

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

CORNERSTONE HEALTH CARE GROUP,

Respondent

Case No. 16-CA-154503

and

ROMAINE REEVES, An Individual,

Charging Party

BRIEF OF CORNERSTONE HEALTH CARE GROUP

Frederick C. Miner
LITTLER MENDELSON, P.C.
2425 E. Camelback Rd., Suite 900
Phoenix, Arizona 85016
TEL: 602.474.3653
FAX: 602.391-2836

Attorneys for CORNERSTONE
HEALTH CARE GROUP

TABLE OF CONTENTS

I. INTRODUCTION AND FACTUAL BACKGROUND1

II. STATEMENT OF THE ISSUES.....2

III. THE CLASS ACTION WAIVER AND REPRESENTATIVE ACTION WAIVER
DO NOT VIOLATE SECTION 8(A)(1) OF THE ACT3

IV. THE POLICY AGAINST AUDIO AND VIDEO RECORDINGS IS NOT OVERLY
BROAD.....8

V. CONCLUSION.....12

CERTIFICATE OF SERVICE13

I. INTRODUCTION AND FACTUAL BACKGROUND

Cornerstone Health Care Group operates acute care hospitals. The Complaint challenges language in a predispute workplace arbitration agreement promulgated in June of 2015. In the agreement, employees waive their ability to assert claims against Cornerstone on a class or representative basis. Complaint ¶ 5. The General Counsel contends that the Class Action Waiver and Representative Action Waiver in the agreement violate Section 8(a)(1) of the National Labor Relations Act (the “Act”). *Id.* The Complaint also alleges that Cornerstone maintains a handbook rule restricting audio and video recordings that interferes with Section 7 rights, in violation of Section 8(a)(1) of the Act. *Id.* ¶ 6.

As demonstrated below, neither argument has any merit. Class and representative action waivers such as at issue here are valid under applicable judicial authorities. The General Counsel’s claim here is directly contrary to controlling decisions of the U. S. Court of Appeals for the Fifth Circuit. Cornerstone has maintained since before issuance of the Complaint, in its Answer, and reiterates here that any adverse decision in this case will be appealed directly to the Fifth Circuit. Moreover, the handbook rule at issue does not prevent employees from documenting workplace conditions of concern to them, and it does not restrict Section 7 rights. Cornerstone denies the unfair labor practices alleged in the Complaint. Answer ¶¶ 5-6.

The relevant facts are undisputed. Cornerstone is a healthcare institution with care facilities in six states, including Texas. Stipulation of Facts ¶ 9. About June 1, 2015, Cornerstone promulgated a mandatory predispute arbitration policy that includes the following section titled “Class and Representative Action Waivers”:

THE COMPANY AND YOU HEREBY WAIVE ANY RIGHT FOR ANY CLAIM OR DISPUTE TO BE BROUGHT, HEARD, DECIDED OR ARBITRATED AS A CLASS AND/OR COLLECTIVE ACTION (“Class Action Waiver”). Nor shall the arbitrator have any authority to hear or arbitrate any such Claims. Notwithstanding any other clause in this Agreement, the Class Action

Waiver shall not be severable from this Agreement in any instance in which the dispute is brought as a class and/or collective action.

THE COMPANY AND YOU ALSO HEREBY WAIVE ANY RIGHT FOR ANY CLAIM OR DISPUTE TO BE BROUGHT, HEARD, DECIDED OR ARBITRATED AS A REPRESENTATIVE ACTION (“Representative Action Waiver”). Nor shall the arbitrator have any authority to hear or arbitrate any such dispute. However, this Representative Action Waiver may be severed if it is found to be unenforceable by a court of competent jurisdiction, and following severance the representative action may be brought in a court of law.

Id.

Also about June 1, 2015, Cornerstone promulgated a Policy Against Audio and Video

Recordings that provides in pertinent part as follows:

Without the prior written authorization of the Corporate VP of Human Resources in conjunction with a designated Company legal representative, no employee may openly or secretly tape or otherwise surreptitiously record, or videotape, any conversation, communication, activity, or event, which in any way involves the Company or employees of the Company, or any customers or clients, or any other individual with whom the Company is doing business or intending to do business in any capacity (i.e., vendors, suppliers, consultants, attorneys, independent contractors). This policy also applies to conversations and communications with any other third-party unrelated to the Company including, but not limited to, outside legal counsel, auditors and regulatory officials.

“Taping” and “Recording” under this policy includes the recording of any conversation or communications regardless of whether the conversation or communication is taking place in person, over the telephone, or via any other electronic communications device or equipment. This is also regardless of the method used to tape or record (e.g., as with a tape recorder, video recorder, mechanical recording, or wiretapping equipment), and regardless of whether the conversation or communication takes place on or off the Company’s premises.

Id. Violations of the Policy Against Audio and Video Recordings may result in discipline. *Id.*

The Board issued its Order Approving Stipulation, Granting Motion and Transferring Proceeding on April 15, 2016. This Brief is timely submitted pursuant to that Order.

II. STATEMENT OF THE ISSUES

The issues to be resolved in this matter are whether the Class Action Waiver,

Representative Action Waiver, and Policy Against Audio and Video Recordings interfere with, restrain, or coerce employees in the exercise of the rights guaranteed under Section 7 of the Act in violation of Section 8(a)(1) of the Act? Those questions should be answered in the negative.

III. THE CLASS ACTION WAIVER AND REPRESENTATIVE ACTION WAIVER DO NOT VIOLATE SECTION 8(a)(1) OF THE ACT

The General Counsel takes the position that the Class Action Waiver and Representative Action Waiver restrict employees' exercise of Section 7 rights, relying on the Board's faulty decision in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012) (*D.R. Horton I*).

In *D.R. Horton I*, a two Member panel of the Board concluded that an arbitration agreement requiring as a condition of employment all employees to agree to waive the right to bring class or collective actions in any forum violated Section 8(a)(1) of the Act. Specifically, the panel held that "an individual who files a class or collective action regarding wages, hours, or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7" because "[w]hen, as here, employers require employees to execute a waiver as a condition of employment, there is an implicit threat that if they refuse to do so, they will be fired or not hired."

The panel then considered whether its decision to invalidate the agreement was consistent with the language and goals of the FAA, which it acknowledged "manifests 'a liberal federal policy favoring arbitration agreements.'" *Id.* Crucially, the panel held that its decision did not conflict with the goals of the FAA because the right to bring a class or collective action was not merely a procedural right but rather, was a substantive right guaranteed by the NLRA as a form of concerted protected activity. *Id.* Thus, the Board purported to distinguish the United States Supreme Court's decisions in *Stolt Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010) and *AT&T Mobility v. Concepcion*, 131 S. Ct. 1740 (2011), which held,

respectively, that arbitrators *do not* have a right to preside over class proceedings and that it is *permissible* for arbitration agreements to ban such proceedings. The Court reasoned in both cases that arbitration is designed to provide an informal, simple and expedient mechanism for the resolution of disputes and is ill-suited to “bet the company” class proceedings.

D.R. Horton I was rejected by the Fifth Circuit in *D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344, 357 (5th Cir. 2013) (“*D.R. Horton II*”), which drew two crucial differences with the Board’s reasoning. First, the Fifth Circuit found, unlike the Board, that class and collective action waivers such as Cornerstone’s are valid because, at rock bottom, “[t]he use of class action procedures . . . is *not* a substantive right.” *Id.* at 357. An employee’s mandatory waiver *does not violate the NLRA. Id.*

Second, having found that mandatory class and collective action waivers are lawful under the NLRA, the court then turned to an analysis of whether the FAA and its underpinnings are offended by such a decision. In stark contrast to the Board panel’s reasoning, the court emphasized the controlling nature of *Concepcion* and its progeny, stating that “requiring the availability of class actions ‘interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.’” *Id.* at 359-60. The Court further expounded on whether NLRA-vested rights can be considered to override the FAA’s mandate supporting arbitration:

There is no argument that the NLRA’s text contains explicit language of a congressional intent to override the FAA. Instead, it is the general thrust of the NLRA—how it operates, its goal of equalizing bargaining power—from which the command potentially is found. For example, one of the NLRA’s purposes is to “protect[] the exercise by workers of full freedom of association ... for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.” 29 U.S.C. § 151. **Such general language is an insufficient congressional command, as much more explicit language has been rejected in the past.** Indeed, the text does not even mention arbitration. By comparison, statutory references to causes of action, filings in court, or allowing suits all have been found insufficient to infer a congressional command against application of the FAA. **Even explicit procedures for collective actions will not**

override the FAA. The NLRA does not explicitly provide for such a collective action, much less the procedures such an action would employ. 29 U.S.C. § 157. Thus, there is no basis on which to find that the text of the NLRA supports a congressional command to override the FAA.

Id. at 360 (emphasis added) (internal citations omitted).

Thus, in *D.R. Horton II* the court found that, “[b]ecause the Board’s interpretation does not fall within the FAA’s ‘saving clause,’ and because the NLRA does not contain a congressional command exempting the statute from application of the FAA, the [class action waiver] must be enforced according to its terms.” *Id.* at 362. By so holding, the Fifth Circuit concluded, as has “[e]very one of [its] sister circuits to consider the issue,” that “arbitration agreements containing class waivers [are] enforceable.” *Id.* at 362.

Courts in virtually every forum have agreed with the Fifth Circuit’s reasoning in *D.R. Horton II* and rejected challenges to class or representative action waivers in arbitration agreements. *See, e.g., Richards v. Ernst & Young, LLP*, 734 F.3d 871, 873–74 (9th Cir. 2013); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297–98 n. 8 (2d Cir.2013); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir.2013).¹

¹ *See, e.g., Diaz v. Michigan Logistics Inc.*, 2016 WL 866330, at *5 (E.D.N.Y. Mar. 1, 2016) (slip copy); *Levison v. MasTec, Inc.*, 2015 WL 5021645, at *2 (M.D. Fla. Aug. 25, 2015) (slip copy) (citing *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1330-36 (11th Cir. 2014)); *Nanavati v. Adecco USA, Inc.*, 99 F. Supp. 3d 1072, 1079 (N.D. Cal. 2015); *Patterson v. Raymours Furniture Co.*, 96 F. Supp. 3d 71, 80 (S.D.N.Y. 2015) (appeal filed in Second Circuit); *Ortiz v. Hobby Lobby Stores, Inc.*, 52 F. Supp. 3d 1070, 1083 (E.D. Cal. 2014); *Dixon v. NBCUniversal Media, LLC*, 947 F.Supp.2d 390, 403, n. 11 (S.D.N.Y. May 28, 2013); *Morris v. Ernst & Young LLP*, 2013 U.S. Dist. LEXIS 95714 at *34-37 (N.D. Cal. July 9, 2013); *Cunningham v. Leslie's Poolmart, Inc.*, 2013 U.S. Dist. LEXIS 90256 at *39-40, n. 11 (C.D. Cal. June 25, 2013); *Brown v. Citicorp Credit Servs.*, 2013 U.S. Dist. LEXIS 59616 at *4-5 (D. Id. April 24, 2013); *Noffsinger-Harrison v. LP Spring City LLC*, 2013 U.S. Dist. LEXIS 16442 at *15-16 (E.D. Tenn. Feb. 7, 2013); *Miguel v. JPMorgan Chase Bank, N.A.*, 2013 U.S. Dist. LEXIS 16865 at *23-25 (C.D. Cal. Feb. 5, 2013); *Long v. BDP Int’l, Inc.*, 919 F.Supp.2d 832, 852, n. 11 (S.D. Tex. Jan. 22, 2013); *Carey v. 24 Hour Fitness USA, Inc.*, 2012 U.S. Dist. LEXIS 143879, *4-6 (S.D. Tex. October 4, 2012); *Jasso v. Money Mart Express, Inc.*, 879 F.Supp.2d 1038, 1049 (N.D. Cal. 2012); *Morvant v. P.F. Chang’s China Bistro, Inc.*, 870 F.Supp.2d 831,

Most recently, on October 26, 2015, the Fifth Circuit issued its decision in *Murphy Oil v. NLRB*, 808 F.3d 1013 (5th Cir. 2015), reiterating and reaffirming its holding in *D.R. Horton II*. There, the court noted that the Board had “disregarded this court’s contrary *D.R. Horton* ruling” that class action waivers in arbitration agreements are enforceable. *Murphy Oil*, 808 F.3d at 1018 (citing *D.R. Horton*, 737 F.3d at 362). The employer in *Murphy Oil* argued “the Board’s explicit ‘defiance’ of *D.R. Horton* warrants issuing a writ or holding the Board in contempt so as to ‘restrain [it] from continuing its nonacquiescence practice with respect to this [c]ourt’s directive.’” *Id.* The Fifth Circuit declined to issue a writ or hold the Board in contempt because the Board claimed it could not predict where the employer would seek review. The Fifth Circuit stated, “[a]n administrative agency’s need to acquiesce to an earlier circuit court decision when

845 (N.D. Cal. 2012); *Delock v. Securitas Security Services USA, Inc.*, 883 F.Supp.2d 784, 789-91 (E.D. Ark. 2012); *Spears v. Waffle House*, 2012 U.S. Dist. LEXIS 90902, *5-6 (D. Kan. July 2, 2012); *De Oliveira v. Citicorp North America, Inc.*, 2012 U.S. Dist. LEXIS 69573, *6-7 (M.D. Fla. May 18, 2012); *LaVoice v. UBS Fin. Servs., Inc.*, 2012 U.S. Dist. LEXIS 5277, *19-20 (S.D.N.Y. Jan. 13, 2012); *Cohen v. UBS Fin. Servs.*, 2012 U.S. Dist. LEXIS 174700 (S.D.N.Y. Dec. 4, 2012); *Palmer v. Convergys Corp.*, 2012 U.S. Dist. LEXIS 16200, *7 n. 2 (M.D. Ga. February 9, 2012); *Nelsen v. Legacy Partners Residential, Inc.*, 207 Cal. App. 4th 1115, 1134 (2012); *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal. 4th 348, 372-73 (2014); *Truly Nolen of America v. Superior Court*, 208 Cal. App. 4th 487, 514-15 (2012); *Reyes v. Liberman Broadcasting, Inc.*, 208 Cal. App. 4th 1537, 1559-60 (2012); *Lloyd v. J.P. Morgan Chase & Co.*, 2013 U.S. Dist. LEXIS 129102, at *20, n. 7 (S.D.N.Y. September 9, 2013); *Ryan v. JPMorgan Chase & Co.*, 924 F.Supp.2d 559, 563 (S.D.N.Y. February 21, 2013); *Green v. Zachry Indus., Inc.*, 36 F.Supp.3d 669, 675 (W.D. Va. March 25, 2014); *Smith v. BT Conferencing, Inc.*, 2013 U.S. Dist. LEXIS 158362, at *22 (S.D. Ohio November 5, 2013); *Sylvester v. Wintrust Fin. Corp.*, 2013 U.S. Dist. LEXIS 140381, at *28 (N.D. Ill. September 30, 2013); *Hickey v. Brinker Int’l Payroll Co., L.P.*, 2014 U.S. Dist. LEXIS 20387, at *5 (D. Colo. February 18, 2014); *Martinez v. Leslie’s Poolmart, Inc.*, 2014 U.S. Dist. LEXIS 156218 at *12-13, n. 5 (C.D. Cal. November 3, 2014); *Chico v. Hilton Worldwide, Inc.*, 2014 U.S. Dist. LEXIS 147752 at *34 (C.D. Cal. October 7, 2014); *Fardig v. Hobby Lobby Stores, Inc.*, 2014 U.S. Dist. LEXIS 87284 at *24 (C.D. Cal. June 13, 2014); *Longnecker v. Am. Express Co.*, 2014 U.S. Dist. LEXIS 72554 at *30 (D. Ariz. May 28, 2014); *Cohn v. Ritz Transp., Inc.*, 2014 U.S. Dist. LEXIS 53381 at *9 (D. Nev. April 17, 2014); *Appelbaum v. AutoNation Inc.*, 2014 U.S. Dist. LEXIS 50588 at *29 (C.D. Cal. April 8, 2014); *Zabelny v. CashCall, Inc.*, 2014 U.S. Dist. LEXIS 2626 at *41 (D. Nev. January 8, 2014); *Siy v. CashCall, Inc.*, 2014 U.S. Dist. LEXIS 1472 at *40 (D. Nev. January 6, 2014); *Fimby-Christensen v. 24 Hour Fitness USA, Inc.*, 2013 U.S. Dist. LEXIS 166647 at *13-14 (N.D. Cal. November 22, 2013).

deciding similar issues in later cases will be affected by whether the new decision will be reviewed in that same circuit.” *Id.* “Murphy Oil could have sought review in (1) the circuit where the unfair labor practice allegedly took place, (2) any circuit in which Murphy Oil transacts business, or (3) the United States Court of Appeals for the District of Columbia.” *Id.* “The Board may well not know which circuit's law will be applied on a petition for review.” For that reason, “We do not celebrate the Board's failure to follow our *D.R. Horton* reasoning, but neither do we condemn its nonacquiescence” in that case. *Id.*

Unlike *Murphy Oil*, and as Cornerstone repeatedly has informed counsel for the General Counsel, there is no such doubt in this case. Both pre- and post-Complaint, Cornerstone has placed the Region, counsel for the General Counsel, and now the Board on notice of its intention to appeal any adverse ruling in this case to the Fifth Circuit. Because the matter is free from ambiguity, the Board's insistence upon finding the Class Action Waiver and Representative Action Waiver unlawful would constitute deliberate defiance of the court's rulings in *D. R. Horton II* and *Murphy Oil II*, and an act of judicial contempt.

Both *D.R. Horton* and *Murphy Oil* hold class and representative action waivers in arbitration agreements, such as promulgated by Cornerstone, do not violate Section 7. As such, the issuance of a decision against Cornerstone erroneously concluding that these provisions violate Section 7 would defy controlling Fifth Circuit precedent and exceed the Board's statutory authority. By doing so, the Board would be seeking to alter an arbitration agreement between Cornerstone and its employees in a manner that falls outside of, and conflicts with its statutory authority to enforce the Act. Cornerstone's relationship with its employees, and the mechanism for promptly resolving disputes arising out of their employment, would be materially altered in a manner that defies the Act as explicitly described by controlling Fifth Circuit law. Cornerstone

would be forced to appeal an illegal Decision, and would suffer a due process deprivation as a result of disregard for the law and the duties and powers of the agency.

The Board should apply the Fifth Circuit's decisions in *D.R. Horton II* and *Murphy Oil II* and their progeny here. Employees do not have a right under Section 7 to class or representative action procedures. The FAA's strong mandate in favor of binding arbitration agreements cannot be overridden by mere procedural rights. Class and representative action waivers like those at issue are valid and enforceable.

IV. THE POLICY AGAINST AUDIO AND VIDEO RECORDINGS IS NOT OVERLY BROAD

An employer commits an unfair labor practice when it maintains a work rule that "reasonably tends to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). Cornerstone's Policy Against Audio and Video Recordings is not overly broad because it does not restrict activities protected by Section 7. The Policy simply does not refer to wages, hours or other terms and conditions of employment. Rather, it prohibits audio recordings of matters related to the Company's business, and surreptitious video recordings, in a manner that protects its interests in promoting professional cooperation among care providers, and the privacy interests of patients and their families. These purposes do not implicate, and do not contradict, any employee rights protected by Section 7. The Policy preserves tools for employees to document their workplace concerns, and it places no restriction on communications about, or dissemination of such documentation to coworkers or the public.

A policy such as Cornerstone's, that does not apparently restrict any protected activity, may nevertheless be considered unlawful based upon a showing of one of the following: (1) employees would reasonably construe the policy to prohibit Section 7 activity; (2) the policy was promulgated in response to union activity; or (3) the policy has been applied to restrict the

exercise of Section 7 rights. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). The Complaint does not allege the existence of any union activity among employees, nor does it claim the Policy has resulted in the restriction of any employee Section 7 rights.

The issue raised by the Complaint is whether the Policy Against Audio and Video Recordings would reasonably be construed by Cornerstone employees to restrict conduct that the Act protects. In determining whether a challenged rule is lawful, the Board “give[s] the rule a reasonable reading,” in the sense that it will “refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights.” *Id.*

Reading the Policy from the standpoint of a Cornerstone employee, without construing phrases in isolation or improperly presuming interference, it plainly is lawful. It cannot be construed to prohibit any kind of organizational or otherwise protected, concerted activities without making the type of presumption that the Board specifically has cautioned against. The Policy prohibits audio “taping,” and it prohibits “surreptitiously record[ing], or videotap[ing]” Cornerstone or employee activities. The prohibition on *surreptitious recording* or *surreptitious videotaping* is in no way unlawful or restrictive of employee rights.² To the contrary, such surreptitious recordings are inimical to freedom of expression and cooperation by employees in the workplace. The Board long has noted the chilling, inhibiting effect of recordings on free and open discussion, even in the far more deliberative environment at the bargaining table. *See Architectural Fiberglass*, 165 NLRB 238 (1967) (insistence on recording negotiations unlawful, inasmuch as the recording process inhibits free and open dialog and frustrates and delays bargaining). In the same way, employees who suspect they are being monitored by audio or

² The rule is no broader than the laws in 11 states that prohibit the recording of any conversation without the consent of all parties. Finding the policy here interferes with Section 7 rights would require finding the laws in these 11 states are in conflict with the Act, something the Board has never suggested.

video surveillance are affirmatively chilled in their own conduct. This is critically important in a patient care environment like Cornerstone's, where service providers must communicate freely and work together with a sense of urgency regarding matters of life and death. The presence of audio or video surveillance inhibits the hospital's service and is a threat to patient care.

The prohibition on audio recordings is limited and far narrower than other similar prohibitions the Board has found lawful. In *Flagstaff Medical Center, Inc.*, 357 NLRB No. 65 (2011), the hospital adopted a rule prohibiting during work time any kind of electronically made or stored audio or photographic recordings, and further prohibiting at any time "the use of cameras for recording images of patients and/or hospital equipment, property, or facilities." The ALJ held the policy was lawful, and would not chill Section 7 rights. Rather, the policy reasonably would be construed by employees as limited, and it "was motivated by lawful business considerations designed to resolve legitimate patient privacy concerns." *Id.* The Board adopted the ALJ's decision that the employer's rule was "not unlawfully overbroad as it does not have a reasonable tendency to interfere with Section 7 activities." *Id.*, slip op. at 6. The Board also found the employer's "privacy interests of hospital patients are weighty," citing HIPAA regulations prohibiting disclosure of individually identifiable health information. The Board ruled that "[e]mployees would reasonably interpret [the employer's] rule as a legitimate means of protecting the privacy of patients and their hospital surroundings, not as a prohibition of protected activity." *Id.*

Cornerstone's Policy is narrower than the rule at issue in *Flagstaff Medical Center*. It does not categorically restrict all recording, and it does not prohibit any kind of recording based on the exercise of Section 7 rights. It does not restrict photographing or other forms of visual documentation, so long as it is not done in a surreptitious manner. Employees may document

matters related to their workplace and the hospital's business with the sole admonition that they may not use audio recordings or secretly make audio and video recordings for that purpose. In short, it does not purport to restrict or otherwise interfere with employees' ability to preserve information relating to the workplace, and as noted above, it places no restriction on employees' ability to disseminate information or otherwise communicate with one another, or the public, regarding their wages, hours or other terms and conditions of employment.

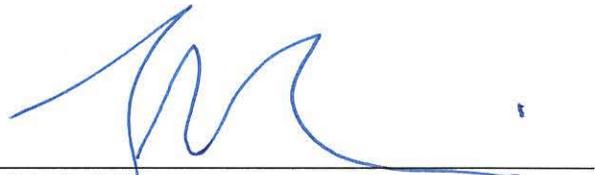
Recently in *Whole Foods Market*, 363 NLRB No. 87 (2015), the Board acknowledged that a sufficient business justification may warrant maintenance of a broad no-recording rule. In particular, the Board distinguished the rule at issue in the retail environment from the "pervasive or compelling...patient privacy interest" at issue in the healthcare environment, such as Cornerstone's or Flagstaff Medical Center's. Flagstaff Medical Center is a small, community-based hospital in northern Arizona. Cornerstone operates a network of hospitals that have 24-hour physician support and ancillary services including laboratory, radiology, procedure rooms, intensive care units and high observation and telemetry units. Cornerstone specializes in the treatment of medically complex patients who require individualized, interdisciplinary acute care by a range of highly skilled professionals. In short, Cornerstone's interests in promoting collaborative care in an environment that respects the very important (and legally protected) privacy interests of patients and their families, is *at least as great* as in Flagstaff Medical Center's environment.

Like the policy at issue in *Flagstaff Medical Center*, Cornerstone's policy complies with Section 7. Cornerstone's policy does not even arguably prohibit taking photographs of hospital bulletin boards, unsafe working conditions, or gatherings of employees in connection with concerted activities. It meets the standards the Board articulated in *Flagstaff Medical Center* for

assuring opportunities for employees to engage in documentation of workplace issues and concerns. Cornerstone's Policy does not expressly restrict Section 7 activity, and a reasonable employee would not interpret the rule as a restriction on Section 7 activity. And as noted above, Cornerstone has weighty privacy interests regarding protected health information obtained, stored, and used in its business operations, that meet or exceed the interests that motivated the rule in *Flagstaff Medical Center*.

V. CONCLUSION

Cornerstone's Class Action Waiver and Representative Action Waiver are enforceable and do not violate the Act. The Policy Against Audio and Video Recordings is not overly broad. The Complaint has no merit. It should be dismissed.



Frederick C. Miner
LITTLER MENDELSON, P.C.
2425 E. Camelback Rd., Suite 900
Phoenix, Arizona 85016
TEL: 602.474.3600
FAX: 602.957.1801
Attorneys for CORNERSTONE HEALTH CARE
GROUP

CERTIFICATE OF SERVICE

I certify that I have this 6th day of May, 2016, caused an electronic copy of the foregoing **Brief of Cornerstone Health Care Group**, containing the signature of counsel for Cornerstone, in .PDF format, to be filed electronically using the National Labor Relations Board's E-Filing System.

I also certify that I have cause a copy of the foregoing document to be served via electronic mail on the following:

Bryan Dooley, Esq. (Bryan.Dooley@nlrb.gov)

I further certify that a copy of the foregoing document has been sent via Federal Express to the following:

Romaine Reeves
16631 Vance Jackson Ap. 1310
San Antonio, TX 78257-5029

Tisha Davis