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GameStop Corp., GameStop Inc., Sunrise Publications, Inc., and GameStop Texas Ltd. (L.P.) and Michelle Krecz-Gondor. Case 20–CA–080497

December 31, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA
AND HIROZAWA

On August 29, 2013, Administrative Law Judge Gerald M. Etchingham issued the attached decision. The Respondents filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondents filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Applying the Board’s decision in *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), the judge found that the Respondents violated Section 8(a)(1) of the Act by maintaining the Concerned Associates Reaching Equitable Solutions (C.A.R.E.S.) Rules of Dispute Resolution Including Arbitration (the Rules) that require employees, as a condition of employment, to waive their right to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial. The judge also found, relying on *D. R. Horton* and *U-Haul of California*, 347 NLRB 375, 377–378 (2006), enf. 255 Fed. Appx. 527 (D.C. Cir. 2007), that maintaining the C.A.R.E.S. Rules violated Section 8(a)(1) because employees reasonably would believe that the Rules bar or restrict their right to file unfair labor practice charges with the Board. In *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied in relevant part No. 14-60800, 2015 WL 6457613, __ F.3d __ (5th Cir. Oct. 26, 2015), the Board reaffirmed the relevant holdings of *D. R. Horton*, supra.

The Board has considered the decision and the record in light of the exceptions and briefs and, based on the judge’s application of *D. R. Horton* and on our subsequent decision in *Murphy Oil*, we affirm the judge’s rulings, findings¹ and conclusions,² and adopt the recommended Order as modified and set forth in full below.³

¹ Unlike our dissenting colleague, we agree with the judge that employees would reasonably interpret the three interrelated documents comprising the Respondents’ C.A.R.E.S. Rules to restrict their right to file charges with the Board, notwithstanding the isolated language in the Rules stating that they “do not preclude any employee from filing a charge with a state, local or federal administrative agency such as the

1. The Respondents argue that the complaint is time-barred by Section 10(b) because the initial unfair labor practice charge was filed and served more than 6 months after the Charging Party, Michelle Krecz-Gondor, signed and became subject to the C.A.R.E.S. Rules. We reject this argument, as did the judge, because the Respondents continued to maintain the unlawful Rules during the 6-month period preceding the filing of the initial charge. The Board has held under these circumstances that maintenance of an unlawful workplace rule, such as the Respondents’ Rules, constitutes a continuing violation that is not time-barred by Section 10(b). See *PJ Cheese, Inc.*, supra, slip op. at 1; *Neiman Marcus Group*, 362 NLRB No. 157, slip op. at 2 & fn. 6 (2015); and *Cellular Sales of Missouri, LLC*, 362 NLRB No. 27, slip op. at 2 & fn. 7 (2015).

2. The Respondents argue that their C.A.R.E.S. Rules include an exemption allowing employees to file charges with administrative agencies, including with the Board, and thus do not, as in *D. R. Horton*, supra, unlawfully prohibit employees from collectively pursuing litigation of employment claims in all forums. See, e.g., *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053–1054 (8th Cir. 2013), in which the court stated, in dicta, that the arbitration agreement there did not bar all concerted employee activity in pursuit of employment claims because the agreement permitted employees to file charges with administrative agencies that could file suit on behalf of a class of employees. We reject the Respondents’ argument for the reasons set forth in *SolarCity Corp.*, 363 NLRB No. 83 (2015).

3. We also reject the Respondents’ and our dissenting colleague’s contention that the opt-out provision of the C.A.R.E.S. Rules places the Rules outside the scope of

Equal Employment Opportunity Commission,” and that “[m]atters within the jurisdiction of the National Labor Relations Board” are not “Covered Claims.” See *PJ Cheese, Inc.*, 362 NLRB No. 177, slip op. at 2 fn. 6 (2015); see also *Amex Card Services Co.*, 363 NLRB No. 40, slip op. at 2–3 (2015).

We reverse the judge’s finding that the Respondents’ confidentiality provision independently violates Sec. 8(a)(1). That provision appears in a list of directives on pp. 9–13 of the C.A.R.E.S. Rules, under the subheading “Arbitration Procedures,” and requires employees to keep confidential all records and results of arbitration proceedings. The parties litigated this case on a stipulated record, and neither the complaint nor the stipulations identify this as an issue to be litigated. Therefore, the Respondents had no opportunity to counter the General Counsel’s argument in his brief to the judge that the confidentiality provision restricts concerted activity. In sum, the Respondents lacked notice that they should defend this particular aspect of their Rules. See *Pergament United Sales*, 296 NLRB 333, 334 (1989), enf. 920 F.2d 130 (2d Cir. 1990).

² We do not rely on the judge’s discussion in fn. 5 of his decision.

³ We shall substitute a new notice to conform to the Order as modified.

the prohibition against mandatory individual arbitration agreements under *Murphy Oil* and *D. R. Horton*. See *D. R. Horton*, supra, slip op. at 13 fn. 28. The Board has rejected this argument, holding that an opt-out procedure still imposes an unlawful mandatory condition of employment that falls squarely within the rule set forth in *D. R. Horton* and affirmed in *Murphy Oil*. See *On Assignment Staffing Services*, 362 NLRB No. 189, slip op. at 1, 4–5 (2015). The Board further held in *On Assignment Staffing Services*, slip op. at 1, 5–8, that even assuming that an opt-out provision renders an arbitration agreement not a condition of employment (or nonmandatory), an arbitration agreement precluding collective action in all forums is unlawful even if entered into voluntarily because it requires employees to prospectively waive their Section 7 right to engage in concerted activity.⁴ In light of *On Assignment Staffing Services*, we need not pass on the judge’s additional rationale for finding that the Rules are not voluntary.

ORDER

The National Labor Relations Board orders that the Respondents, GameStop Corp., GameStop Inc., Sunrise Publications, Inc., and GameStop Texas Ltd. (L.P.), Sacramento, California, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration policy in their Concerned Associates Reaching Equitable Solution (C.A.R.E.S.) Rules of Dispute Resolution Including Arbitration that employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board.

(b) Maintaining a mandatory arbitration policy in their C.A.R.E.S. Rules that requires employees, as a condition of employment, to waive the right to maintain class or

⁴ Our dissenting colleague observes that the Act “creates no substantive right for employees to insist on class-type treatment of non-NLRA claims.” This is surely correct, as the Board has previously explained in *Murphy Oil*, supra, slip op. at 2, 16; and *Bristol Farms*, 363 NLRB No. 45, slip op. at 2 and fn. 2 (2015). But what our colleague ignores is that the Act does “creat[e] the right to pursue joint, class, or collective claims if and as available without the interference of an employer-imposed restraint.” *Murphy Oil*, supra, slip op. at 16–17 (emphasis in original). The Respondents’ C.A.R.E.S. Rules are just such an unlawful restraint.

Likewise, for the reasons explained in *Murphy Oil* and *Bristol Farms*, there is no merit to our colleague’s view that finding the Rules unlawful runs afoul of employees’ Sec. 7 right to “refrain from” engaging in protected activity. See *Murphy Oil*, supra, slip op. at 18; *Bristol Farms*, supra, slip op. at 3. Nor is he correct in insisting that Sec. 9(a) of the Act requires the Board to permit individual employees to prospectively waive their Sec. 7 right to engage in concerted legal activity. *Murphy Oil*, supra, slip op. at 17–18; *Bristol Farms*, supra, slip op. at 2.

collective actions in all forums, whether arbitral or judicial.

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

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

(a) Rescind the mandatory arbitration policy in all of its forms, or revise it in all of its forms to make clear to employees that the arbitration policy does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums, and that it does not bar or restrict employees’ right to file charges with the National Labor Relations Board.

(b) Notify all current and former employees who were required to sign or otherwise become bound to the C.A.R.E.S. Rules that they have been rescinded or revised and, if revised, provide them a copy of the revised policy.

(c) Within 14 days after service by the Region, post at their facility in Sacramento, California, and at all other facilities where the unlawful arbitration program is or has been in effect, copies of the attached notice marked “Appendix.”⁵ Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondents’ authorized representative shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 7, 2011.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 20 a sworn certification of a responsible official on a form provided by the

⁵ If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading, “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. December 31, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD
MEMBER MISCIMARRA, concurring in part and dissenting in part.

In this case, my colleagues find that the GameStop C.A.R.E.S.¹ Rules of Dispute Resolution (the Rules) violate Section 8(a)(1) of the National Labor Relations Act (the Act or the NLRA) because the Rules waive the right to participate in class or collective actions regarding non-NLRA employment claims. I respectfully dissent from this finding for the reasons explained in my partial dissenting opinion in *Murphy Oil USA, Inc.*² However, I concur with my colleagues' finding that some documentation relating to Respondents' Rules—specifically, the Acknowledgment and Receipt form (Acknowledgment) signed by employees—violates Section 8(a)(1) by interfering with employees' right to file unfair labor practice charges with the Board.

1. *The "Class Action" Waiver.* I agree that an employee may engage in "concerted" activities for "mutual aid or protection" in relation to a claim asserted under a

¹ The acronym "C.A.R.E.S." stands for "Concerned Associates Reaching Equitable Solutions."

² 361 NLRB No. 72, slip op. at 22-35 (2014) (Member Miscimarra, dissenting in part). The Board majority's holding in *Murphy Oil* invalidating class-action waiver agreements was recently denied enforcement by the Court of Appeals for the Fifth Circuit. *Murphy Oil USA, Inc. v. NLRB*, No. 14-60800, 2015 WL 6457613, __ F.3d __ (5th Cir. Oct. 26, 2015).

I join my colleagues in reversing, on due process grounds, the judge's finding that the confidentiality provision in the Rules violates the Act.

Because I disagree with the Board's decisions in *Murphy Oil*, above, and *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), enf. denied in pertinent part 737 F.3d 344 (5th Cir. 2013), and I believe the NLRA does not render unlawful arbitration agreements that provide for the waiver of class-type litigation of non-NLRA claims, I find it unnecessary to reach whether such agreements should independently be deemed lawful to the extent they "leave[] open a judicial forum for class and collective claims," *D. R. Horton*, 357 NLRB No. 184, slip op. at 12, by permitting the filing of complaints with administrative agencies that, in turn, may file class or collective-action lawsuits. See *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013).

statute other than the NLRA.³ However, I disagree with my colleagues' finding that Section 8(a)(1) of the NLRA prohibits agreements that waive class and collective actions, and I especially disagree with the Board's finding here, similar to the Board majority's finding in *On Assignment Staffing Services*,⁴ that class-waiver agreements violate the NLRA even when they contain an opt-out provision. In my view, Sections 7 and 9(a) of the NLRA render untenable both of these propositions. As discussed in my partial dissenting opinion in *Murphy Oil*, NLRA Section 9(a) protects the right of every employee as an "individual" to "present" and "adjust" grievances "at any time."⁵ This aspect of Section 9(a) is reinforced by Section 7 of the Act, which protects each employee's right to "refrain from" exercising the collective rights enumerated in Section 7. Thus, I believe it is clear that (i) the NLRA creates no substantive right for employees to insist on class-type treatment of non-NLRA claims,⁶ (ii) a class-waiver agreement pertaining to non-NLRA claims does not infringe on any NLRA rights or obliga-

³ I agree that non-NLRA claims can give rise to "concerted" activities engaged in by two or more employees for the "purpose" of "mutual aid or protection," which would come within the protection of NLRA Sec. 7. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 23–25 (Member Miscimarra, dissenting in part). However, the existence or absence of Sec. 7 protection does not depend on whether non-NLRA claims are pursued as a class or collective action, but on whether Sec. 7's statutory requirements are met—an issue separate and distinct from whether an individual employee chooses to pursue a claim as a class or collective action. *Id.*; see also *Beyoglu*, 362 NLRB No. 152, slip op. at 4–5 (2015) (Member Miscimarra, dissenting).

⁴ 362 NLRB No. 189, slip op. at 1, 4–5 (2015).

⁵ *Murphy Oil*, above, slip op. at 30–34 (Member Miscimarra, dissenting in part). Sec. 9(a) states: "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment" (emphasis added). The Act's legislative history shows that Congress intended to preserve every individual employee's right to "adjust" any employment-related dispute with his or her employer. See *Murphy Oil*, above, slip op. at 31–32 (Member Miscimarra, dissenting in part).

⁶ When courts have jurisdiction over non-NLRA claims that are potentially subject to class treatment, the availability of class-type procedures does not rise to the level of a substantive right. See *D. R. Horton, Inc. v. NLRB*, 737 F.3d 344, 362 (5th Cir. 2013) ("The use of class action procedures . . . is not a substantive right.") (citations omitted), petition for rehearing en banc denied No. 12-60031 (5th Cir. 2014); *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 332 (1980) ("[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims.").

tions, which has prompted the overwhelming majority of courts to reject the Board's position regarding class-waiver agreements;⁷ (iii) enforcement of a class-action waiver as part of an arbitration agreement is also warranted by the Federal Arbitration Act (FAA),⁸ and (iv) for the reasons stated in my dissenting opinion in *Pama Management*, 363 NLRB No. 38, slip op. at 3–5 (2015), the legality of such a waiver is even more self-evident when the agreement contains an opt-out provision, based on every employee's 9(a) right to present and adjust grievances on an "individual" basis and each employee's Section 7 right to "refrain from" engaging in protected concerted activities. Although questions may arise regarding the enforceability of particular agreements that waive class or collective litigation of non-NLRA claims, I believe these questions are exclusively within the province of the court or other tribunal that, unlike the NLRB, has jurisdiction over such claims.

2. *Interference with NLRB Charge-Filing.* I believe this case presents a close question regarding whether the Rules and related documentation violate Section 8(a)(1) by interfering with the filing of NLRB charges. Similar to my separate opinion in *Applebee's Restaurant*,⁹ I disagree with the judge's finding and my colleagues' conclusion that the Rules unlawfully interfere with Board charge-filing, and I believe that the Respondents lawfully created and distributed a summary brochure regarding the Rules. However, I believe the separate Acknowledgment signed by employees interferes with Board charge-filing in violation of Section 8(a)(1).

Preliminarily, as the judge found, the Respondents' Rules program consists of "three interrelated docu-

⁷ The Fifth Circuit has twice denied enforcement of Board orders invalidating a mandatory arbitration agreement that waived class-type treatment of non-NLRA claims. See *Murphy Oil, Inc., USA v. NLRB*, above; *D. R. Horton, Inc. v. NLRB*, above. The overwhelming majority of courts considering the Board's position have likewise rejected it. See *Murphy Oil*, 361 NLRB No. 72, slip op. at 34 (Member Miscimarra, dissenting in part); *id.*, slip op. at 36 fn. 5 (Member Johnson, dissenting) (collecting cases); see also *Patterson v. Raymours Furniture Co., Inc.*, 96 F.Supp.3d 71 (S.D.N.Y. 2015); *Nanavati v. Adecco USA, Inc.*, No. 14-cv-04145-BLF, 2015 WL 1738152 (N.D. Cal. Apr. 13, 2015), motion to certify for interlocutory appeal denied 2015 WL 4035072 (N.D. Cal. June 30, 2015); *Brown v. Citicorp Credit Services, Inc.*, No. 1:12-cv-00062-BLW, 2015 WL 1401604 (D. Idaho Mar. 25, 2015) (granting reconsideration of prior determination that class waiver in arbitration agreement violated NLRA).

⁸ For the reasons expressed in my *Murphy Oil* partial dissent and those thoroughly explained in former Member Johnson's dissent in *Murphy Oil*, the FAA requires that the arbitration agreement be enforced according to its terms. *Murphy Oil*, above, slip op. at 34 (Member Miscimarra, dissenting in part); *id.*, slip op. at 49–58 (Member Johnson, dissenting).

⁹ 363 NLRB No. 75, slip op. at 2–5 (2015) (Member Miscimarra, dissenting in part).

ments": (i) a 16-page Rules document (consisting of 14 pp., followed by an "Internal Review Request Form" and a "Notice of Intent to Arbitrate" form) (Jt. Exh. M); (ii) a three-page program brochure (Brochure) (including a one-page diagram of the arbitration process and a two-page summary of the Rules) (Jt. Exh. N); and (iii) a one-page Acknowledgment form signed by employees (Jt. Exh. O).

(a) *The Rules and Brochure.* The Rules document expressly states (on pp. 2 and 4) that (i) the Rules "do not preclude any employee from filing a charge with a state, local or federal administrative agency such as the Equal Employment Opportunity Commission," and (ii) excluded from the term "Covered Claim" are "[m]atters within the jurisdiction of the National Labor Relations Board."

The judge reasons that these exclusions are contradicted by other broad language in the Rules that appears to make NLRA claims subject to the Rules' mandatory arbitration provisions. The judge states, for example, that the protection afforded the right to file agency charges is rendered "illusory" by other "Covered Claim" language that includes "examples" of claims that "fall within the NLRB's jurisdiction" (e.g., alleged "retaliation" for exercising "protected rights under any statute" and claimed discrimination on "[an] unlawful basis" (alteration in judge's decision)). My colleagues adopt the judge's reasoning.

I agree that the Rules are ambiguous about whether NLRA claims are subject to mandatory arbitration.¹⁰

¹⁰ The Rules (as noted above) expressly *exclude* from the term "Covered Claim" all matters that are "within the jurisdiction of the National Labor Relations Board," which suggests strongly that all NLRA claims are exempt from arbitration. Yet the Rules state that "Covered Claim" *includes* any alleged violation of the "Taft-Hartley Act," which many people regard as another name for the NLRA. The NLRA (also called the Wagner Act) was originally adopted in 1935. However, in 1947, Congress substantially amended the NLRA as part of the Labor Management Relations Act (LMRA), also commonly called the Taft-Hartley Act. Here, it may be helpful to understand that the Taft-Hartley Act consisted of multiple sections, organized by "Titles." Thus, Taft-Hartley Sec. 101, set forth within Title I, restated the *entire* amended NLRA, and the amended NLRA became widely known as the "Taft-Hartley Act." However, other sections and Titles within the Taft-Hartley Act addressed labor-related matters totally separate from the NLRA, such as the Federal Mediation and Conciliation Service (FMCS) and procedures for resolving national emergency disputes (Title II), and various unlawful payments involving employers or labor organizations and court jurisdiction over certain labor disputes (Title III), among other things.

Because the Rules *exclude* from the term "Covered Claim" NLRA matters (i.e., "[m]atters within the jurisdiction of the National Labor Relations Board"), but "Covered Claim" *includes* all alleged violations of "any . . . government statute" including "[t]he Taft-Hartley Act," the Rules suggest that NLRA claims are both excluded from and included within the scope of the Rules' mandatory arbitration provisions. As explained in the text, however, I believe it is not necessary to resolve

However, the question of whether an arbitration agreement covers NLRA claims is different from whether or not the Agreement interferes with NLRB charge-filing. As I explained in *Applebee's Restaurant*, supra, decades of case law—including the Board's recent decision in *Babcock & Wilcox Construction Co.*, 361 NLRB No. 132 (2014)—establish that parties may lawfully agree to submit NLRA claims to arbitration, provided they do not otherwise interfere with NLRB charge-filing. In this case, the Rules expressly state that agency charge-filing is permitted, and the term “Covered Claim” expressly excludes all matters “within the jurisdiction of the National Labor Relations Board.” Thus, even if the Rules require arbitration regarding certain NLRA claims (there is some question here),¹¹ I believe this is permitted under Section 8(a)(1), and the express exclusions referenced above preclude a reasonable conclusion that the Rules unlawfully interfere with Board charge-filing. These same considerations distinguish the instant case from the charge-filing prohibition deemed unlawful in *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. mem. 255 Fed. Appx. 527 (D.C. Cir. 2007).

The judge refers to certain provisions in the Rules as “buried” and “embedded at the end of the Program Rules.” Although the Rules, including the two exclusions referenced above, are contained in a 16-page document, this does not warrant a finding that the Rules unlawfully interfere with the right to file Board charges. Employees may be subject to collective-bargaining agreements and benefit plan documents that may span hundreds of pages, where particular employee rights or obligations turn on the meaning of a single clause, phrase, or word. Similarly, I respectfully disagree with the judge's suggestion that the Rules are “overbroad, confusing, and ambiguous so that a reasonable employee would read them as prohibiting him or her from filing unfair labor practice charges with the Board.”¹² To the

this conundrum because decades of Board and court case law establish that NLRA claims may lawfully be subjected to arbitration, provided that the agreement that so provides does not otherwise interfere with NLRB charge-filing, although the Board in all cases retains the right, under Sec. 10(a) of the Act, to independently review any allegations of unfair labor practices made in a charge filed with the Board. See *Applebee's Restaurant*, supra.

¹¹ See fn. 10, supra.

¹² In fairness to the judge, the characterization set forth in the text applies to his evaluation of the Rules “Program as a whole,” and I agree that one part of that Program—the Acknowledgment form—unlawfully interferes with NLRB charge-filing in violation of Sec. 8(a)(1). However, the judge clearly bases his finding that the agreement unlawfully interferes with the filing of Board charges on the fact that it may “require arbitration of claimed violations of the Act.” As noted in the text, I believe existing case law establishes it is lawful to provide for the submission of NLRA claims to arbitration, even though the Board

contrary—and this accounts, in part, for their length—the Rules are written in relatively plain English, with shorter sentences than what one often sees in more succinct, but more difficult-to-understand, legal documents. The main sections of the Rules are identified with understandable headings (e.g., “What is a Covered Claim?”) set in bold-face type. Ten pages are devoted to important procedures governing internal complaint processing (prearbitration) and arbitration itself. It is understandable that these procedures would be spelled out in some detail, their presentation is relatively well organized, and the procedures provided for under the Rules are more favorable to claimants in some respects than the procedures that apply to Board proceedings.¹³ In all these respects, I believe the Rules document, including the exclusions regarding agency charge-filing and matters within the NLRB's jurisdiction, easily satisfy whatever standard of clarity may be applicable when considering whether the Rules unlawfully interfere with protected rights in violation of Section 8(a)(1).

I also disagree with whatever negative inference the judge derives from his characterization of the Rules as a “clever packaged Program” that refers to its employees as “associates” and “misleads them by selling the Program as ‘GameStop C.A.R.E.S.’” and stating that the program “does not change any substantive rights but simply moves the venue for the dispute out of the courtroom and into arbitration.”¹⁴ There is nothing unlawful about referring to employees as “associates,” or using “clever” packaging for an employment policy or program. Nor does it violate Section 8(a)(1) to use an acronym in the title of an arbitration program that spells out “C.A.R.E.S.” or to state that an arbitration program “does not change any substantive rights but simply moves the venue for the dispute out of the courtroom and into arbitration.” Indeed, this last quotation from Respondents' Rules is virtually identical to language that appears in Supreme Court decisions upholding mandatory arbitration agreements that encompass statutory claims. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (“By agreeing to arbitrate a statutory claim, a party does not forgo the

retains jurisdiction to independently evaluate alleged violations that are the subject of an NLRB charge.

¹³ For example, the time limits set forth in the Rules make it fairly clear that any dispute will be resolved much more quickly than would likely be the case under the Board's multiple-level unfair labor practice procedures. Also, the Rules provide for potential prehearing discovery (upon request to the arbitrator), and both sides are guaranteed the right “to know who the other's witnesses will be and to see all relevant documents before the . . . hearing.” None of these procedures is available in Board unfair labor practice proceedings.

¹⁴ My colleagues do not rely on this part of the judge's decision.

substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991) (same). See also fn. 6, *supra*.¹⁵

Finally, I do not believe the Respondents’ three-page Brochure, which summarizes the Rules, interferes with the right to file Board charges. This Brochure contains general language describing the types of claims that are subject to arbitration, and it does not reproduce the two Rules provisions regarding the right to file agency charges and the “Covered Claim” exclusion of matters within the NLRB’s jurisdiction. However, the Brochure clearly states that it is only a “general description,” that “details of the program are set out in the GameStop C.A.R.E.S. Rules of Dispute Resolution,” and that “[i]f there are any differences between this brochure and the GameStop C.A.R.E.S. Rules, the Rules shall control.”¹⁶ I believe the Brochure constitutes the type of “summary description” that is familiar in the employment setting.¹⁷ The Board has never held that a lawful employment-related program or agreement becomes unlawful whenever a party provides a less formal oral or written summary that fails to repeat or reproduce each and every provision that might affect some NLRA-related right or obligation. As noted above, the importance and complexity of Respondents’ arbitration program warrant the type of detailed descriptions set forth in the Rules document, and I believe it is lawful for the Respondents to utilize, in connection with the program, a three-page summary document that clearly identifies itself as a “general description,” expressly refers employees to the Rules document itself for the “details of the program,” and concludes with

¹⁵ There is absolutely no support in the record or Board precedent for the judge’s gratuitous statement that Respondents’ program contains “misleading language [that] is akin to the slick advertising campaign of the 1960’s and 1970’s where a cigarette manufacturer targeted teenagers with a trendy cartoon camel.” As noted in the text, there is nothing unlawful about creating attractive, readable documents regarding an arbitration program, even if it might be described as “slick” or “trendy.” Moreover, Respondents’ arbitration process is similar to procedures that have been upheld by countless courts and that afford the opportunity for many employee-claimants to remedy legal violations in a manner that is cheaper, faster and more accessible than court litigation. Even though the Board finds that some aspects of Respondents’ procedures unlawfully interfere with protected rights under the NLRA, I believe it is terribly unfair to draw any parallel between Respondents’ Rules and the conduct of a “cigarette manufacturer” whose advertising for two decades allegedly “targeted teenagers” by using a “trendy cartoon camel.” Again, my colleagues do not rely on this part of the judge’s decision.

¹⁶ Jt. Exh. N, p. 3.

¹⁷ For example, summary plan descriptions, which are short-form descriptions of more detailed benefit plan documents, are required under the Employee Retirement Income Security Act (ERISA).

a statement (in boldface type) that the Rules are controlling.

(b) *The Acknowledgement Form.* In connection with the Rules program, the only document signed by employees is the one-page Acknowledgment form, which states:

ACKNOWLEDGMENT AND RECEIPT OF THE STORE ASSOCIATE HANDBOOK AND GAMESTOP C.A.R.E.S. RULES INCLUDING ARBITRATION

*I acknowledge that I have received a copy of the GameStop Store Associate Handbook, including the GameStop C.A.R.E.S. Rules for Dispute Resolution. The Rules set forth GameStop’s procedure for resolving workplace disputes ending in final and binding arbitration. The Handbook summarizes certain information about my job and company policies, procedures and practices. I understand that it is my responsibility to read and familiarize myself with the information contained in the Handbook. I agree that all workplace disputes or claims will be resolved under the GameStop C.A.R.E.S. program rather than in court. This includes legal and statutory claims, and class or collective action claims in which I might be included. I understand that at any time and for any reason, GameStop may make changes to the Store Associate Handbook, except for the Rules, without prior notice. I understand that my employment with GameStop is “at will,” and that either I or GameStop may end my employment at any time and for any reason.*¹⁸

The closeness of the question in this case, as it relates to the Acknowledgment form, stems from three factors. First, the Acknowledgment does more than merely acknowledge and reflect the employee’s receipt of the Rules. It characterizes the Rules in a short-form manner, stating that they constitute the “Respondent’s procedure for resolving workplace disputes ending in final and binding arbitration.” Second, rather than merely stating that the employee agrees to the Rules, the Acknowledgment sets forth an independent one-sentence agreement, essentially condensing the 16-page Rules into a 20-word sentence: “I agree that all workplace disputes or claims will be resolved under the GameStop C.A.R.E.S. program rather than in court.” Third, the Acknowledgment does not use the key term “Covered Claim” (in uppercase letters or generically), nor does it reasonably suggest—contrary to the single-sentence restatement of the agreement—that under the Rules’ more detailed provisions, some “workplace disputes or claims” may be “resolved”

¹⁸ Jt. Exh. O (emphasis added).

by an agency or court¹⁹ and *not* exclusively in “GameStop’s procedure . . . ending in final and binding arbitration.”

The purpose of an acknowledgment form is to reference other, more detailed source documents. Consequently, I do not believe one can reasonably expect Respondents’ Acknowledgment form to reproduce all of the source documents’ definitions, qualifications and exclusions. And it is worth noting that the Acknowledgment starts out with an express reference to the more detailed “GameStop C.A.R.E.S. Rules for Dispute Resolution.” Nonetheless, the factors described above, taken in combination, reasonably suggest that the Acknowledgment form provides that (i) all “workplace disputes” are subject to GameStop’s procedure culminating in “final and binding arbitration,” and (ii) the employee agrees that “all workplace disputes” will be “resolved” in binding arbitration and in this manner only. The second part of this interpretation—at least without some further qualification—plainly precludes the filing of a Board charge. I concede that the relevant language is susceptible to a different reading.²⁰ However, I believe the above inter-

¹⁹ In addition to the “Covered Claim” exclusion of matters within the jurisdiction of the NLRB, the Rules set forth other exclusions pertaining to benefit claims and criminal charges (both subject to potential court resolution), as well as claims for workers compensation benefits (except for alleged retaliation) and claims for unemployment compensation benefits. Jt. Exh. M, p. 4.

²⁰ A sentence-by-sentence parsing of the Acknowledgment, viewing each sentence in isolation, could result in an interpretation that (a) the employee acknowledges receipt of the Rules, which are part of the Associate Handbook; (b) the Rules set forth the “procedure” for “resolving workplace disputes” that ends with “final and binding arbitration”; (c) the employee agrees that “all workplace disputes or claims will be resolved under the GameStop C.A.R.E.S. program rather than in court”; (d) the reference to resolution “under the GameStop C.A.R.E.S. program rather than in court” cannot logically mean employees are prevented from filing NLRB charges because the NLRB is not a “court”; and (e) the same provision—that all workplace disputes “will be resolved under the GameStop C.A.R.E.S. program”—explicitly permits NLRB charge-filing because, “under” the Rules governing the C.A.R.E.S. program, employees can “resolve” claims by filing agency charges, and matters within the Board’s jurisdiction are expressly excluded from the phrase “Covered Claim.”

I believe this interpretation, though plausible, is strained for two reasons. First, it gives an unnatural interpretation to the phrase “resolved under” to suggest that having workplace disputes “resolved under the GameStop C.A.R.E.S. program” actually means some disputes may be resolved under the Board’s processes following the filing of a Board charge. If a dispute ends up being resolved by the NLRB based on the filing of a Board charge rather than through arbitration, one would not normally regard the dispute as having been “resolved under the GameStop C.A.R.E.S. program.” Second, a standard principle of contract interpretation requires all words and phrases to be construed in conjunction with one another. The successive sentences in the Acknowledgment strongly suggest that the “GameStop C.A.R.E.S. Rules” (referenced in sentence one) make all “workplace disputes” subject to “final and binding arbitration” (sentence two). Therefore, when the

pretation is the most reasonable one, and the problems described above could be easily avoided in numerous ways.²¹ In the circumstances presented here, I believe the record supports a finding that the Acknowledgment interferes with NLRB charge-filing in violation of Section 8(a)(1).

Accordingly, as to the above issues, I respectfully dissent in part from my colleagues’ decision, and I concur in part with other aspects of their decision.

Dated, Washington, D.C. December 31, 2015

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD
APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

Acknowledgment states the employee agrees that “all workplace disputes or claims will be resolved under the GameStop C.A.R.E.S. program” (sentence four), I believe most people would interpret this to mean that all “workplace disputes” must be resolved in “final and binding arbitration” and in this manner only. As indicated in the text, this would preclude any potential filing of Board charges absent some qualification to the contrary.

²¹ The problems described in the text could be avoided if, for example, the Acknowledgment form simply stated that the employee has received and agrees to the Rules document (which would obviously encompass the Rules’ detailed provisions, exceptions and qualifications). If the Acknowledgment attempted to condense and restate in a single sentence the content of a 16-page arbitration procedure, that sentence might include language similar to the Brochure’s disclaimers (described previously), or state that the employee’s agreement was “subject to the Rules’ more detailed provisions, exceptions and exclusions,” or add an “except as otherwise provided in the Rules” qualification to the “I agree” sentence (“I agree that all workplace disputes or claims will be resolved under the GameStop C.A.R.E.S. program rather than in court.”). Employees could also sign a copy of the actual Rules document *without* a separate Acknowledgment form, or the Acknowledgment form might repeat the exclusions set forth in the Rules relating to NLRB charge-filing. In these and other ways, I believe an arbitration agreement could lawfully be entered into by an employer and its employees, even if the agreement encompassed the arbitration of NLRA claims, without negating that the agreement permits NLRB charge-filing.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration policy in our Concerned Associates Reaching Equitable Solution (C.A.R.E.S.) Rules of Dispute Resolution Including Arbitration that our employees reasonably would believe bars or restricts their right to file charges with the National Labor Relations Board.

WE WILL NOT maintain a mandatory arbitration policy in our C.A.R.E.S. Rules that requires our employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the mandatory arbitration policy in all of its forms, or revise it in all of its forms to make clear that the arbitration policy does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not bar or restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the C.A.R.E.S. Rules that they have been rescinded or revised and, if revised, WE WILL provide them a copy of the revised policy.

GAMESTOP CORP., GAMESTOP INC., SUNRISE PUBLICATIONS, INC., AND GAMESTOP TEXAS LTD. (L.P.)

The Board's decision can be found at www.nlr.gov/case/20-CA-080497 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Joseph D. Richardson, for the Acting General Counsel.

Ross Friedman (Morgan, Lewis & Bockius LLP), for the Respondent.

Christian Schreiber (Chavez & Gertler LLP), for the Charging Party.

DECISION

STATEMENT OF THE CASE

GERALD M. ETCHINGHAM, Administrative Law Judge. This is yet another case raising issues concerning arbitration policies that effect collective bargaining and representative rights related to *D. R. Horton, Inc.*, 357 NLRB No. 184 (2012), petition to review filed 12-60031 (5th Cir. Jan. 13, 2012), and the limits of the Federal Arbitration Act (FAA) to change the status quo if it overlaps the later-enacted National Labor Relations Act (the Act or the NLRA).¹ This case was tried based on a joint motion and stipulation of facts approved by me on May 1, 2013. The Charging Party, Michelle Krecz-Gondor (Krecz-Gondor or the Charging Party), filed the initial charge on May 7, 2012,² with amendments on January 17 and February 25, 2013, respectively, and the Acting General Counsel issued his initial complaint on February 27, 2013, and his amended complaint on March 25, 2013 (collectively the complaint). Respondents, GameStop Corp., GameStop, Inc., Sunrise Publications, Inc., and GameStop Texas Ltd. (L.P.) (collectively Respondents or the Company), filed timely answers to the complaint on March 13 and April 8, 2013, respectively, denying all material allegations and setting forth affirmative defenses.

The complaint alleges that Respondents violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining a policy and/or requiring a rule of its employees which interferes with, restrains, and coerces employees in the exercise of their rights as guaranteed in Section 7 of the Act.

On the entire record and after considering the briefs filed by the Acting General Counsel and Respondents, I make the following.

¹ The FAA was enacted in 1925, the Norris-LaGuardia Act (NLA) was enacted in 1932 and the NLRA was enacted in 1935. The FAA, however, was pro forma reenacted in 1947 without substantive amendment. See *Bulova Watch Co. v. U.S.*, 365 U.S. 753, 758 (1961); see also H.R. Rep. No. 80-251 (1947), reprinted in 1947 U.S.C.C.A.N. 1511 (expressly stating that the 1947 bill made “no attempt” to amend the existing FAA); H.R. Rep. No. 80-225 (1947), reprinted in 1947 U.S.C.C.A.N. 1515 (same).

² All dates are in 2012, unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION

At all times material, Respondent GameStop Corp., a Delaware corporation, with offices and places of business throughout the State of California and the United States, including one in Sacramento, California, has been engaged in business as a videogame retailer. Respondent GameStop Corp. admits, and I find, that during the calendar year ending December 31, GameStop Corp., in conducting its business operations described above derived gross revenues in excess of \$500,000 and sold and shipped from its California facilities products valued in excess of \$5000 directly to points outside the State of California. Respondent GameStop Corp. admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (Stips. 2(a)–(b), 3(g).)

Also at all times material, Respondent GameStop, Inc., a Minnesota corporation, and a wholly-owned subsidiary of GameStop Corp., maintains offices and places of business throughout the State of California and the United States, including one in Sacramento, California, and has been engaged in business as a videogame retailer. Respondent GameStop, Inc. admits, and I find, that during the calendar year ending December 31, GameStop, Inc., in conducting its business operations described above derived gross revenues in excess of \$500,000 and sold and shipped from its California facilities products valued in excess of \$5000 directly to points outside the State of California. Respondent GameStop, Inc. admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (Stips. 3(a)–(b), (g).)

Further, at all times material, Respondent Sunrise Publications, Inc., a Minnesota corporation, and a wholly-owned subsidiary of GameStop, Inc., maintains offices and places of business throughout the United States, including its principal offices in Minneapolis, Minnesota, and has been engaged in business as a publisher of print and online magazines. Respondent Sunrise Publications, Inc. admits, and I find, that during the calendar year ending December 31, Sunrise Publications, Inc., in conducting its business operations described above derived gross revenues in excess of \$500,000 and sold and shipped from its Minneapolis, Minnesota facility products valued in excess of \$5000 directly to points outside the State of Minnesota. Respondent Sunrise Publications, Inc. admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (Stips. 3(c)–(d), (g).)

In addition, at all times material, Respondent GameStop Texas Ltd. (L.P.), a Delaware corporation, and a wholly-owned subsidiary of GameStop, Inc., maintains offices and places of business throughout the United States, including its principal offices in Grapevine, Texas, and has been engaged in business as a videogame retailer. Respondent GameStop Texas Ltd. (L.P.) admits, and I find, that during the calendar year ending December 31, GameStop Texas Ltd. (L.P.), in conducting its business operations described above derived gross revenues in excess of \$500,000 and sold and shipped from its Grapevine, Texas facility products valued in excess of \$5000 directly to points outside the State of Texas. Respondent GameStop Texas Ltd. (L.P.) admits, and I find, that it is an employer engaged in

commerce within the meaning of Section 2(2), (6), and (7) of the Act. (Stips. 3(e)–(g).)

In 2007, Respondents implemented the GameStop Concerned Associates Reaching Equitable Solutions mandatory Arbitration Program (collectively known as the GameStop C.A.R.E.S. or simply the Program or Program Rules) for all employees at all their facilities throughout the United States and Puerto Rico. (Stip. 4.) Respondents' employees are distributed information concerning the Program through three interrelated documents: (1) The 16-page Program Rules (Jt. Exh. M); (2) The Program Brochure (Jt. Exh. N); and (3) Acknowledgement (Jt. Exh. O).

Among other things, the Respondents' Program Rules provide as follows:

SUMMARY DESCRIPTION

It is our goal that your workplace disputes or claims be handled responsibly and on a prompt basis. In furtherance of this goal, GameStop has established an internal dispute resolution program, GameStop C.A.R.E.S.

The goal of GameStop C.A.R.E.S. is always to resolve workplace disputes or claims on a fair and prompt basis. GameStop C.A.R.E.S. does not change any substantive rights, but simply moves the venue for the dispute out of the courtroom and into arbitration. GameStop believes that GameStop C.A.R.E.S. will benefit employees and management alike by encouraging prompt, fair and cost-effective solutions to workplace issues.

SCOPE OF GAMESTOP C.A.R.E.S.

GameStop C.A.R.E.S. covers all GameStop employees in the U.S. and Puerto Rico, including employees of GameStop, Inc., GameStop Texas, L.P. and Sunrise Publications, Inc.

[p.2] These [Rules] govern procedures for the resolution and arbitration of all workplace disputes or claims. The Rules are a mutual agreement to arbitrate Covered Claims (as defined below). The Company and you agree that the procedures provided in these Rules will be the sole method used to resolve any Covered Claim as of the Effective Date of the Rules, regardless of when the dispute or claim arose. The Company and you agree to accept an arbitrator's award as the final, binding and exclusive determination of all Covered Claims. These Rules do not preclude any employee from filing a charge with the state, local or federal administrative agency such as the Equal Employment Opportunity Commission.

GameStop C.A.R.E.S. is an agreement to arbitrate pursuant to the Federal Arbitration Act, 9 U.S.C. Sections 1–14, or if the Act is held to be inapplicable for any reason, the arbitration law in the state of Texas will apply. The parties acknowledge that the Company is engaged in transactions involving interstate commerce.

NO COVERED CLAIM MAY BE INITIATED OR MAINTAINED ON A CLASS, COLLECTIVE OR REPRESENTATIVE BASIS EITHER IN COURT OR UNDER THESE RULES, INCLUDING ARBITRATION. ANY COVERED CLAIM PURPORTING TO BE BROUGHT AS A CLASS ACTION, COLLECTIVE ACTION OR REPRESENTATIVE ACTION WILL BE DECIDED UNDER THESE RULES AS AN INDIVIDUAL CLAIM. THE EXCLUSIVE PROCEDURE FOR THE RESOLUTION OF ALL CLAIMS THAT MAY OTHERWISE BE BROUGHT ON A CLASS, COLLECTIVE OR REPRESENTATIVE ACTION BASIS WHETHER PARTICIPATION IS ON AN OPT-IN OR OPT-OUT BASIS, IS THROUGH THESE RULES, INCLUDING FINAL AND BINDING ARBITRATION, ON AN INDIVIDUAL BASIS. A PERSON COVERED BY THESE RULES MAY NOT PARTICIPATE AS A CLASS OR COLLECTIVE ACTION REPRESENTATIVE OR A CLASS, COLLECTIVE OR REPRESENTATIVE ACTION MEMBER OR BE ENTITLED TO A RECOVERY FROM A CLASS, COLLECTIVE OR REPRESENTATIVE ACTION. ANY ISSUE CONCERNING THE VALIDITY OF THIS CLASS ACTION, COLLECTIVE ACTION AND REPRESENTATIVE ACTION WAIVER MUST BE DECIDED BY A COURT, AND AN ARBITRATOR DOES NOT HAVE AUTHORITY TO CONSIDER THE ISSUE OF THE VALIDITY OF THIS WAIVER. IF FOR ANY REASON THIS CLASS, COLLECTIVE OR REPRESENTATIVE ACTION WAIVER IS FOUND TO BE UNENFORCEABLE THE CLASS, COLLECTIVE AND REPRESENTATIVE CLAIM MAY ONLY BE HEARD IN COURT AND MAY NOT BE ARBITRATED UNDER THESE RULES. AN ARBITRATOR APPOINTED UNDER THESE RULES SHALL NOT CONDUCT A CLASS, COLLECTIVE OR REPRESENTATIVE ACTION ARBITRATION AND SHALL NOT ALLOW YOU TO SERVE AS A REPRESENTATIVE OF OTHERS IN AN ARBITRATION CONDUCTED UNDER THESE RULES.

[Emphasis in original.]

If any court of competent jurisdiction declares that any part of GameStop C.A.R.E.S., including these Rules, is invalid, illegal or unenforceable (other than as noted for the class action, collective action and representative action waiver above), such declaration will not effect the legality, validity, or enforceability of the remaining parts, and each provision of GameStop C.A.R.E.S. will be valid, legal and enforceable to the fullest extent permitted by law.

....

WHAT IS A COVERED CLAIM?

[p.3] Arbitration applies to any “Covered Claim” whether arising before or after the Effective Date of the Rules. A Covered Claim is any claim asserting the violation or infringement of a legally protected right, whether based on statutory or common law, brought by an existing or former employee or job applicant, arising out of or in any way relating to the employee’s employment, the terms or conditions of employment, or an application for employment, including the denial of employment; unless specifically excluded as noted in “What is Not a Covered Claim” below. Covered Claims include:

- Discrimination or harassment on the basis of race, sex, religion, national origin, age, disability or other unlawful basis (for example, in some jurisdictions protected categories include sexual orientation, familial status, etc.).
- Retaliation for complaining about discrimination or harassment.
- Violations of any common law or constitutional provision, federal, state, county, municipal or other governmental statute, ordinance, regulation or public policy. The following list reflects examples of some, but not all such laws. This list is not intended to be all inclusive but simply representative: Consolidated Omnibus Budget Reconciliation Act (COBRA), Davis Bacon Act, Drug Free Workplace Act of 1988, Electronic Communications Privacy Act of 1986, Employee Polygraph Protection Act of 1988, Fair Credit Reporting Act, Fair Labor Standards Act, Family and Medical Leave Act of 1993, Federal Omnibus Crime Control and Safe Streets Act of 1968, the Hate Crimes Prevention Act of 1999, The Occupational Safety and Health Act, Omnibus Transportation Employee Testing Act of 1991, Privacy Act of 1993, Portal to Portal Act, The Taft-Hartley Act, Veterans Reemployment Rights Act, Worker Adjustment and Retraining Notification Act (WARN).
- **[p.4]**—Personal injuries except those covered by workers’ compensation or those covered by an employee welfare benefit plan, pension plan, or retirement plan which are subject to the Employee Retirement Security Act of 1974 (ERISA) other than claims for breach of fiduciary duty (which shall be arbitrable).
- Retaliation for filing a protected claim for benefits (such as workers’ compensation) or exercising your protected rights under any statute.

- Breach of any express or implied contract, breach of a covenant of good faith and fair dealing, and claims of wrongful termination or constructive discharge.
- Exceptions to the employment-at-will doctrine under applicable law.
- Breach of any common law duty of loyalty, or its equivalent.
-
- Any common law claim, including but not limited to defamation, tortious interference, intentional infliction of emotional distress or “whistleblowing”.

WHAT IS NOT A COVERED CLAIM?

- Claims for workers’ compensation benefits, except for claims of retaliation.
- Claims for benefits under a written employee pension or welfare benefit plan, including claims covered by ERISA.
- Claims for unemployment compensations benefits.
- Criminal charges.
- Matters within the jurisdiction of the National Labor Relations Board.
-

GAMESTOP C.A.R.E.S. PROCEDURES

Any Covered Claim between the Company and you must be resolved through procedures described in the following steps.

STEP 1: OPEN DOOR POLICY

If you have a workplace dispute or claim arising out of or in any way related with your employment or application for employment with the Company, you may, but do not have to, begin the dispute resolution process by reviewing the dispute with your supervisor. GameStop encourages employees to initiate the discussion of all workplace issues with their supervisor in an open and frank discussion of the situation. You are free to contact and involve your Human Resource representative at this stage as well. Most all workplace issues [p.5] are usually resolved in this manner. Applicants should contact the Human Resources representative for the location where they applied.

STEP 2: INTERNAL REVIEW

If you have a workplace dispute or claim arising out of or in any way related with your employment or application for employment with the Company and Step 1, which is optional, did not resolve it, you must proceed through the resolution process of GameStop C.A.R.E.S. by requesting Internal Review. Step 2 Internal Review is a mandatory step prior to arbitration of a Covered Claim. . . .

You should receive the ERO’s [The Company’s Executive Review Officer’s] decision within 30 days of the date the Internal Review Request form was received. For Covered Claims, if no decision is received within 30 days or if the dispute is not resolved to your satisfaction in Step 2, you must submit the Covered Claim to Step 3, Binding Arbitration, if you wish to pursue it further. For all other claims, the decision from Step 2, Internal Review, is final for purposes of the GameStop C.A.R.E.S. dispute resolution procedure.

. . . .

Charges Filed with the EEOC or State Agency

Some Covered Claims are claims that may be filed with the Equal Employment Opportunity Commission (EEOC) or an equivalent state agency, such as a claim for discrimination or harassment. For these Covered Claims, you may either file a complaint with these agencies or proceed to use GameStop C.A.R.E.S. If you choose to proceed directly to the GameStop [p.6] C.A.R.E.S. steps of internal review and arbitration, you will be asked to sign a voluntary waiver of the right to file charges with an agency. . . .

STEP 3: ARBITRATION AND OPTIONAL NON-BINDING MEDIATION

If you are dissatisfied with the results of the Internal Review and the claim is a Covered Claim, you must initiate arbitration in order to pursue the matter further. . . .

2. Submit One Copy of the Notice of Intent to Arbitrate Form to the American Arbitration Association (the “AAA”) along with a check in the amount of \$125 (your share of the arbitration service cost) . . .

[p.8]—MEDIATION AND ARBITRATION PROCEDURES

Arbitration Procedures

. . . .

[p.12] 16. Confidentiality.

The parties will have access throughout the arbitration proceedings to information that may be sensitive to the other party. Information disclosed by the parties or witnesses shall remain confidential. All records, reports or other documents disclosed by either party shall be confidential. The results of the arbitration, including any award, are confidential.

. . . .

19. Optional Expenses and Refund of Fee.

If the arbitrator finds totally in your favor, the Company will reimburse the \$125 arbitration fee to you. In addition to the arbitration fee, you [p. 13] may also

have expenses which are your responsibility to pay, but only if you decide to incur the costs. Examples include:

- Your own attorney fees, if you choose to have legal representation,
- Any costs for witnesses you decide to call (other than Company management witnesses),
- Any costs to produce evidence that you request, or
- A stenographic record of the proceedings.

If the arbitrator rules in your favor on a claim under which fees and costs can be granted under law, then the arbitrator has the same authority as a judge to award reasonable attorneys' fees and other costs to you. Likewise, if the arbitrator rules in the Company's favor on a claim under which fees and costs can be granted under law, then the arbitrator has the same authority as a judge to award reasonable attorneys' fees and other costs to the Company.

[p.14] **CALIFORNIA EMPLOYEES**

GameStop employees in California have the option to forgo the benefits of the GameStop C.A.R.E.S. Rules if they so choose. In order to opt out of the Rules, California employees must send notice to GameStop within sixty (60) days of the Effective Date of the program or, for employees hired after the Effective Date of the Rules, within sixty (60) days of the start of their employment, that they do not want to be covered by the Rules. Notice must be sent by certified mail to GameStop C.A.R.E.S. ERO, 625 Westport Parkway, Grapevine, Texas 76051.

....

DEFINITIONS.

....

The "employee" or "you" means any employee, former employee, or applicant for employment, of the Company in the U.S. and Puerto Rico on or after the Effective Date.

....

(Jt. Exh. M.)

The Program Brochure (the Brochure), among other things, provides that the Program is the result of Respondents' "philosophy of treating associates fairly and respectfully." (Jt. Exh. 1 at 2.) The Brochure goes on to state that "[b]oth associates and management benefit from programs that offer prompt, economical and responsible solutions to problems." Id. It further discloses that the Respondents' Program "is designed as a user-friendly way to resolve disputes with all of the remedies of litigation, but without the delays and cost." Id. It goes on to state that the neutral arbitrator will make a final decision and can award the same remedies as a court and that the Program "reduces legal costs for everyone." Id. The Brochure also provides that "Covered Claims are most legal issues and are defined in the Rules" and concludes by pointing out that by ac-

cepting an offer of employment or by continuing employment with Respondents and its affiliates, the employee agrees to use the Program and resolve workplace disputes and claims, including legal and statutory claims, arising out of the employee's employment regardless of the date such dispute or claim arose, and to accept an arbitrator's award as the final, binding, and exclusive determination of all claims. The Brochure does not mention the Opt-Out option for California employees or the exclusion from Covered Claims of matters within the jurisdiction of the National Labor Relations Board. The Brochure further provides that if there are any differences between the Brochure and the Program Rules, the Rules shall control. (Jt. Exh. N at 3.)

All individuals employed by Respondents since November 7, 2011, have received a copy of the C.A.R.E.S. Program, including the Program Brochure. (Stip. 5; Jt. Exh. N.)

At all material times, Respondents have required employees employed at facilities located in all 50 U.S. States, the District of Columbia, and Puerto Rico, as a condition of employment, to execute a written acknowledgment of receipt for the C.A.R.E.S. Program (Acknowledgment), although Respondents' California-based employees could opt out of the C.A.R.E.S. Program by following the procedure specified therein at page 14 of the Program Rules. (Stip. 7.)

On April 1, 2010, the Charging Party signed the Acknowledgment which was retained by Respondents. (Stip. 6; Jt. Exh. O.) The Acknowledgment also reads as follows:

I acknowledge that I have received a copy of the GameStop Store Associate Handbook, including the GameStop's procedure for resolving workplace disputes ending in final and binding arbitration. The Handbook summarizes certain information about my job and company policies, procedures and practices. I understand that it is my responsibility to read and familiarize myself with the information contained in the Handbook. I agree that all workplace disputes or claims will be resolved under the GameStop C.A.R.E.S. program rather than in court. This includes legal and statutory claims, and class or collective action claims in which I might be included. I understand that at any time and for any reason, GameStop may make changes to the Store Associate Handbook, except for the Rules, without prior notice. I understand that my employment with GameStop is "at will," and that either I or GameStop may end my employment at any time and for any reason.

No evidence was provided showing that the Charging Party opted out of the Program within 60 days of the effective date of the program in 2007 or, within 60 days of the start of her employment. In addition, no evidence was provided showing that the Charging Party ever affirmatively gave notice to Respondents that she did not want to be covered by the Rules or that she sent notice by certified mail to Respondents address of 625 Westport Parkway, Grapevine, Texas 76051. Thus, I find that the Charging Party did not opt out of the Program as a California employee within 60 days of signing the Acknowledgment.

II. ISSUES

1. Whether the GameStop C.A.R.E.S. Program maintained by Respondents, which permits California-based employees such as the Charging Party to opt-out of the C.A.R.E.S. Program, requires employees, as a condition of employment, to waive their right to resolution of employment-related disputes by collective or class action in violation of Section 8(a)(1) of the Act?
2. Whether the GameStop C.A.R.E.S. Program maintained by Respondents would reasonably be read by employees to prohibit them from filing unfair labor practice charges with the Board in violation of Section 8(a)(1) of the Act?

III. ANALYSIS

A. Section 10(b) does not Bar a Finding as to the Validity of Respondents' Program

Respondents argue that the Board lacks jurisdiction over the unfair labor practice claims alleged here because they are barred by Section 10(b) of the Act since the Charging Party signed the Acknowledgement and Program agreement on April 1, 2010, outside the 6-month 10(b) period of filing her charge on May 7, 2012. (R. Br. at 16–18.) The Acting General Counsel responds that the 2007 implementation date for the Program is irrelevant as its continued application to all of Respondents' employees makes the continuing rule subject to an ongoing violation within the 10(b) period.

The complaint alleges that the Respondents maintain the Program which permits California-based employees such as the Charging Party to opt-out of it and requires employees, as a condition of employment, to waive their right to resolution of employment-related disputes by collective or class action in violation of Section 8(a)(1) of the Act. I find that the alleged unlawfulness of the Program here is not related solely to circumstances existing on a date in 2007 when the Program was implemented or on the date that the Charging Party signed the Acknowledgment in April 2010. Instead, at issue is the legality of Respondents' continued maintenance of its Program. Since the complaint here alleges that the Program is unlawful and the Respondents' continued maintenance of it is violative under the Act, I find that the allegations are not barred by the statute of limitations set for in Section 10(b) of the Act as the alleged violation is not "based upon" or "inescapably grounded on" events outside the 6-month 10(b) period. See *Control Services, Inc.*, 305 NLRB 435, 435 fn. 2, 442 (1991) (Section 10(b) does not bar finding of violation of continually maintained rules.).

B. The Respondents' Arbitration Program as Applied to Respondents' Employees, Violates Section 8(a)(1) of the Act as a Reasonable Employee would Read the Program to be Mandatory Waiver under D. R. Horton

The first issue, set forth in stipulation 1 and paragraphs 3(a), 4, and 5 of the complaint, is whether in view of the Board's decision in *D. R. Horton*, the Respondents' maintenance of the Program, as a condition of employment which contains provi-

sions requiring employees to resolve employment-related disputes exclusively through individual arbitration proceedings, and to relinquish any right to resolve such disputes through collective, representative, or class action, violates Section 8(a)(1) of the Act by precluding employees from acting collectively or as a class or otherwise exercising their Section 7 rights under the Act.³

In *D. R. Horton*, supra, slip op. at 1, the Board explained that an employer violates Section 8(a)(1) of the Act by imposing, as a condition of employment, a mandatory arbitration agreement that precludes employees from "filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial." Citing to *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948–949 (1942); *Electrical Workers Local 266-B (Salt River Valley Water Users Assn.)*, 99 NLRB 849, 853–854 (1952), enf. 206 F.2d 325 (9th Cir. 1953), and a string of other cases, the Board noted that concerted legal action addressing wages, hours, and working conditions has consistently fallen within Section 7's protections. *D. R. Horton*, supra, slip op. at fn. 4. The Board stopped short of requiring employers to permit both classwide arbitration and classwide suits in a court or administrative forum, finding that "[s]o long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of class-wide arbitration." *Id.*, slip op. at 12.

1. The Program as applied to Respondents' non-California employees is mandatory and unlawful under *D. R. Horton*

In the instant case, there is no dispute that the Program is a condition of employment. It is self-executing upon implementation of the Program in 2007, or accepting and continuing employment. The Program is also a mandatory condition of em-

³ As has been argued frequently over the past year, Respondents also argue that *D. R. Horton*, discussed herein, is void because the Board lacked a quorum when it issued the decision. This argument derives from the D.C. Circuit's decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), which the Board has rejected and so must I. See, e.g., *Bloomington's Inc.*, 359 NLRB No. 113 (2013); *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. at 1 fn.1 (2013). Though the Fourth Circuit recently agreed with *Noel Canning* when it decided *NLRB v. Enterprise Leasing Co. Southeast, LLC*, 722 F.3d 609 (4th Cir. 2013), the Board has noted that at least three courts of appeals have reached a different conclusion on similar facts. *Bloomington's*, supra (citing *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), cert. denied 544 U.S. 942 (2005); *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *U.S. v. Allocco*, 305 F.2d 704 (2d Cir. 1962)). Earlier in this case, I rejected the same argument by Respondents and I ruled in my April 9, 2013 Order Denying Respondents' Motion to Stay this proceeding, citing many of the same cases. Consistent with Board precedent, Respondents' defense based on *Noel Canning* and a lack of quorum fails. Also, Respondents additionally or alternatively argue that *D. R. Horton* was wrongly decided, noting that the Eighth Circuit and lower courts have declined to follow it to date in matters, I note, are unrelated to the NLRA. See, e.g., *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013). However, I reject any claim that the *D. R. Horton* decision was wrongly decided as I am bound by Board precedent unless and until it is reversed by the Board itself or the Supreme Court. See *Pathmark Stores, Inc.*, 342 NLRB 378 fn. 1 (2004).

ployment because it is a term of employment to which all non-California employees are bound at the beginning of their employment with Respondents and continuing thereafter.

It is likewise clear that the Program prohibits collective and representative actions entirely. With regard to collective or representative arbitration, the scope of the Program states at page 2:

NO COVERED CLAIM MAY BE INITIATED OR MAINTAINED ON A CLASS, COLLECTIVE OR REPRESENTATIVE BASIS EITHER IN COURT OR UNDER THESE RULES, INCLUDING ARBITRATION. ANY COVERED CLAIM PURPORTING TO BE BROUGHT AS A CLASS ACTION, COLLECTIVE ACTION OR REPRESENTATIVE ACTION WILL BE DECIDED UNDER THESE RULES AS AN INDIVIDUAL CLAIM. THE EXCLUSIVE PROCEDURE FOR THE RESOLUTION OF ALL CLAIMS THAT MAY OTHERWISE BE BROUGHT ON A CLASS, COLLECTIVE OR REPRESENTATIVE ACTION BASIS WHETHER PARTICIPATION IS ON AN OPT-IN OR OPT-OUT BASIS, IS THROUGH THESE RULES, INCLUDING FINAL AND BINDING ARBITRATION, ON AN INDIVIDUAL BASIS. A PERSON COVERED BY THESE RULES MAY NOT PARTICIPATE AS A CLASS, COLLECTIVE OR REPRESENTATIVE ACTION MEMBER OR BE ENTITLED TO A RECOVERY FROM A CLASS, COLLECTIVE OR REPRESENTATIVE ACTION.

Here, as in *D. R. Horton*, the Program also precludes an arbitrator from awarding any class, collective, or representative remedy. The exclusive procedure for the resolution of all claims that may otherwise be brought on a class, collective, or representative action basis whether participation is on an opt-in or opt-out basis, is through the Program Rules, including final and binding arbitration, on an individual basis. Because Respondents' Program compels its employees to waive their rights to pursue class, collective, or representative actions in court or arbitrations as a condition of employment, I find *D. R. Horton* is directly applicable and the Program unlawful. *Id.*, slip op. at 12.

Respondents argue that the excepted language of "matters within the jurisdiction of the [NLRB]" distinguishes this case from the facts in *D. R. Horton* to save the Program. For the same reasons articulated by my colleague, Administrative Law Judge Steven Fish, in his recent decision styled *JP Morgan Chase & Co.*, JD(NY) 40-13, 2913 WL ____ (Aug. 21, 2013), I reject Respondents' argument and for the same reasons in Judge Fish's case involving identical exclusion language for any claims under the NLRA. I also find the Program here is unlawful "[n]ot because it restricts or bars filing of NLRB charges," but because it interferes with and restricts employees engaging in protected concerted conduct. See *JP Morgan Chase & Co.*, supra at 10. Furthermore, I also agree with ALJ Fish that "this distinction between *D. R. Horton* is insignificant, and the inclusion of the clause concerning the right to file NLRB charges in no way effects the violation of the Act encompassed by the complaint that employees are precluded from

pursuing class or collective actions in all forums, whether arbitral or judicial." *Id.*

Respondents also cite various Supreme Court cases both predating and postdating *D. R. Horton* to argue that either *D. R. Horton* was wrongly decided or will soon be overruled. As referenced in footnote 3 above, I am bound by the Board's decision in *D. R. Horton* until the Board or the Supreme Court does something to change its current holding. To the extent Respondents' Supreme Court cases predate *D. R. Horton*, I also find that the Board considered these arguments and precedents in *D. R. Horton* to support a different conclusion, by which I am bound.

As for the Supreme Court cases that postdate *D. R. Horton*, I find them distinguishable and not controlling as they do not address fundamental substantive Federal labor rights established by congressional legislation as is involved in this case. Here, the Program restrains and interferes with Respondents' employees and illegally prevents them from engaging in protected concerted activity by pursuing class or collective actions in all forums as guaranteed under the NLRA. Unlike other Federal statutes, the NLRA is built and based upon collective action procedures to protect substantive rights including a right to assemble, pursue claims, and seek remedies in a collective manner. I further find that the NLRA precludes a waiver of substantive collective or representative actions in all forums.

Therefore, I find that the Program is a condition of employment for non-California employees that unlawfully requires employees to waive their right to resolution of all employment-related disputes by collective, representative, or class action in violation of Section 8(a)(1) of the Act. The *D. R. Horton* case remains controlling Board law and requires a finding that Respondents have violated the Act as alleged as to its non-California employees.

2. The Program, as applied to Respondents' California employees, is also mandatory and unlawful

The Program defines Respondents' employees to be "any employee, former employee, or applicant for employment, of the Company in the U.S. and Puerto Rico on or after the Effective Date." (Jt. Exh. M at p. 14.) It does not specifically exclude their California employees from the mandatory terms of the Program except finally embedded at the end of the Program Rules at page 14 one finds the opt-out right available only to California employees if they take affirmative action to give notice to Respondents via certified mail. Therefore, if a California employee does nothing under the Program Rules, he or she defaults to the mandatory arbitration terms and forgoes any right to engage in protected concerted conduct and pursue a collective or representative claim or seek collective remedies at the NLRB.

Moreover, neither the Brochure nor the Acknowledgment clearly informs the Charging Party or other California employees that they are eligible to opt-out of Respondents' Program as California employees. (Jt. Exh. O.) The documents also do not clearly state that California employees are reserved the right to engage in protected concerted conduct in a collective or representative action at the NLRB as part of the Program. Once again, buried at page 14 of the Program Rules is there language

about a California employee's opt-out right. Consequently, I find that the Acknowledgment and Brochure are ambiguous and do not clearly inform California employees like the Charging Party here that they can opt-out of the Program. As a result, I further find that due to this ambiguity as to a California employee's opt-out rights and an employee's continued ability to retain their Section 7 rights as part of the Program, the Program, as a term and condition of employment, is a form of mandatory arbitration that is unlawful under *D. R. Horton* even for California employees like the Charging Party.

Therefore, I find that Respondents have violated Section 8(a)(1) of the Act by maintaining and distributing the overbroad Program documents including the Rules, Brochure, and Acknowledgment documents, as alleged. I further find that the Program is unlawful for California employees the same as it is for non-California employees and it unlawfully requires employees to waive their right to resolution of all employment-related disputes by collective, representative, or class action in violation of Section 8(a)(1) of the Act. The *D. R. Horton* case remains controlling Board law and requires a finding that Respondents have violated the Act also as alleged as to its California employees.

3. Respondents' Arbitration Program, as applied to California employees, also violates Section 8(a)(1) of the Act as the opt-out language and confidentiality provisions make it involuntary and in violation of public policy

Alternatively, if there is no ambiguity and the current language of Respondents' Program is clear and not overly broad that California employees are given clear notice that they are required to opt-out of the Program by taking affirmative action detailed in the Program Rules, I must analyze whether the opt-out provision here is lawful and voluntary under the Act with the Program's confidentiality provisions.

I further find that it is unlawful to force employees to take affirmative involuntary actions just to maintain the status quo to retain the same substantive Section 7 rights that each California employee had *before* enactment of the Program. It is a fallacy to believe there is any value or benefit received by Respondents' California employees to prospectively waive their substantive Section 7 rights to engage in protected concerted conduct in exchange for utilizing the FAA to pursue a single individual work-related action. In addition, I further find that a reasonable employee would interpret the Program's confidentiality provision as an unlawful instruction not to talk about their working conditions as even employees who opt-out of the Program are prevented from acting concertedly with employees who opt-into the Program. Consequently, I further find that Respondents' Program violates Section 8(a)(1) of the Act for these reasons and those that follow.

a. The status quo

First of all, one must understand that there has been an influx in analogous opt-out or waiver provisions in connection with company-imposed arbitration programs where the challenged practice involves employees being required to take affirmative actions, through a form of "notice" rule, by mailing to the employer via certified mail, a written notice that they are opting

out of the mandatory arbitration program, just to maintain the "status quo" that has existed to them for decades—the substantive rights under Sections 7 and 8(a)(1) of the Act to engage in protected concerted conduct for the purpose of collective bargaining or other mutual aid or protection without employer interference, restraint, or coercion.

Under the status quo, a charging party can file a charge with the NLRB at no cost to the charging party. If the charge is deemed to have merit by the Agency's Office of the General Counsel, a complaint is issued on behalf of the charging party, a hearing is noticed approximately 30–60 days down the road, and most cases get prosecuted as a collective or representative action in a timely manner. In limited situations, if the company is able to prevail in the case, the company recovers against the Government and *not* the charging party.

In contrast, under Respondents' Program, the charging party must pay \$125 to initiate arbitration if the labor dispute is not worked out in-house and individually within the Company in the first two steps where the charging party is either alone or must pay for a lawyer to proceed. (Jt. Exh. M at p. 4–6.) In addition, under Respondents' Program, the charging party is liable for Respondents' attorney fees and costs if the Company prevails under certain conditions. (Jt. Exh. M, at p. 12.) Finally, under Respondents' Program, the charging party is subject to three steps or proceedings, possibly four, if either party elects to pursue nonbinding mediation. (Jt. Exh. M at p. 4–6.)

Thus, ignoring the validity of the Program under the Act, given the choice between the status quo and Respondents' Program, it is less expensive, more efficient, and more feasible for a charging party to proceed with his or her work-related claim under the status quo than in the Program. Consequently, I find that Respondents' California employees do not gain any benefit or advantage pursuing their work-related claims individually in mandatory arbitration under the Program rather than through the status quo of protected concerted conduct through a collective or representative action at the NLRB.

This case is similar to other recent cases decided by other administrative law judges, but not yet addressed by the Board, that have decided whether an employer's mandatory arbitration program with an opt-out provision is truly voluntary on employees who must take affirmative action to opt-out or, instead, a form of involuntary interference on an employee's ability to participate in protected activities under the Act. Therefore, this case is different and distinguishable from the *D. R. Horton* case referenced above. See, i.e., *24 Hour Fitness USA, Inc.*, JD(SF) 51–12, 2012 WL 5495007 (Nov. 6, 2012), respondent's exceptions filed Jan. 3, 2013; *Mastec Services*, JD(NY) 25–13, 2013 WL 2409181 (June 3, 2013), respondent's exceptions filed June 28, 2013; and *Bloomingtons, Inc.*, JD(SF) 29–13, 2013 WL _____ (June 25, 2013), respondent's exceptions filed August 12 and general counsel's exceptions filed August 13, 2013. I agree with the legal analysis applied by my colleagues in the *24 Hour Fitness, Inc.* and *Mastec Services* cases and respectfully disagree with my colleague in the *Bloomingtons, Inc.* case as explained hereafter.

b. General policy behind the Act and the NLA

Section 7 of the Act guarantees employees the right to invoke procedures generally available under State or Federal law for concertedly pursuing employment-related legal claims without employer coercion, restraint, or interference. *D. R. Horton, Inc.*, 357 NLRB No. 184, slip op. at 10 (2012); see also *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567 slip op. at 10568 (1978). By imposing on employees, as a condition of employment, a policy that precludes collective, representative, and classwide actions and compels them to affirmatively send a notice via certified mail just to maintain the status quo, Respondents have unlawfully denied employees their right to act collectively and voluntarily. Section 8(a)(1) prohibits employers from compelling individual employees, as a condition of employment, to waive their Section 7 substantive right to protected concerted conduct for mutual aid and protection triggered by workplace terms and conditions.

The NLA and the NLRA were enacted to level the playing field between employers on one side and their unsophisticated, powerless, unaware, and/or otherwise vulnerable employees, on the other side. See 29 U.S.C. § 151; *24 Hour Fitness USA, Inc.*, supra at 15 (The case describes the public policy declarations in the NLA and the NLRA.). The fact that the NLA and the NLRA were enacted *after* the FAA brings the FAA's savings clause into play to limit the FAA if it conflicts or interferes with the NLA or the NLRA. See 9 U.S.C. § 2 ("A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").

Given the purposes and public policy behind the NLA and NLRA to protect those individual employees having less bargaining power than their employers, collective and representative claims require multiple parties prosecuting an action given the long history of abuse by employers over their less powerful employees. Strength in numbers is more than a colloquialism when an individual employee faces or dares to engage in protected concerted conduct with his or her more powerful employer. Finally, for matters under the NLRA, the individual action has never been an option as stated herein the purpose and goal of the NLRA is to instill by way of collective action substantive rights upon employees to proceed with their work-related claims without interference, coercion, or restraint. See Section 7 of the Act.

The Program here imposes a waiver of Section 7 rights at a time when employees are unlikely to have any awareness of employment issues that may be resolved most effectively by collective legal action, or of any other employees' efforts to act concertedly to redress issues of common concern. The Program's confidentiality clause prevents all employees from discussing with other employees the arbitration process or the results of arbitration. Moreover, the Program here imposes a waiver in circumstances where employees have no notice of their Section 7 rights to engage in class or collective legal activity or that a prohibition of such activity violates Section 8(a)(1) of the Act. As noted by the Supreme Court:

[C]oncerted activity rights] are not viable in a vacuum; their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others.

Central Hardware Co. v. NLRB, 407 U.S. 539, 543 (1972).

c. The NLRA vs. the FAA

While in recent cases, the Supreme Court has found the FAA to be the Swiss Army knife of the dispute resolution world for large complex commercial cases, large class-action consumer lawsuits, and to preempt various proceedings involving State laws, there is a limit to the FAA's utility when it effects collective or representative claims under the NLRA. See *Kilgore v. KeyBank, National Assn.*, 673 F3d 947, 955 (9th Cir. 2012) (Congress intended to keep claims under the NLRA out of arbitration proceedings.)⁴ While the FAA may be a favored benefit for some types of litigation, it is not favored or beneficial to an unaware and less powerful individual charging party versus their employer engaging in protected concerted conduct. Respondents' Program, even if employees entered into by choice, unlawfully "[s]eeks to erect 'a dam at the source of supply' of potential, protected activity" and "therefore interfere[s] with employees' exercise of their Section 7 rights." *Parexel International*, 356 NLRB No. 82, slip op. at 4 (2011), quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185 (1941).

As an appointed judicial officer at this Agency, I am empowered to protect the NLRA from attack be it from an overextended FAA or otherwise. To maintain the status quo, the FAA should not trump the NLA or the NLRA. See *Sullivan & Glyn*, "Horton Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution," 64 Ala. L. Rev. 1013, 1015, 1020, 1034-1054 (2013). Also as the Board emphasized in *D. R. Horton*, "the intent of the FAA was to leave substantive rights undisturbed." *D. R. Horton*, supra, slip op. at 11. As stated above, the Program here is unlawful because it compels Respondents' employees to waive their substantive right to pursue work-related claims in a collective or class action, a Program that forbids class or collective actions in any forum. See *D. R. Horton*, supra, slip op. at 10-11. As such, the Program is unlawful and violates public policy because it requires employees to waive the rights guaranteed under the NLRA as a condition of employment.

Moreover, the Program is unlawful on public policy grounds because it operates as a prospective waiver of Respondents' employees' right to pursue future protected concerted conduct in the form of collective or representative actions or seek reme-

⁴ Generally speaking under established precedent, the Board finds deferral to arbitration appropriate when the following conditions are met: the parties' dispute arises within the confines of a long and productive collective-bargaining relationship; there is no claim of animosity to employees' exercise of Sec. 7 rights; the parties' agreement provides for arbitration in a broad range of disputes; the parties' arbitration clause clearly encompasses the dispute at issue; the party seeking deferral has asserted its willingness to utilize arbitration to resolve the dispute; and the dispute is well suited to resolution by arbitration. See *Sheet Metal Workers Local 18 (Everbrite, Inc.)*, 359 NLRB No. 121 (2013), citing *United Technologies*, 268 NLRB 557, 558 (1984); accord: *Collyer Insulated Wire*, 192 NLRB 837, 842 (1971).

dies provided by the NLRA such as cease and desist orders and notice provisions to fellow employees. Respondents' employees cannot be lawfully compelled to affirmatively act (opt-out, via certified mail, within 60 days of signing the Acknowledgment) in order to maintain the status quo—their substantive statutory rights under Section 7 of the Act. See *Ishikawa Gasket America, Inc.*, 337 NLRB 175, 175–176 (2001), *enfd.* 354 F.3d 534 (6th Cir. 2004) (Future rights of employees as well as the rights of the public may not be traded away in a settlement agreement for monetary consideration.); see also *Mastec Services*, *supra* at 5–6 (same). Stated differently, the requirement that Respondents' employees must affirmatively act to preserve rights already protected by Section 7 of the Act and return to the status quo through the opt-out process is an unlawful burden on the substantive right of employees to engage in protected concerted conduct through collective or representative litigation that may arise in the future. See *24 Hour Fitness, Inc.*, *supra* at 16. Moreover, the opt-out language is unlawful because it forces Respondents' employees to prospectively waive their Section 7 right to participate in class or collective actions.

To allow the FAA to trump or somehow overrule the NLA and NLRA would be to take us back to the oppressive work conditions of the late 1920s. Employees today remain reluctant to pursue individual labor claims against their employer because they remain unsophisticated, powerless, unaware, and/or vulnerable on their own. Employees are reluctant to give affirmative notice and bring attention to themselves just to make noise and jump through hoops solely to maintain the status quo of having free and quick access to litigate their collective and representative claims and engage in protected concerted conduct at the NLRB. I find that there is no consideration for an employee's promise to forgo future unfair labor practice collective or representative claims at the NLRB in exchange for the being forced to arbitrate these same claims solely on an individual basis.

d. The opt-out requirement is unlawful

The Charging Party and other California employees under Respondents' opt-out Program, must either affirmatively opt-out of the Program within 60 days of the effective date in 2007 or within 60 days of the start of their employment by mailing notice via certified mail to an address deeply embedded at page 14 of the Rules. (Jt. Exh. M at p. 14.) Respondents argue that the Charging Party did not choose to opt-out of the Program, “instead opting to continue to voluntarily participate in the [P]rogram.” (R. Br. at 5.)

Giving California employees this limited opportunity to opt out of the Program during their first 60 days of employment while they may be on probation or simply unaware or afraid to act or proceed more than individually does not adequately protect employees' Section 7 rights and does not make the program voluntary. Cf., e.g., *Williams v. Securitas Sec. Services*, 2011 WL 2713741, at 2 (e.d. Pa. 2011) (“[the employer] intends to bind its employees unless they opt out by calling a phone number deeply embedded in the ‘agreement’ within 30 days even though the employee never signs the document. Quite simply, this Agreement stands the concept of fair dealing on its head”).

I further find that Respondents' opt-out policy would have a reasonable tendency to chill employees from exercising their statutory rights because Respondents' employees are required to take affirmative action that draws attention to themselves such as sending notice that they are opting out of the Program via certified mail to Respondents. In addition, Respondents' requirement that their California employees affirmatively opt-out of the Program to preserve their Section 7 rights is an unlawful burden on the employees' right to engage in collective litigation. Respondents do not cite any cases on point that hold differently or address employees' Section 7 right to act concertedly, including their substantive statutory right to bring collective or class claims, or whether that right can be irrevocably waived with respect to all future claims. I find that by imposing the immediate and affirmative requirement on employees to maintain their Section 7 rights, or lose them entirely, Respondents interfere with their employees' exercise of those statutory rights.

The Act protects “concerted activity” such as the right to strike and, similarly, the filing and pursuit of collective, representative, and classwide work-related claims, because Congress believed that, individually, employees could not and would not effectively protect their legitimate interests. A notice rule, applied to concerted activity, requires that each individual inform the employer of his or her intention to engage in concerted activity in order for the activity to be protected. *Special Touch Home Care Services*, 357 NLRB No. 2, slip op. at 7 (2011). The Board, through: (1) the premises of the Act; (2) Congress' decision to impose a duty to give notice *only* on unions; and (3) its own experience with labor-management relations, “all suggest that permitting an employer to compel employees to provide individual notice of participation in collective action would impose a significant burden on the right to strike, both as to individual employees and employees as a group.” *Id.*; *D. R. Horton*, *supra*, slip op. at 3 (quoting same). Just the same here, a significant burden exists on the right to engage in protected concerted conduct through a collective or representative action, both to individual employees and employees as a group who are compelled to provide individual opt-out notice of participation in the protected right to the employer.

Not only would individual employees be faced with the potentially intimidating prospect of telling their employer that they intend to take action that the employer might view unfavorably, but the ability of employees as a group to mount an effective strike would also depend on the willingness of individual employees to so notify the employer.

Special Touch Home Care Services, *supra*, slip op. at 7. As stated above, I find that the same significant burden, and intimidation fear applies to Respondents' opt-out notice rule interfering with their California employees' rights to engage in protected concerted conduct such as pursuing a collective or representative work-related action as it does to a notice rule compelling the same interferes with an employee's to the right to strike. Both the right to engage in collective or representative actions and a right to strike are equally viewed a protected concerted conduct.

I further find that the opt-out policy is unconscionable as it provides Respondents' California employees something (the compelled opt-out requirement) that has no value. It involuntarily forces employees to bring attention to their actions by affirmatively opting out through the compelled use and burdensome procedure and expense of certified mail to the Company just to return to the status quo—proceeding unabated, at present or in the future, in a collective and representative manner to engage in protected concerted conduct before the NLRB under the NLRA.

e. The Program's confidentiality language

Finally, the Acting General Counsel raises further challenges the legality of the Program's confidentiality provisions and points out that "even for employees who avail themselves to the opt-out provision, the . . . Rules substantially interfere with Section 7 activity by interfering with concerted activity between opting-out and nonopting out employees." (AGC Br. at 8.) In addition, the Acting General Counsel later argues that because an employee who proceeds to arbitration may not disclose any information obtained during that proceeding, or the results of the arbitration, this would presumably prevent nonopting-out employees who had prevailed in arbitration from advising their co-workers with regard to similar work-related claims, including employees who had opted opted-out. (AGC Br. at 10.)

The Board has consistently held that a confidentiality provision which expressly prohibits employees from discussing among themselves, or sharing with others, information relating to wages, hours, or working conditions, or other terms and conditions of employment violates Section 8(a)(1) even if it was never enforced and was not unlawfully motivated. See, e.g., *Double Eagle Hotel & Casino*, 341 NLRB 112, 115 (2004).

The relevant Program provision states:

The parties will have access throughout the arbitration proceedings to information that may be sensitive to the other party. Information disclosed by the parties or witnesses shall remain confidential. All records, reports or other documents disclosed by either party shall be confidential. The results of the arbitration, including any award, are confidential.

I find this provision would reasonably restrict employees from disclosing to other employees information about any employment disputes subject to the Program. Employees would reasonably construe this provision as barring them from discussing the substance and outcome of an arbitration regarding their terms or conditions of employment, and it is therefore overly broad. Moreover, the effect of this prohibition as applied to arbitrations concerning wages, hours, and working conditions would be to create an unlawful barrier to group action. Under the Program, employees are not only precluded from proceeding together in arbitration, they are precluded by the confidentiality provision from discussing any aspect of the arbitration including information disclosed in the proceeding, all records, reports, or other documents, as well as all results, decision, and award from the arbitration proceedings. As the Acting General Counsel accurately points out, the Program substantially interferes with Section 7 activity by preventing

protected concerted conduct between opting-out and opting-in employees.

Accordingly, because a reasonable employee would interpret the Program's confidentiality provision as an unlawful instruction not to talk about their working conditions, I find that by maintaining the Program as a condition of employment as alleged, it violates Section 8(a)(1) of the Act. Furthermore, I also find that the Program is a condition of employment that requires employees to waive their right to maintain class, collective, or representative actions in all forums, whether arbitral or judicial, in violation of Section 8(a)(1) of the Act. Finally, for the reasons stated above, I further find that the Program unlawful under Section 8(a)(1) of the Act and in violation of public policy because Respondents cannot lawfully require its employees to affirmatively act or opt-out via certified mail within 60 days of signing the Acknowledgment just to maintain the status quo of Section 7 under the Act. This illegal opt-out requirement is not voluntary, chills an employee's ability to maintain his or her rights under the Act, and restrains or interferes with employees' substantive rights under Section 7 to engage in protected concerted conduct.

4. Respondents' employees would reasonably read the Arbitration Program to prohibit them from filing unfair labor practice charges with the Board in violation of Section 8(a)(1) of the Act

Paragraphs 3(b), 4, and 5 of the complaint allege that at all material times since 2007, employees would reasonably conclude that the Program, as a condition of employment, precludes them from filing unfair labor practice charges with the Board as well as from engaging in conduct protected by Section 7 of the Act.

The Acting General Counsel, however, asserts that the Program precludes employees from filing unfair labor practice charges with the Board. On the other hand, Respondents argue that the Program does not and could not reasonably be read to prohibit employees from filing charges with the Board.

The Program is imposed on all employees as a condition of hiring or continued employment by Respondents, and it is therefore treated in the same manner as other unilaterally implemented workplace rules. When evaluating whether a rule, including a mandatory arbitration policy, violates Section 8(a)(1), the Board applies the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). See *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), *enfd.* 255 Fed. Appx. 527 (D.C. Cir. 2007); *D. R. Horton*, *supra*, slip op. at 4–6. Under *Lutheran Heritage*, the first inquiry is whether the rule explicitly restricts activities protected by Section 7. If it does, the rule is unlawful. If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage*, *supra* at 647.

In the instant case, I find that the Program is unlawful on its face as it interferes with and restricts Respondents' employees from engaging in protected concerted conduct under Section 7

of the Act and explicitly precludes them from pursuing class, collective, or representative actions in all forums.

Alternatively, as stated above, in evaluating the impact of a rule on employees, the inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). A rule does not violate the Act if a reasonable employee merely *could* conceivably read it as barring Section 7 activity. Rather, the inquiry is whether a reasonable employee *would* read the rule as prohibiting Section 7 activity. *Lutheran Heritage*, supra. The Board must give the rule under consideration a reasonable reading and ambiguities are construed against its promulgator. *Lutheran Heritage*, supra at 647; citing *Lafayette Park Hotel*, 326 NLRB at 828. Moreover, the Board must “refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights.” *Lutheran Heritage*, supra at 646.

Looking at the Program as a whole, I find the Rules to be overbroad, confusing, and ambiguous so that a reasonable employee would read them as prohibiting him or her from filing unfair labor practice charges with the Board. For example, as pointed out by the Acting General Counsel, page 2 of the Rules provides that they “govern procedures for the resolution and arbitration of all workplace disputes or claims,” and that all “Covered Claims” must be arbitrated. (Jt. Exh. M at 2.) Covered claims under the Rules include “any claim asserting the violation or infringement of a legally protected right, whether based in statutory or common law . . . arising out of or in any way relating to the employee’s employment . . . , unless specifically excluded as noted in “What is Not a Covered Claim” below.” Id at 3–4. Examples of “Covered Claims,” include many of the same things that make up unfair labor practice claims under the Act such as “Discrimination or harassment on [an] unlawful basis,” “Retaliation for complaining about discrimination or harassment,” “[v]iolations of any . . . federal . . . statute,” including “the Taft-Hartley Act . . . , [r]etaliation for . . . exercising your protected rights under any statute,” and “claims of wrongful termination or constructive discharge.” Id.

As stated above, many of Respondents’ “Covered Claims” are interchangeable examples of unfair labor practice claims. Moreover, unlawful discrimination and retaliation based on activity protected by Section 7 of the Act likewise could be considered a “Covered Claim” under the Rules. At this point, any possible reading leads to the conclusion that arbitration would be the employee’s sole and exclusive remedy for an unfair labor practice dispute.

It is not until page 4 of the Rules that the Program first lists “Matters within the jurisdiction of the National Labor Relations Board” as part of a short list of “What is Not a Covered Claim.” Id. at 4. Even the meaning of this statement is unclear as it finally comes after mentioning that many potential NLRA disputes must be arbitrated as individual claims. Moreover, while the Rules state on page 2 that they “do not preclude any employee from filing a charge with a state, local, or federal administrative agency such as the Equal Employment Opportunity Commission,” any reading of this provision to apply to the NLRB is undercut by the contrary statements that come both before and after it.

The Respondents place strong reliance on this single sentence to argue that such explicit language “obviously and explicitly permits employees to access the Board.” (R. Br. at 1, 11–15.) As just discussed, however, this sentence is illusory, because when this single sentence is read in conjunction with the “Covered Claim” language through numerous examples of the types of claims that fall within the NLRB’s jurisdiction, the picture is confusing at best. This is particularly true since nowhere in the Program are disputes forming the basis for an NLRB charge defined, either by plain terms or by way of example, as “What is Not a Covered Claim.”

I find the Program language is overly broad and that most non-lawyer employees would not be familiar with such intricacies, nuances, or differences between claims within NLRB jurisdiction and the Program’s Covered Claims. I further find that an employee would easily construe the Program to require arbitration of claimed violations of the Act, a Federal statute, and such common claims before the NLRB as those involving retaliation allegations for filing a claim under the Act and frequent claims of wrongful termination and constructive discharge—claims defined as Covered Claims in the Program.⁵

Finally, while Respondents’ Program Rules exclude matters within the jurisdiction of the NLRB from arbitration, the exclusion is not mentioned at all in Respondents’ Brochure or Program Acknowledgment that every employee must sign when hired. As a result, there is a conflict between the Program Rules and the Brochure and Acknowledgment form language that creates an ambiguity that would reasonably lead employees to believe that their right to file unfair labor practice claims with the Board is prohibited or restricted.

Considering that ambiguities must be construed against the employer, I find the Program violates Section 8(a)(1) because it explicitly interferes with rights protected by Section 7, and it would cause employees to reasonably believe that filing charges with the Board are either prohibited or would be futile.

CONCLUSIONS OF LAW

1. Respondents, GameStop Corp., GameStop, Inc., Sunrise Publications, Inc., and GameStop Texas Ltd. (L.P.) (collectively Respondents or the Company), are employers within the meaning of Section 2(6) and (7) of the Act.

2. Respondents violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory and binding arbitration policy which required employees to resolve employment-related

⁵ Respondents’ clever packaged Program refers to its 20-something videogame enthusiast employees as “associates” and misleads them by selling the Program as “GameStop C.A.R.E.S.” and the Program “does not change any substantive rights but simply moves the venue for the dispute out of the courtroom and into arbitration”, “GameStop C.A.R.E.S. is designed as a user-friendly way to resolve disputes with all of the remedies of litigation, but without the delays and cost” and “[t]he arbitrator can award the same remedies as a court.” Jt. Exh. M at 1, Jt. Exh. N at 2. As explained above, instead of treating its employees fairly and responsibly, Respondents’ Program restrains and interferes with its employees’ Sec. 7 rights to engage in protected concerted conduct through collective or representative actions with collective remedies. The Program’s misleading language is akin to the slick advertising campaign of the 1960s and 1970s where a cigarette manufacturer targeted teenagers with a trendy cartoon camel.

disputes exclusively through individual arbitration proceedings and to relinquish any right they have to resolve such disputes through collective or class action.

3. Respondents violated Section 8(a)(1) of the Act by maintaining a mandatory and binding arbitration policy that restricts employees' protected activity or that employees reasonably would believe bars or restricts their right to engage in protected activity and/or file charges with the National Labor Relations Board.

4. Respondents violated Section 8(a)(1) of the Act by requiring employees to maintain the confidentiality of the existence, content, and outcome of all arbitration proceedings.

5. Respondents' conduct found above affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

In accord with the request of the Acting General Counsel, my recommended order will also require Respondents to notify "all judicial and arbitral forums wherein (the Program) has been enforced that it no longer opposes the seeking of collective or class action type relief." This will include a requirement that Respondent: (1) withdraw any pending motion for individual arbitration, and (2) request any appropriate court to vacate its order for individual arbitration granted at Respondents' request if a motion to vacate can still be timely filed.

As I have concluded that the C.A.R.E.S. Arbitration Program including its Rules, Brochure, and Acknowledgment documents is unlawful, the recommended order requires that Respondents revise or rescind it, and advise their employees in writing that the rule has been so revised or rescinded. Because the Respondents utilized the C.A.R.E.S. Arbitration Program including its Rules, Brochure, and Acknowledgment documents on a corporatewide basis, Respondents shall post a notice at all locations where the C.A.R.E.S. Arbitration Program including its Rules, Brochure, and Acknowledgment documents was in effect. See, e.g., *U-Haul Co. of California*, supra at fn. 2 (2006); *D. R. Horton*, supra, slip op. at 17.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

ORDER

The Respondents, GameStop Corp., GameStop, Inc., Sunrise Publications, Inc., and GameStop Texas Ltd. (L.P.) (collectively Respondents), their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining any provision in the arbitration of disputes section of its C.A.R.E.S. Arbitration Program including its Rules, Brochure, and Acknowledgment documents that prohib-

its its employees or would reasonably lead employees from bringing or participating in class or collective actions brought in any arbitral or judicial forum that relates to their wages, hours, or other terms and conditions of employment.

(b) Enforcing, or seeking to enforce, any provision in the C.A.R.E.S. Arbitration Program including its Rules, Brochure, and Acknowledgment documents that prohibits employees or would reasonably lead employees from bringing or participating in class or collective actions brought in any arbitral or judicial forum that relates to their wages, hours, or other terms and conditions of employment.

(c) Maintaining a mandatory and binding arbitration policy that restricts employees' protected concerted activity or that employees reasonably would believe bars or restricts their right to engage in protected concerted activity and/or file charges with the National Labor Relations Board.

(d) Maintaining a policy requiring employees to maintain the confidentiality of the content and outcome of all arbitration proceedings.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

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

(a) Remove from the C.A.R.E.S. Arbitration Program including its Rules, Brochure, and Acknowledgment documents any prohibition against employees from bringing or participating in class or collective actions brought in any arbitral or judicial forum that relates to their wages, hours, or other terms and conditions of employment.

(b) Rescind or revise the C.A.R.E.S. Arbitration Program including its Rules, Brochure, and Acknowledgment documents to make it clear to employees that the agreement does not constitute a waiver in all forums of their right to maintain employment-related class or collective actions, does not restrict employees' right to file charges with the National Labor Relations Board or engage in protected activity, and does not require employees to keep information regarding their Section 7 activity confidential.

(c) Notify present and future employees individually that the existing prohibition against bringing or participating in class or collective actions in any arbitral or judicial forum that relates to their wages, hours, or other terms and conditions of employment currently contained in the C.A.R.E.S. Arbitration Program including its Rules, Brochure, and Acknowledgment documents will be given no effect and that the provision will be removed from subsequent editions of the C.A.R.E.S. Arbitration Program including its Rules, Brochure, and Acknowledgment documents.

(d) Notify any arbitral or judicial tribunal where it has pursued the enforcement of the prohibition against bringing or participating in class or collective actions relating to the wages, hours, or other terms and conditions of employment of its employees since April 1, 2010, that it desires to withdraw any such motion or request, and that it no longer objects to it employees bringing or participating in such class or collective actions.

⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Within 14 days after service by the Region, post at all of its facilities located in the United States and its territories copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 20 after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, inasmuch as Respondents customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the posted hard copy notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since April 1, 2010.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. August 29, 2013

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce a mandatory and binding arbitration policy that waives the right to maintain class or collective actions in all forums, whether arbitral or judicial.

⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

WE WILL NOT maintain a mandatory and binding arbitration policy that restricts employees' protected concerted activity or that employees reasonably would believe bars or restricts their right to engage in protected concerted activity and/or file charges with the National Labor Relations Board.

WE WILL NOT maintain a policy requiring employees to maintain the confidentiality of the content and outcome of all arbitration proceedings.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

WE WILL rescind or revise the C.A.R.E.S. Arbitration Program and all related documents to make it clear to employees that the agreement does not constitute a waiver of their right in all forums to maintain class or collective actions, does not restrict employees' right to file charges with the National Labor Relations Board or engage in other protected activity, and does not require employees to keep information regarding their Section 7 activity confidential.

WE WILL remove the opt-out provision for California employees from the C.A.R.E.S. Arbitration Program and all related future documents any prohibition against you from bringing or participating in class or collective actions relates to your wages, hours, or other terms and conditions of employment brought in any arbitral or judicial forum.

WE WILL remove from the C.A.R.E.S. Arbitration Program and all related future documents any prohibition against you from disclosing the content or results of any arbitration conducted under that policy

WE WILL notify present and future employees individually that our existing prohibition against bringing or participating in class or collective actions in any arbitral or judicial forum that relate to their wages, hours, or other terms and conditions of employment currently contained in the C.A.R.E.S. Arbitration Program and all related documents will be given no effect and that the provision will be removed from subsequent editions of the C.A.R.E.S. Program.

WE WILL notify present and future employees individually that our existing prohibition against disclosing the content or results of any arbitration conducted under our C.A.R.E.S. Arbitration Program and all related documents will be given no effect and that the provision will be removed from subsequent editions of our C.A.R.E.S. Program.

WE WILL notify any arbitral or judicial tribunal where we have pursued the enforcement of our prohibition against bringing or participating in class or collective actions that relate to the wages, hours, or other terms and conditions of employment of our employees since April 1, 2010, that we desire to withdraw any such motion or request, and that WE WILL no longer object to our employees bringing or participating in such class or collective actions.

GAMESTOP CORP., GAMESTOP, INC., SUNRISE PUBLICATIONS, INC., AND GAMESTOP TEXAS LTD. (L.P.) (COLLECTIVELY RESPONDENTS)