collective action waiver).

Respondents had a First Amendment right to petition the District Court to decide this issue of federal law. *See Bill Johnson's*, 461 U.S. at 746 (holding that the Board "must not deprive a litigant of his right to have genuine state-law legal questions decided by the state judiciary"); *BASF Wyandotte Corp.*, 278 NLRB 173, 181 (1986) (applying *Bill Johnson's* in the context of action in federal court to decide issue of federal law).

Now that the District Court has decided this issue and granted Respondents' motion to compel arbitration of the Charging Parties FLSA claims pursuant to the BAA, Respondents' motion to compel arbitration cannot be found to have an unlawful objective within the meaning of *Bill Johnson's*. If the Board were to now hold that the motion to compel arbitration had an unlawful objective, the Board would be acting in disregard of the District Court's decision. As discussed above, the District Court, not the Board, is the proper forum for deciding this issue because it is not merely an NLRA issue. It is an issue concerning the enforceability of arbitration agreements under the FAA and it is an issue requiring interpretation of the FLSA, the substantive law governing the Charging Parties' underlying claims.

The decisions cited by the ALJ were cases in which the purpose of the federal action was to circumvent the Board's prior decision in a case involving the same parties. *See Local 776,*

Teamsters v. NLRB, 973 F.3d 230 (3d Cir. 1992) (holding that union committed unfair labor practice by pursuing federal suit to enforce arbitrator's award on representational issue following contrary determination by the Board); *Sheet Metal Workers, Local 27 (E.P. Donnelly*), 357 NLRB No. 131 (2011) (union unlawfully maintained federal court breach of contract lawsuit against employer attempting "to obtain work already awarded by the Board under Section 10(k) to a different group of employees"); *Teamsters Local 776 (Rite Aid Corp.)*, 305 NLRB 832 (1991) (union filed Section 301 lawsuit in federal court seeking to enforce arbitration award that was inconsistent with Board's ruling on unit clarification petition); *Teamsters Local 952 (Pepsi Cola Bottling)*; 305 NLRB 263 (1991) (union filed state and federal court suits seeking to undermine Board's ruling in representation case). The same is true of two of the other cases cited by the ALJ involving state court actions or arbitration proceedings – the Board had already ruled on the issue and one of the parties resorted to a different forum to seek a different result. *See Operative Plasters, Local 200 (Standard Drywall)*, 357 NLRB No. 160 (2011) (union filed state court suits seeking result contrary to Board's 10(k) award); *Allied Trades Council (Duane Reade Inc.)*, 324 NLRB 1010 (2004) (union brought grievance seeking accretion to bargaining unit contrary to determination by Regional Director).[3]

Exactly the opposite situation is presented here. Respondents filed the motion to compel arbitration in the District Court before this unfair labor practice charge was filed, and the District

[3] The remaining cases cited by the ALJ are also inapposite. *J. A. Croson & Co.*, 359 NLRB No. 2 (2012), and *Federal Security Inc.*, 359 NLRB No.1 (2012), were state court lawsuits that were found to be preempted by the NLRA, as opposed to suits with an unlawful objective. Similarly, *Laundry Workers, Local 3 (Virginia Cleaners)*, 275 NLRB 697 (1985), involved a state court suit brought by a union to collect fines from employees who had resigned from the union. Thus, the union's suit in *Laundry Workers* was an attempt to use state law to achieve a result that was contrary to the NLRA. *Elevator Constructors (Long Elevator)*, 289 NLRB 1095 (1988), and *Teamsters, Local 705 (Emery Air Freight)*, 278 NLRB 1303 (1986), involved grievance proceedings, not lawsuits, and the Board noted in *Local 705* that it was only assuming, and not deciding, that *Bill Johnson's* applied to grievance proceedings. *Id.* at 1304.

Court has now, before any Board decision has issued in this case, found that the BAA is lawful and enforceable. Respondents' motion to compel arbitration cannot be found to have an unlawful objective in these circumstances. Respondents' motion to compel arbitration was protected by the First Amendment.

The remedy recommended by the ALJ, that Respondents withdraw their motion to compel arbitration in the District Court and reimburse the Charging Parties for their litigation costs directly related to that motion, is mooted by the District Court's decision. In any event, such a remedy would violate Respondents' First Amendment right to petition the federal courts. *See Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 956 (D.C. Cir. 2013) ("[F]reedom of speech prohibits the government from telling people what they must say") (*citing Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 61 (2006)).

D. <u>The BAA Is Distinguishable From The Agreement At Issue In *D. R. Horton.*</u>

If the Board reaches the merits of this case, there are significant differences between the BAA and the agreement at issue in *D. R. Horton*. As noted previously, the Board in *D. R. Horton* emphasized the limits of its holding, stating that "[o]nly a small percentage of arbitration agreements are potentially implicated by the holding in this case." 357 NLRB No. 184, slip op. at 12. The BAA is not among the "small percentage" of arbitration agreements covered by *D. R. Horton*.

The BAA does not prohibit employees from participating in a class or collective action in order to challenge the enforceability of the BAA. It provides that "only a court with jurisdiction over the parties may issue a determination regarding the enforceability of the [class or collective action] waiver" and, if a court finds the class/collective action waiver to be unenforceable "for any reason," then such class or collective action will proceed in court rather than in arbitration. ALJD at 9 (quoting Stip. Ex. J at ¶ 8). The ALJ erred in finding that these provisions do not

differentiate the BAA from the "small percentage" of agreements encompassed by *D. R. Horton*. In addition to differentiating this case from *D. R. Horton*, these provisions reinforce that the courts, and not the Board, are the appropriate forum for determining whether the BAA is enforceable.

Furthermore, the BAA provides that employees may seek a temporary restraining order or a preliminary injunction in order to preserve the status quo pending resolution of a claim through the BAA. Stip. Ex. J at ¶ 3. This provision further demonstrates that the BAA does not interfere with employees' ability to seek effective remedies in arbitration and cannot reasonably be read to contain any threat of discipline or retaliation if employees concertedly seek to protect their interests in court.

Also unlike the agreement in *D. R. Horton*, the BAA does not preclude employees from filing charges with the Board or other administrative agencies. As the ALJ found, there is no allegation that the BAA is unlawful on this basis. ALJD at 9-10. The right to file an administrative charge, in addition to pursuing a claim through arbitration, is a significant factor weighing in favor of the enforceability of the arbitration agreement. *See Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) ("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."). If the agency finds that the employees' claim has merit, the agency can prosecute the claim against the employer and seek a remedy on behalf of all affected employees. The 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 employees. Therefore, by protecting employees' right to file

administrative charges, the BAA does not foreclose the pursuit of group-wide remedies. This is a significant difference from the agreement at issue in *D. R. Horton*.

E. <u>The Board Should Reconsider *D. R. Horton*.</u>

The ALJ declined to consider Respondents' arguments that *D. R. Horton* is invalid and wrongly decided, resting on the proposition that he is bound by the Board's decision regardless of its validity or merit. ALJD at 11 ("the arguments made by Respondent as to why *D. R. Horton* was wrongly decided, including its rejection by courts, must be made directly to the Board and not to me"). The ALJ did, however, take note of the controversy that has surrounded *D. R. Horton* and stated that "it is not inconceivable that the Board will have an opportunity to revisit and perhaps change its mind about *D.R. Horton*." *Id*. Given the serious questions regarding the validity of *D. R. Horton* and its universal rejection by the Circuit Courts, the Respondents urge the Board to take this opportunity to reconsider the novel and extraordinary position taken by two Members in *D. R. Horton*, one of whom held an invalid recess appointment.

1. The Board Did Not Have Authority To Decide *D. R. Horton.*

The Board did not have authority to issue its decision in *D. R. Horton* for two reasons: (1) because Member Becker's recess appointment in March 2010 was constitutionally invalid, the Board lacked a quorum when it issued *D. R. Horton*; and (2) even if Member Becker's recess appointment had been valid, *D. R. Horton* was decided by only two members without a delegation of the full Board to a three-member panel.

The Board must have at least three members in order to issue decisions. *New Process Steel, L.P. v. NLRB*, 130 S. Ct. 2635, 2644-45 (2010) (*citing* 29 U.S.C. § 153(b)). The Board had only two valid members when it issued *D. R. Horton* because Member Becker's March 27, 2010 recess appointment was invalid. A recess appointment is invalid if (1) it occurs during a session

of Congress; or (2) it fills a vacancy that originated during a prior intersession recess. *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013). Member Becker's March 27, 2010 recess appointment was invalid for both reasons: (1) it occurred intrasession (during the second session of the 111th Congress, *see* Congressional Directory for the 112th Congress, *available* at http://www.gpo.gov/fdsys/pkg/CDIR-2011-12-01/pdf/CDIR-2011-12-01.pdf (pages 536-538) (last visited September 25, 2013), and (2) it purported to fill a vacancy on the Board that originated during a previous intersession recess (on December 17, 2004, between the 108th and 109th Congresses, *see* http://www.nlrb.gov/who-we-are/board/members-nlrb-1935 (last visited September 25, 2013)).

The Third Circuit has specifically held that Member Becker's March 27, 2010 recess appointment was invalid. *NLRB v. New Vista Nursing & Rehab.*, 719 F.3d 203, 221 (3d Cir. May 16, 2013) (holding that Member Becker's recess appointment was invalid because it occurred during an intrasession break, but declining to rule whether the appointment was also invalid because it originated during a previous intersession recess). The D.C. Circuit has also indicated that Member Becker's recess appointment was invalid. *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 952 (D.C. Cir. 2013) (assuming, without deciding, that Member Becker's March 27, 2010 recess appointment was constitutionally invalid); *cf. NLRB v. Enter. Leasing Co. Se.*, 722 F.3d 609, 647 (4th Cir. 2013) (agreeing with *New Vista* and *Noel Canning* that appointments that occur during intrasession breaks are invalid and holding that January 4, 2012 recess appointments were invalid). Because Member Becker's recess appointment was invalid and the Board lacked a three-member quorum when it issued *D. R. Horton*, that decision is a legal nullity.

Even if Member Becker's recess appointment had been constitutional, *D. R. Horton* would still be invalid because it was issued by only two members without prior delegation to a three-member panel. The Board could have properly issued the *D. R. Horton* decision with two members only if it had delegated its authority to a three-member panel. 29 U.S.C. § 153(b); *see also* United States Department of Justice, Office of Legal Counsel Memorandum, dated March 4, 2003, at 7a ("[T]he statute provides that once a delegation is made to a group of three or more members, the quorum becomes the group of two."). In its brief to the Supreme Court in *New Process Steel*, the Board recognized that two members may act only pursuant to a valid delegation to a group of three or more members. *See, e.g.*, Brief for NLRB at 12; *New Process Steel*, 130 S. Ct. 2635 (2010) ("Congress amended the Act in 1947 by increasing the size of the Board from three to five members, by allowing the Board to delegate any or all of its powers to a group of three members, and by allowing such a delegee group to operate with a two-member quorum.").

The Board has, in fact, delegated its authority to a three-member panel in many cases, but not in *D. R. Horton*. "[W]hen the Board's membership has fallen to three members, the Board has developed a practice of designating those members as a 'group' in cases where one member will be disqualified." Office of Legal Counsel Memorandum Opinion for the Solicitor National Labor Relations Board, NLRB *New Process Steel* Br., Appendix A at 7a. Of course, if the statute permitted the Board to act in all cases with two members when the Board has only three members – which it clearly does not – the Board would not have had to issue a delegation to its three members in order for two members to act.

The Board's statement that it has "developed a practice" of delegating its powers to a three member group is borne out in the text of thousands of NLRB decisions, including several

decisions issued in the days and weeks immediately before and after the *D. R. Horton* decision. *See, e.g.*, *New Vista Nursing & Rehab., LLC,* 2011 WL 6936391, at *1 (NLRB Dec. 30, 2011); *Apollo Detective, Inc.*, 358 NLRB No. 1 (Jan. 31, 2012). In these decisions, the NLRB made its delegation explicit; stating in *Apollo Detective* that "[t]he National Labor Relations Board has delegated its authority in this proceeding to a three member panel", 358 NLRB No. 1, slip op. at 1, and in *New Vista Nursing* that "[p]ursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel." 358 NLRB No. 55, slip op. at 1 (2012).

In its decision in *D. R. Horton*, however, the Board made no such delegation. *See* 357 NLRB No. 184. Instead, the Board simply stated "Chairman Pearce and Member Becker participated; Member Hayes was recused." *Id.* at 1. This does not satisfy the Act's three-member delegation requirement. While the delegation clause does not require Member Hayes to participate in the decision on the merits, it does require that he and the other members of the Board delegate the Board's authority to a three-member group before a decision on the merits is issued by only two members. 29 U.S.C. § 153(b). In contravention of its own established practice, the Board did not make such a delegation in this case.

While Member Hayes' recusal would not have affected the quorum had there been a proper delegation, in the absence of a proper delegation, Member Hayes could not properly be considered to have "participated" in the *D. R. Horton* decision. *See Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 Admin. L. Rev. 1111, 1186-1187 (2000) (discussing cases holding that members of multimember agencies who are disqualified from participating in a decision do not count towards the quorum). Thus, *D. R. Horton* was issued by only two Board members. Therefore, it was improperly issued because 29 U.S.C. §

153(b) requires that a quorum of three members participate in each decision. It did not do so, rendering *D. R. Horton* invalid under *New Process Steel*.

2. *D. R. Horton* Was Wrongly Decided.

Even if *D. R. Horton* had been validly decided, the Board should reconsider and reverse that decision in light of its overwhelming rejection in the courts. In addition to the September 9, 2013 decision of the United States District Court for the Southern District of New York in *Lloyd v. J.P. Morgan Chase & Co.*, 2013 WL 4828588, at *6 (S.D.N.Y. Sept. 9, 2013), discussed above, all of the Circuit Courts that have considered *D. R. Horton* since the decision issued in January 2012 have rejected it. *See, e.g.*, *Richards v. Ernst & Young, LLP*, ---F.3d---, 2013 WL 4437601 (9th Cir. Aug. 21, 2013); *Raniere v. Citigroup Inc.*, 2013 WL 4046278 (2d Cir. Aug. 12, 2013) (summary order); *Sutherland v. Ernst & Young LLP*, --- F.3d ---, 2013 WL 4033844 (2d Cir. Aug. 9, 2013); *Owen v. Bristol Care*, 702 F.3d 1050 (8th Cir. 2013)

Moreover, virtually all of the other federal and state courts that have considered *D. R. Horton* have rejected it as well. *See Dixon v. NBCUniversal Media, LLC*, --- F. Supp. 2d ---, 2013 WL 2355521, at *9 n.11 (S.D.N.Y. May 28, 2013); *Birdsong v. AT&T Corp.*, 2013 WL 1120783, at *6 n.4 (N.D. Cal. Mar. 18, 2013); *Ryan v. J.P. Morgan Chase & Co.*, 924 F. Supp. 2d 559, 562 (S.D.N.Y. 2013); *Noffsinger-Harrison v. LP Spring City, LLC*, 2013 WL 499210, at *5-6 (E.D. Tenn. Feb. 7, 2013); *Miguel v. JPMorgan Chase Bank*, 2013 WL 452418 (C.D. Cal. Feb. 5, 2013); *Torres v. United Healthcare Servs., Inc.*, 920 F. Supp. 2d 368 (E.D.N.Y. 2013); *Long v. BDP Int'l, Inc.*, 919 F. Supp. 2d 832 (S.D. Tex. 2013); *Cohen v. UBS Fin. Servs, Inc.*, 2012 WL 6041634, at *4 (S.D.N.Y. Dec. 4, 2012); *Andrus v. D. R. Horton, Inc.*, 2012 WL 5989646, at *8-9 (D. Nev. Nov. 5, 2012); *Johnson v. TruGreen Ltd. P'ship*, No. 12-00166, slip op. at 11-16 (W.D. Tex. Oct. 25, 2012); *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); *Truly Nolen of Am. v. Superior Court*, 208 Cal.App. 4th 487 (Cal. App. 4 Dist. 2012); *Delock v. Securitas Sec. Servs. USA, Inc.*, 883 F. Supp. 2d 784 (E.D. Ark. 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 Oliverira v. Citigroup NA, Inc.*, 2012 WL 1831230, at *2 (M.D. Fla. May 18, 2012); *Coleman v. Jenny Craig, Inc.*, 2012 WL 3140299, at *3-4 (S.D. Cal. May 15, 2012); *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831 (N.D. Cal. May 2012); *Brown v. Trueblue, Inc.*, 2012 WL 1268644 (M.D. Pa. Apr. 16, 2012); *Jasso v. Money Mart Express, Inc.*, 879 F. Supp. 2d 1038 (N.D. Cal. 2012); *Johnmohammadi v. Bloomingdales*, No. 11-6434-GW-AJWx, Dkt. No. 38, slip op. at 2-3 (C.D. Cal. Feb. 23, 2012); *Palmer v. Convergys Corp.*, 2012 WL 425256, at *3 (M.D. Ga. Feb. 9, 2012); *Sanders v. Swift Transp. Co. of Arizona, LLC*, 843 F. Supp. 2d 1033, 1036 n.1 (N.D. Cal. 2012); *LaVoice v. UBS Fin. Servs., Inc.*, 2012 WL 124590, at *6 (S.D.N.Y. Jan. 13, 2012); *Nelsen v. Legacy Partners Residential, Inc.*, 207 Cal. App. 4th 1115 (Cal. Ct. App. 2012).

These decisions demonstrate that the NLRB overstepped its authority in attempting to outlaw such mandatory arbitration agreements, which are intended to govern the resolution of *non-NLRA* claims. The NLRB overstepped its authority in several fundamental ways. First, the NLRB failed to apply appropriate deference to the FAA and Supreme Court authority holding that mandatory arbitration agreements with class/collective action waivers are enforceable under the FAA. Second, the Board's attempts to avoid or distinguish the controlling Supreme Court precedent on this issue are unavailing. Third, the NLRB failed to recognize that these types of arbitration agreements do not seek to regulate or affect core Section 7 rights (*i.e.*, the rights to organize and bargain collectively), but rather seek to resolve claims arising under other federal

and state laws that have their own regulatory and enforcement mechanisms. Fourth, there is no right under Section 7 to litigate these non-NLRA claims on a class or collective action basis. Fifth, the NLRB's decision rests on a flawed interpretation of a statute, the Norris-LaGuardia Act, that the NLRB has no authority to interpret or enforce.

a. The NLRA must yield to the FAA and the strong federal policy favoring arbitration of employment disputes.

The Board in *D. R. Horton* failed to give appropriate deference to the FAA and the strong federal policy favoring arbitration of employment disputes. The Board acknowledged that when there is a conflict between the policies of the NLRA and another federal statute, such as the FAA, the Board must undertake a "careful accommodation" of the two statutes. *D. R. Horton*, slip. op. at 8 (citing *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942)). *See also Collyer Insulated Wire*, 192 NLRB 837, 840 (1971) ("[L]abor law as administered by the Board does not operate in a vacuum isolated from other parts of the Act, or, indeed, from other acts of Congress."); *Int'l Harvester Co.*, 138 NLRB 923, 927 (1962), *aff'd*, *Ramsey v. NLRB*, 327 F.2d 784 (7th Cir. 1964) (citing *Southern Steamship*: "the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives").

In the case of the FAA, the Supreme Court has made it abundantly clear how the FAA and another federal statute are to be accommodated. The FAA requires enforcement of arbitration agreements according to their terms unless the NLRA contains a clear "congressional command" to the contrary. *Italian Colors*, 130 S.Ct. at 2309 (citing *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012)). Despite the absence of any such clear command in the NLRA, the Board found that to the extent the FAA conflicts with the NLRA, "the FAA would have to yield." *D. R. Horton*, slip. op. at 12. Thus, *D. R. Horton* clearly conflicts with the

Supreme Court's unequivocal directive that arbitration agreements should be enforced under the FAA in the absence of clear statutory language requiring the FAA to yield.

The FAA provides that an arbitration agreement "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 incorporate[s] a "liberal federal policy favoring arbitration agreements." *Gilmer*, 500 U.S. at 24-25 (internal citations omitted).

The courts interpreting the FAA, including the U.S. Supreme Court, have concluded that arbitration agreements are to be enforced under the FAA "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator." *Gilmer*, 500 U.S. at 32 (internal citations omitted). The Supreme Court reiterated in *Italian Colors*, 130 S.Ct. at 2309; *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); and *CompuCredit Corp*, 132 S. Ct. at 669, that the FAA *requires* courts to enforce arbitration agreements according to their terms unless there is a clear congressional intent to override that mandate. That mandate is essential to preserving the strong federal policy favoring arbitration, a policy which is difficult to overstate.

In its recent decision in *CompuCredit*, a decision that the *D. R. Horton* panel did not have the benefit of reviewing, the Supreme Court reaffirmed that "even when the claims at issue are federal statutory claims, unless the FAA's mandate has been overridden by a contrary congressional command," the arbitration agreement is enforceable. *CompuCredit Corp.*, 132 S. Ct. at 669 (internal quotations and citations omitted). This "congressional command" must be clear. *Id.* Indeed, 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 Supreme Court has reinforced this time and again by finding that even "[s]tatutory references to having causes of action, filing in court, allowing suits, and even pursuing class actions are insufficient commands" to override the FAA's mandate. *See Delock*, 883 F. Supp. 2d at 789-90 (citing *CompuCredit*, 132 S. Ct. at 670-71).

For example, in *Gilmer*, the Court enforced an agreement to arbitrate claims under the ADEA, which specifically provides for a right to a jury trial and further states: "Any person aggrieved may bring a civil action in any *court* of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter," 29 U.S.C. § 626(c)(1) (emphasis added). *See* 500 U.S. at 29 (rejecting argument that "arbitration is improper because it deprives claimants of the judicial forum provided for by the ADEA," because Congress "did not explicitly preclude arbitration or other nonjudicial resolution of claims").

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

Likewise, the Ninth Circuit has expressly "reject[ed] the argument . . . that the 1991 [Civil Rights] Act's provision of a right to jury trial precludes arbitration of Title VII claims."

EEOC v. Luce, Forward, Hamilton & Scripps, 345 F.3d 742, 750 (9th Cir. 2003) (en banc). The Ninth Circuit acknowledged that "the view that compulsory arbitration weakens Title VII conflicts with the Supreme Court's stated position that arbitration affects only the choice of forum, not substantive rights." *Id.*

In reaching the same result, the Second Circuit found it "untenable to contend that compulsory arbitration conflicts with the [Civil Rights] Act's provision for the right to a jury trial," even though there was "express language in the legislative history that suggests a congressional purpose to *preclude* mandatory arbitration of Title VII claims." *Desiderio v. NASD, Inc.*, 191 F.3d 198, 205 (2d Cir. 1999). As the court concluded, "we assume, as does the Supreme Court, that the drafters of Title VII and the amendments introduced in the Act were well aware of what language was required for Congress to evince an intent to preclude a waiver of judicial remedies. In construing Title VII, the absence of that language is a meaningful omission." *Id.*

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

recover threefold the damages he sustains and the cost of the suit," 18 U.S.C. § 1964(c) (emphasis added). *McMahon*, 482 U.S. at 239-42. By contrast, the NLRA says *nothing* about access to any particular forum or procedure for pursuing non-NLRA claims.

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

Here, nothing in the NLRA's text or legislative history suggests that Congress intended to ban a class action waiver in an arbitration agreement. Section 7 provides that employees "shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]" 29 U.S.C. § 157. If language actually touching upon the adjudication of legal claims does not evince a sufficiently clear congressional command to override the FAA, it surely follows that the

NLRA's more ambiguous definition of "concerted activities" for the "mutual aid or protection" of employees is insufficient. 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.[4]

Section 7 says nothing about arbitration, federal court jurisdiction, the right to particular procedural options to resolve legal claims, or *anything* else about what goes on during judicial proceedings. *Delock*, 883 F. Supp. 2d at 789-90 ("The NLRA's text contains no command that is contrary to enforcing the FAA's mandate."); *Morvant*, 870 F. Supp. 2d at 845 ("Congress did not expressly provide that it was overriding any provision in the FAA when it enacted the NLRA or the Norris-LaGuardia Act[.]"); *Jasso*, 879 F. Supp. 2d at 1047 ("[T]here is no language in the NLRA . . . demonstrating that Congress intended the employee concerted action rights therein to override the mandate of the FAA."). When a statute "is silent on whether claims under [it] can proceed in an arbitral forum, the FAA requires the arbitration agreement to be enforced according to its terms." *CompuCredit*, 132 S. Ct. at 673.

Moreover, there is nothing in the legislative history of the NLRA to suggest antipathy towards individual arbitration. Section 1 of the NLRA declares that it is the policy of the United States to protect union organizing and collective bargaining "for the purpose of negotiating the terms and conditions of . . . employment…[.]" 29 U.S.C. § 151; *see also Allied Chem. & Alkali*

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[4] Congress does so when it wants to. *See CompuCredit*, 132 S. Ct. at 672. Section 26 of the Commodity Exchange Act expressly provides that "[n]o predispute 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 an 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 *after* the controversy arises all parties consent in writing to use arbitration); *cf.* 12 U.S.C. § 5518 (authorizing the Bureau of Consumer Financial Protection, by regulation, to "prohibit or impose conditions or limitations" on the use of pre-dispute arbitration agreements in contracts for consumer financial products or services).

Workers of Am. v. Pittsburgh Plate Glass Co., 404 U.S. 157, 166 (1971) (the NLRA "is concerned with the disruption to commerce that arises from interference with the *organization* and *collective-bargaining rights* of workers…" (emphasis added)). Nor does the legislative history of Section 7 have anything specific to say about employees' use of a particular procedural device to adjudicate a claim under an *unrelated, non-NLRA* statute. *See Owen*, 702 F.3d at 1053. In fact, modern class action procedures were not even adopted in federal courts until 1966, decades after the Wagner Act was first enacted. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997) (describing 1966 developments in Rule 23). Therefore, Congress could not possibly have intended for Section 7 to guarantee access to a procedural mechanism that did not yet exist. *See Italian Colors*, 130 S.Ct. at 2309 (noting that federal antitrust laws could not contain a contrary congressional command because they predated the adoption of Rule 23).

In sum, the NLRA's text and legislative history do not contain *any* indication that Congress intended to override the FAA's mandate to enforce arbitration agreements according to their terms. At the very least, Congress did not do so with the "clarity" required for the NLRA to override the FAA. *CompuCredit*, 132 S. Ct. at 672. Thus, it is no surprise that both the current Acting General Counsel and prior General Counsel of the NLRB have taken the position that an employee *can* permissibly waive the right to bring a class or collective action without implicating concerns under the NLRA.

In its arguments to the two-member panel in *D. R. Horton*, the Acting General Counsel stated: "An employer has the right to limit arbitration to individual claims—as long as it is clear

that there will be no retaliation for concertedly challenging the agreement."[5] *D. R. Horton*, Acting Gen. Counsel's Reply Br. at 2.[6] In other words, as long as employees can join together to test the *validity* of an arbitration agreement, free from any retaliation, the NLRA does not prevent the *enforcement* of an otherwise valid agreement.

This position was consistent with the prior General Counsel who stated that "no Section 7 right is violated when an employee possessed of an individual right to sue enters such a *Gilmer* agreement[7] as a condition of employment[.]" GC Mem. 10-06, at 6 (June 16, 2010).[8] The prior General Counsel also found that "no issue cognizable under the NLRA is presented" if a mandatory arbitration agreement is drafted "to make clear that the employees' Section 7 rights to challenge those agreements through concerted activity are preserved[.]" *Id.* at 2. Thus, an employer "may lawfully seek to have a class action complaint dismissed by the court on the ground that each purported class member is bound by his or her signing of a lawful *Gilmer* agreement/waiver." *Id.* at 7.

Consistent with the NLRB's longstanding position pre-*D. R. Horton*, the administrative law judge 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. &*

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[5] In fact, because the General Counsel in *D. R. Horton* agreed on this issue, there was no actual controversy before the NLRB on this point. In resolving it anyway, the NLRB improperly rendered an advisory opinion. *Cf. United States v. Alpine Land & Reservoir Co.*, 887 F.2d 207, 214 (9th Cir 1989) ("[C]ourts should not render advisory opinions upon issues which are not pressed before the court, precisely framed and necessary for decision.").

[6] Available at https://www.nlrb.gov/search/advanced/all/ (case: 12-CA-025764).

[7] The General Counsel described this term as an employee's agreement, "as a condition of employment, to channel his or her individual non-NLRA employment claims into a private arbitral forum for resolution." GC Mem. 10-06 at 1.

[8] Available at https://www.nlrb.gov/publications/general-counsel-memos (search: GC 10-06).

Michael Cuda, No. 12-CA-25764, JD(ATL)-32-10, slip op. at 5 (Div. of Judges Jan. 3, 2011). Although the Board in *D. R. Horton* overruled the ALJ, it acknowledged the tension between its decision and the General Counsel's prior position. 357 NLRB No. 184, slip op. at 6.

This historical absence of any notion that the NLRA precludes a class-action waiver in an arbitration agreement belies the NLRB's decision in *D. R. Horton*. Not only does the fact that a "right" to collective litigation was articulated for the first time in 2012 by an invalid two-member panel severely undermine the idea that such a *nonwaivable* "right" exists at all, but the fact that the federal courts, the NLRB's past and present General Counsel, and even the ALJ in *D. R. Horton* reached the opposite conclusion and never identified *any* "contrary congressional command" in the NLRA for over 75 years means, at a *minimum*, that such a command has not been expressed by Congress with the "clarity" necessary to override the FAA's strong mandate. *CompuCredit*, 132 S. Ct. at 672.

The absence of clear Congressional intent to override the FAA is also confirmed by the well-established principle that Section 7 rights are not absolute. Rather, there are limits on Section 7's protections when necessary to promote other legitimate purposes or when the concerted activities are not linked to the NLRA's core concerns: organizing and collective bargaining. *See, e.g.*, *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976) (NLRB must consider "the nature and strength of the respective Section 7 rights"). For example, an employer need not provide an open forum for all union communication; reasonable restrictions may be used to advance legitimate business purposes. *See, e.g.*, *NLRB v. United Steel Workers*, 357 U.S. 357, 361-64 (1958) (employer's no-solicitation rules "may duly serve production, order and discipline"); *Guardian Indus. Corp. v. NLRB*, 49 F.3d 317, 318 (7th Cir. 1995) (reasonable restrictions allowed on bulletin board postings); *NLRB v. Starbucks Corp.*, 679 F.3d 70 (2d Cir. 2012) (employer may limit employees'

ability to wear union insignia). Similarly, concerted activity that is disloyal, disruptive, opprobrious, or insubordinate is not protected by the NLRA. *See, e.g., NLRB v. Local Union No. 1229, IBEW*, 346 U.S. 464 (1953). In these circumstances, other interests must be considered and can take preeminence. The FAA's mandate that courts "rigorously enforce" arbitration agreements as written is just such an interest.

As argued more fully in Section III.E.2.c, *infra*, when concerted activity does not directly relate to employee organizing or collective bargaining, other interests must be considered and can take on preeminence. *See, e.g., United Food & Commercial Workers, Local No. 880 v. NLRB*, 74 F.3d 292, 294 (D.C. Cir. 1996); *NLRB v. Great Scot, Inc.*, 39 F.3d 678, 682 (6th Cir. 1994). The FAA's "emphatic" policy favoring enforcement of arbitration agreements is a competing purpose here, just as it has carried the day when courts have ordered arbitration of so many other types of claims. *See supra* at pp. __. Section 7 rights, especially when they do not relate to the Act's core protection of collective bargaining and employee organizing, must give way to the FAA.

b. The Board's attempts to avoid application of the FAA in D. R. Horton are contrary to clear Supreme Court precedent.

Recognizing the conflict between its decision and the Supreme Court's clear precedent that other statutes must yield to the FAA, the Board made several arguments as to why the FAA did not require enforcement of the arbitration agreement in *D. R. Horton*. First, the Board attempted to reconcile its decision with the FAA by citing the principle that an arbitration agreement may not require a party to "forgo the substantive rights afforded by the statute." 357 NLRB No. 184, slip op. at 9 (citing *Gilmer*, 500 U.S. at 26). The Board reasoned that agreements to arbitrate non-NLRA claims on an individual basis fall within this exception because such agreements deprive individuals of their substantive rights under Section 7 of the NLRA. *Id.* This is a

misreading of *Gilmer*. The Supreme Court held in *Gilmer* that an arbitration agreement cannot require a party to "forego the substantive rights afforded by *the* statute" – meaning the statute a plaintiff brings suit under – not *any* federal statute. *Gilmer*, 500 U.S. at 26 (emphasis added). In *Gilmer*, the Supreme Court analyzed whether the Age Discrimination in Employment Act ("ADEA"), which formed the basis of the plaintiff's suit, precluded waiver of a judicial forum. *Id.*[9] The Supreme Court was not required to seek out *any* federal statute that might confer an implicit substantive right upon the plaintiff that would be impaired if the arbitration agreement were enforced. Rather, the Court looked only to the ADEA itself to find a contrary congressional command. *Gilmer*, 500 U.S. at 26. Finding none, the Supreme Court "had no qualms … enforcing a class waiver in an arbitration agreement even though the federal statute at issue, the [ADEA], expressly permitted collective actions." *Italian Colors*, 130 S.Ct. at 2311. Here, because the NLRA contains no congressional command that class or collective actions must be permitted, Supreme Court precedent requires that the BAA be enforced.

Second, the Board further misconstrued the law under the FAA when it held that "nothing in the text of the FAA suggests that an arbitration agreement that is inconsistent with the NLRA is nevertheless enforceable." 357 NLRB No. 184, slip op. at 11. The Board's reasoning is backwards. The FAA applies to all arbitration agreements; it need not specify that it applies to arbitration agreements that might be regulated by the NLRA. Rather, it is the NLRA that must contain language that expressly rules out the enforceability of bilateral arbitration agreements under the FAA. *See Gilmer*, 500 U.S. at 26 ("[H]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver

[9] The Supreme Court noted in *Gilmer* that the plaintiff bore the burden to "show that Congress intended to preclude a waiver of a judicial forum for ADEA claims." *Id.*

of judicial remedies for the statutory rights at issue.") (internal citations omitted). However, the NLRA contains no such language evincing a Congressional intention to ban class action waivers.

Finally, recognizing that the *D. R. Horton* decision was inconsistent with Supreme Court precedent including *Concepcion*, the Board attempted to justify this departure by relying on a false premise. *Concepcion* concludes, without limitation, that "[a]rbitration is poorly suited to the higher stakes of class litigation." 131 S. Ct. at 1752; *see also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662. 685 (2010) (noting that "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"). The Board, however, erroneously reasoned that consumer cases can involve "tens of thousands of potential claimants," whereas the average single employer has 20 employees. According to the Board, this means "class-wide arbitration is thus far less cumbersome and more akin to an individual arbitration." *D. R. Horton*, 357 NLRB No. 184 at *15. But employment class action suits regularly allege large classes of more than 20 members. *See, e.g., Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2547 (2011) (1.5 million); *Smith v. T-Mobile USA Inc.*, 570 F.3d 1119, 1120 (9th Cir. 2009) (25,000). Therefore, the Board's speculation that class arbitration of employment disputes is "far less cumbersome" than individual claims is contrary to modern employment litigation and conflicts with *Concepcion*, which applies with equal force in the employment context as it does in consumer cases.

In sum, especially in light of the subsequent *CompuCredit* and *Italian Colors* decisions, it is clear that *D. R. Horton* runs afoul of Supreme Court precedent. The Board's attempts to avoid application of the FAA to arbitration agreements covered by the NLRA are unavailing when the

"contrary congressional command" test is applied. The NLRA does not contain such a command, and so it must yield to the FAA.

c. Mandatory arbitration agreements that seek to resolve non-NLRA claims do not affect core Section 7 rights and therefore must yield to other interests.

As discussed in Section III.E.2.a, *supra*, Section 7 rights are not absolute. In *D. R. Horton*, the Board failed to recognize that Section 7 rights fall on a spectrum and, at some point, must be balanced against other statutory and common law rights. *See Hudgens*, 424 U.S. at 521-23 (stating that whether Section 7 rights must give way to other legal rights, such as property rights, "largely depend[s] upon the content and the context of the [Section] 7 rights being asserted"); *Hoffman Plastic Compounds Inc. v. NLRB*, 535 U.S. 137, 144 (2002) ("we have accordingly never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA"). The FAA's "liberal federal policy" favoring arbitration agreements is precisely the type of interest that Section 7 rights must be balanced against. *Gilmer*, 500 U.S. at 24-25 (internal citations omitted). Because the Section 7 rights found in *D. R. Horton* are far from the core rights protected by the NLRA, they must yield to the FAA's clear mandate.

The spectrum of Section 7 rights becomes weaker the farther the purported activity falls from the NLRA's core concerns: organizing and collective bargaining. The Board must "tak[e] account of the relative strength of the Section 7 right" in a given case before determining that the NLRA is predominant. *Jean Country*, 291 NLRB 11, 18 (1988). When the Section 7 activity does not directly relate to employee organizing or collective bargaining, other rights and interests must be given greater weight. *See, e.g., United Food & Commercial Workers, Local No. 880 v. NLRB*, 74 F.3d 292, 294 (D.C. Cir. 1996) ("*Babcock* and its progeny indicate that . . . the interest of nonemployees in organizing an employer's employees is stronger than the interest of

nonemployees engag[ed] in protest or boycott activities ....”); *NLRB v. Great Scot, Inc.*, 39 F.3d 678, 682 (6th Cir. 1994) (“Non-employee area standards picketing is even farther removed from the core concerns of Section 7 . . . their picketing was not even ostensibly aimed at organization . . . [which] warrants even less protection than non-employee organizational activity.”).

Whether an employment law claim is litigated on a class or collective basis has nothing to do with organizing or bargaining collectively under the NLRA. Thus, the Section 7 right identified in *D. R. Horton* falls on the dimmest end of the spectrum, if even on the spectrum at all. Courts that have considered, and rejected, *D. R. Horton* have reached this very conclusion. *See, e.g.*, *Nelsen v. Legacy Partners Residential, Inc.*, 207 Cal. App. 4th 1115 (Cal. Ct. App. 2012) (“[The Board] cites no prior legislative expression, or judicial or administrative precedent suggesting class action litigation constitutes ‘concerted activity for the purpose of . . . other mutual aid or protection.’”).

For this reason, arbitration agreements with class/collection action waivers for non-NLRA claims do not constitute agreements that “purport to restrict Section 7 rights” as the Board found in *D. R. Horton*. *D. R. Horton*, 357 NLRB No. 184, slip op. at 4. The cases cited in *D. R. Horton* all involved individual employment agreements that purported to restrict core Section 7 activity – the right to organize and engage in collective bargaining. For instance, the individual employment contracts at issue in *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940), were “procured through the mediation of a company-dominated labor organization” and were a means of displacing a legitimate union representative. *Id.* at 360. Furthermore, in those individual agreements, the employees agreed not to “demand a closed shop or a signed agreement by his employer with any Union.” *Id.* The Supreme Court held that these individual agreements “were the fruits of unfair labor practices, stipulated for the renunciation by the employees of rights

guaranteed by the Act, and were a continuing means of thwarting the policy of the Act…" *Id.* at 361.

Similarly, the individual agreements at issue in *J. H. Stone & Sons*, 33 NLRB 1014 (1941), another case that the Board relies upon heavily in *D. R. Horton*, clearly interfered with employees' core Section 7 rights. The Board in *J. H. Stone* found that these individual agreements "were the fruit of the respondents' interference, restraint, and coercion and *had the purpose of defeating unionization of their employees*." *Id.* at 1023 (emphasis added). In enforcing the Board's order in *J. H. Stone*, the Seventh Circuit noted that one of the stated purposes of these agreements was "to prevent strikes and labor troubles" and found that, through the agreement's arbitration provision, the employee "not only waived his right to collective bargaining but his right to strike or otherwise protest on the failure to obtain redress through arbitration." *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942).

The individual contracts in *National Licorice*, *J. H. Stone*, and other cases cited by the Board in *D. R. Horton* in no way resemble the BAA or similar agreements to arbitrate non-NLRA claims on an individual basis. There was no evidence in *D. R. Horton*, and there is no evidence here, that the individual arbitration agreements "had the purpose of defeating unionization" or were intended to "prevent strikes and labor troubles." There is no evidence that these agreements have *anything* to do with the right to organize and bargain collectively under the NLRA. Instead, they are agreements that are designed to resolve *non-NLRA* claims efficiently through arbitration. Congress has not given the Board the power to police employment agreements that have nothing to do with the right to organize or bargain collectively under the Act, especially when balanced against other specific federal laws regulating such agreements, like the FAA.

The Board in *D. R. Horton* erroneously relies on the Supreme Court's decision in *J. I. Case Co. v. NLRB*, 321 U.S. 332 (1944), as authority for invalidating individual arbitration agreements. *D. R. Horton*, slip op. at 4-5. *J. I. Case* actually demonstrates the limits of the Board's authority to invalidate individual employment contracts. The Court held that the Board, "of course, has no power to adjudicate the validity or effect of such contracts except as to their effect on matters within its jurisdiction." *J. I. Case*, 321 U.S. at 340. Therefore, while the Board issued a broad cease and desist order with respect to the individual employment contracts in *J. I. Case*, the Supreme Court made clear that the Board's order would apply only to individual employment contracts that are "utilized to forestall collective bargaining and deter self-organization" and to prohibit the employer from entering into new contracts "under circumstances in which similar infringement of the collective bargaining process *would be a probable consequence*." *Id.* at 340 (emphasis added). Thus, *J. I. Case* can be read only to authorize the Board to invalidate individual employment contracts that would have a "probable consequence" of interfering with core Section 7 rights – namely, the rights to organize and bargain collectively.

There was no finding in this case or in *D. R Horton* that an agreement to arbitrate non-NLRA claims on an individual basis would have a "probable consequence" of thwarting union organizing or interfering with the collective bargaining process. There is no evidence that these agreements were, as in *National Licorice*, negotiated through a company-dominated union or as part of an effort to defeat a strike or union organizing campaign. These agreements are designed, instead, to resolve claims arising under other federal and state laws, which have their own regulatory and enforcement mechanisms, including class enforcement. Simply put, the NLRB is

not the appropriate adjudicator of whether employees can waive a procedural right created by statutes that the Board otherwise has no jurisdiction to enforce.

Numerous courts have concluded that arbitration of claims under the Fair Labor Standards Act and other employment laws does not interfere with the substantive rights under those laws. *See, e.g.*, *Italian Colors*, 130 S.Ct. at 2311*; Gilmer*, 500 U.S. at 32; *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002) (affirming an order to compel plaintiff's FLSA claim to arbitration on an individual basis, finding "no suggestion in the text, legislative history, or purpose of the FLSA that Congress intended to confer a nonwaivable right to a class action under that statute"); *Horenstein v. Mortg. Mkt., Inc.*, 9 F. App'x 618, 619 (9th Cir. 2001) (affirming an order to compel plaintiffs' FLSA claims to arbitration, holding that "[a]lthough plaintiffs who sign arbitration agreements lack the procedural right to proceed as a class, they nonetheless retain all substantive rights under the statute") (internal citation omitted); *Johnson v. W. Suburban Bank*, 225 F.3d 366, 373 (3d Cir. 2000) ("even if plaintiffs who sign valid arbitration agreements lack the procedural right to proceed as part of a class, they retain the full range of rights created by the [relevant statute]").

The Board in *D. R. Horton* impermissibly expanded the NLRA to confer procedural rights that do not otherwise exist under these laws. The NLRB has no authority to invoke Section 7 to regulate how claims will be resolved under other statutes.

d. There is no Section 7 right to litigate non-NLRA claims on a class or collective action basis.

D. R. Horton is an unprecedented expansion of the principle that Section 7's mutual aid or protection clause "protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums…." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978). Even if Section 7 protects employees from retaliation

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

The BAA does not contain any threat of "coercion, restraint or interference" if an employee or group of employees files a class or collective action in court. As noted previously, the BAA specifically contemplates that a court may order that "a class, collective, or other representative or joint action should proceed" and, if so, such class or collective action will proceed in court rather than in arbitration. Stip. Ex. J at ¶ 4. This distinguishes the BAA from the cases cited in *D. R. Horton*, which involve situations in which employees are *disciplined or discharged* merely for asserting common legal claims or jointly selecting a common representative to present such claims to their employer. *See D. R. Horton*, 357 NLRB No. 184, slip op. 2 (citing *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948-49 (1942) (finding that three employees who filed FLSA suit for overtime pay were engaged in protected, concerted activity), and *Salt River Valley Water Users Ass'n*, 99 NLRB 849, 853-54 (1952) (finding that employees who circulated a petition to have employee designated as representative for FLSA claim was

engaged in activity protected under Section 7)). There is no evidence that the claims in these cases were actually litigated as class or collective actions. In *Spandsco Oil*, the case was dismissed, with prejudice, four months after it was filed. In *Salt River Valley Water Users Association*, it does not appear that the claim was ever filed in court. Precedent holding that employees may not be fired merely for attempting to file, or unsuccessfully filing, a claim in court cannot be read to also hold that the employees have a Section 7 right to actually litigate that claim as a class or collective action; such a reading is not supported by the facts of those cases.

Further, *D. R. Horton* mistakenly equates the right to discuss employment claims with other employees, pool resources to hire an attorney, and seek advice and litigation support from a union – rights and activities that can be protected by Section 7 depending on the circumstances – as legally equivalent to having a single forum adjudicate common legal claims under other statutes and rules of civil procedure. 357 NLRB No. 184, slip op. at 6. Even if the activities above mentioned leading up to the filing of a claim in court are considered protected by Section 7, it does not follow that Section 7 dictates *the process* by which the employees' claims are ultimately adjudicated, whether in a single or collective forum.

Courts that have considered *D. R. Horton* have rejected the proposition that the NLRA creates a non-waivable right to adjudicate, in a single forum, common claims arising under other laws and rules of civil procedure. After all, the NLRB has no expertise in the process or rules by which individual claimants may seek to have one court address their claims at the same time. *See, e.g.*, *Nelsen v. Legacy Partners Residential, Inc.*, 207 Cal. App. 4th 1115, 1117 (Cal. App. 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.").

The Board must recognize that the Supreme Court and federal courts have repeatedly deemed a class or collective action as principally a procedural and, therefore waivable, option rather than a substantive right protected by the NLRA or any other law. The Supreme Court reiterated in *Italian Colors* that Rule 23 "was designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Italian Colors*, 130 S.Ct. at 2309. The Supreme Court also has held that "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, Jackson, Miss. v. Roper*, 445 U.S. 326, 332 (1980); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1442 (2010) (upholding Rule 23 under the Rules Enabling Act because "it governs only 'the manner and the means' by which the litigants' rights are 'enforced'") (internal citations omitted); *Blas v. Belfer*, 368 F.3d 501, 505 (5th Cir. 2004) ("no substantive right to a class remedy; a class action is a procedural device."). Most importantly, *Gilmer* itself found that a class or collective action procedure is not a guaranteed right, but rather a waivable option. *Gilmer*, 500 U.S. at 32 (arbitration agreement should be enforced "even if the arbitration could not go forward as a class action or class relief could not be granted by the arbitrator"). The Supreme Court reiterated this holding in *Italian Colors*. 130 S.Ct. at 2311.

Consequently, an arbitration procedure which, like the BAA, seeks only to regulate *how* a claim will be litigated or arbitrated, but contains no threat of discipline or discharge if an employee refuses to acknowledge or challenges that procedure, does not implicate the NLRA because it fully permits the employee to pursue their litigation "without employer coercion, restraint or interference." *D. R. Horton*, 357 NLRB No. 184, slip op. at 10 n.24. Employees retain the ability to join together to discuss and present their claim, as a group, in court. Whether

a court decides to compel individual arbitration of that claim is a matter for the court to decide under the rules of civil procedure, the FAA, and the substantive law governing the claim at issue – not the NLRA, which does not regulate how the case is litigated or arbitrated.

e. The Board has no statutory authority to interpret the NLGA, and even if it did, the NLGA does not prohibit enforcement of arbitration agreements that include class/collective action waivers.

The Board in *D. R. Horton* also erred in holding that the Norris-LaGuardia Act ("NLGA"), and by implication the NLRA, partially repealed the FAA so that it does not apply to employment arbitration agreements containing class/collective action waivers. *D. R. Horton*, 357 NLRB No. 184, slip op. at 5-6, 12. The Board noted the FAA was enacted in 1925 and predated both the NLGA and the NLRA. *D. R. Horton*, 357 NLRB No. 184, slip op. at 12. Therefore, if the FAA conflicts with either of those statutes, the Board in *D. R. Horton* reasoned the FAA must have been repealed, either by the NLGA's provision repealing statutes in conflict with it or impliedly by the NLRA. *Id.*

The Board, however, failed to account for the dates when the NLRA and FAA were amended or re-enacted. Those are the relevant dates for this analysis. *See Chicago & N. W. Ry. Co. v. United Transp. Union*, 402 U.S. 570, 582 n.18 (1971) (looking to re-enactment date of the Railway Labor Act to determine that it post-dated the NLGA and concluding "[i]n the event of irreconcilable conflict" between the two statutes, the former would prevail). Congress reenacted the FAA in 1947, "twelve years after the NLRA and fifteen years after the passage of the Norris-LaGuardia Act." *Owen*, 702 F.3d at 1053 (emphasis in original). Thus, in any conflict between these statutes, the FAA must prevail. "The decision to reenact the FAA suggests that Congress intended its arbitration protections to remain intact even in light of the earlier passage of three major labor relations statutes [including the FLSA]." *Id.*

In any event, the Board's reading of the NLGA is unreasonable and beyond the scope of its jurisdiction. The NLGA is an anti-injunction statute. It deprives courts of authority to issue injunctions in labor disputes, except under certain specific exceptions. *D. R. Horton* was not an injunction proceeding and the NLGA has nothing to do with whether employees have an unwaivable Section 7 right to adjudicate class or collective action claims in court. Further, the NLGA can only be enforced by courts. The statute provides that "[n]o restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction . . . ." 29 U.S.C. § 109. The NLGA specifically defines those contracts to which it applies (colloquially known as "yellow-dog" contracts) as limited to contracts not to join a union or to quit employment if one becomes a member of a union. NLGA § 3(a), (b), 29 U.S.C. § 103(a), (b). *See also Barrow Utils. & Elec. Coop.*, 308 NLRB 4, 11 n.5 (1992) (defining a yellow dog contract as "[a]ny promise by a statutory employee to refrain from union activity or to report the union activities of others…").

D. R. Horton's characterization of the "right" to engage in class and collective legal actions as "the core substantive right protected by the NLRA" and "the foundation on which the Act and Federal labor policy rest," *D. R. Horton*, slip op. at 10, makes no sense given that when the original Wagner Act was passed in 1935, Rule 23, the FLSA, Title VII, the ADEA, and the many other statutes that give rise to modern employment law class and collective actions did not exist. In any event, the Supreme Court has found that the NLGA must accommodate the substantial changes in labor relations and the law since it was enacted. In *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970), the Court considered whether the NLGA prohibited a federal court from enjoining a strike in breach of a no-strike obligation under a

collective bargaining agreement when that agreement provided for binding arbitration of the dispute that was the subject of the strike. The Court concluded the NLGA "must be accommodated to the subsequently enacted" Labor Management Relations Act ("LMRA") "and the purposes of arbitration" as envisioned under the LMRA. *Id*. at 250. The Court noted that through the LMRA, Congress attached significant importance to arbitration as a means of settling labor disputes. *Id.* at 252.

The federal courts have overwhelmingly rejected *D. R. Horton's* analysis of the history of the NLGA, NLRA, and FAA. These courts concluded that Congress was silent on the NLGA and the NLRA's intersection with the FAA and that no such preemptive provision may be read into federal labor law, particularly in light of the fact that the FAA was enacted in 1925 in response to widespread judicial hostility to arbitration agreements, while the NLRA was enacted later in 1935 and subsequently amended in 1947—providing Congress with two opportunities to express its command that the NLRA, or the NLGA, overrides the FAA. *See Morvant*, 2012 WL 1604851, at *11; *Jasso*, 2012 WL 1309171, at *10 & n.3. Accordingly, of the three statutes at issue, the FAA is the most recently re-enacted and Congress never spoke to the intersection of the FAA and the NLRA. If there is any "irreconcilable conflict" among them, the FAA must prevail.

For all of these reasons, *D. R. Horton* is wrongly decided, *ultra vires*, and therefore non-binding. *D. R. Horton* far exceeds the Board's authority and administrative expertise under the NLRA and has been rejected by virtually every court that has considered it.

F. <u>The Regional Director Lacked Authority To Issue The Complaint.</u>

The complaint should be dismissed because the Board did not validly appoint Regional Director Karen Fernbach and, therefore, she had no authority to issue the complaint or prosecute it before the ALJ. The Board has delegated its authority to issue complaints to its Regional

Directors. 29 C.F.R. § 102.15 ("After a charge has been filed, if it appears to the regional director that formal proceedings in respect thereto should be instituted, he shall issue and cause to be served on all other parties a formal complaint in the name of the Board"). The Regional Director issued the complaint in this case on April 23, 2013. Stip. Ex. C at 7.

The Board announced its appointment of Ms. Fernbach to the position of Regional Director on January 6, 2012. *See* Karen Fernbach named Regional Director in Manhattan, (Jan. 6, 2012), available at www.nlrb.gov/news-outreach/news-story/karen-fernbach-named-regional-director-manhattan. At the time of this announcement, however, the Board lacked a quorum. *Noel Canning*, 705 F.3d at 493. Even if Member Becker's March 27, 2010 recess appointment had been valid, which it was not,[10] that appointment would have expired on January 3, 2012, leaving the Board with only two members. *Id.* at 512-14. The recess appointments made on January 4, 2012 were also invalid because they occurred during an intrasession – as opposed to intersession – recess, and because they arose during a recess prior to the recess during which the appointments were purportedly made. *Id.* at 499-514; *see also New Vista*, 719 F.3d 203-21 (agreeing with *Noel Canning* that intrasession recess appointments are improper, but declining to rule on whether appointments can be properly made to vacancies that arose during prior recesses). Because the Board lacked a valid quorum on January 6, 2012, when it purported to appoint Ms. Fernbach, her appointment was "void *ab initio*." *Noel Canning*, 705 F.3d at 493.

Counsel for the Acting General Counsel has asserted that the authority to prosecute this complaint is not derived from the Board but, instead, is derived from the authority of the General Counsel under Section 3(d) of the Act. This does not, however, cloak a Regional Director whose appointment was void *ab initio* with authority to issue the complaint. Furthermore, at least one

[10] *See* Section III.E.1, *supra*.

federal court has held that the Acting General Counsel was not validly appointed under the Federal Vacancies Reform Act ("FVRA"), and, therefore, neither he nor the Regional Director possessed authority to prosecute this complaint against the Respondents. *See Hooks v. Kitsap Tenant Support Servs., Inc.*, 2013 WL 4094344 (W.D. Wash. Aug. 13, 2013).

For all of these reasons, the complaint that was issued against Respondents on April 23, 2013 is *ultra vires* and should be dismissed.

IV. CONCLUSION

Respondents respectfully urge the Board to dismiss the complaint in its entirety for any or all of the following reasons: (1) the Board is bound by the District Court's ruling in *Lloyd* that the BAA is enforceable under the FAA and that the Charging Parties' FLSA claims must be arbitrated on an individual basis pursuant to the BAA, and the Board and should defer to the District Court's accommodation of the FAA, FLSA, and NLRA; (2) Respondents' filing of a motion to compel arbitration in the *Lloyd* case is protected by the First Amendment; (3) the Complaint is time-barred under Section 10(b) of the Act; (4) the BAA is distinguishable from the arbitration agreement at issue in *D. R. Horton*; (5) *D. R. Horton* is procedurally invalid and was wrongly decided; and (6) the Regional Director lacked authority to issue and prosecute the complaint.

Date: September 25, 2013

Respectfully submitted,

By: /s/ Jonathan C. Fritts

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of September, 2013, true and correct copies of the Respondents' Brief in Support of Their Exceptions to the Administrative Law Judge's Decision have been served by electronic mail upon the following:

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