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On or about March 2, 2015, some nineteen months after the termination of his employment, Martinez filed a class action wage claim in the California Superior Court for the County of Los Angeles, Case No. BC-574043, captioned *Filiberto Martinez, et al. v. Darden Restaurants, Inc., et al.*, in which he alleged that Respondent had violated certain wage and hour provisions of California law. Jt. Stip. at 15, Jt. Ex. O. On or about May 7, 2015, the Respondents herein removed this action to the Federal District for the District of Southern California, pursuant to 28 U.S.C. §§ 1332, 1441, and 1446. Jt. Stip. at 17; Jt. Ex. Q. The matter was assigned to Judge George Wu of the Federal District Court. On May 8, 2015, the Respondents herein filed with Judge Wu a Motion to Compel Arbitration of Martinez' claims pursuant to the terms of the DRP, and Martinez filed an Opposition thereto. Jt. Stip. 18, 19, 20; Jt. Ex. R, S, T. On August 13, 2015, Judge Wu issued an Order granting the Respondents' Motion. Jt. Stip. at 21; Jt. Ex. U. Pursuant to Judge Wu's Order, and as affirmed by the Parties' subsequent federal court filing, the matter proceeded to arbitration under the Rules of the American Arbitration Association before Arbitrator Jan Frankl Schau. In February of 2016, after motion and hearing Arbitrator Schau affirmed the validity of the class action waiver. Jt. Stip. at 22 and Jt. Ex. X.

On June 28, 2016, Respondents, the Charging Party and Counsel for the General Counsel submitted the instant matter to the Administrative Law Judge pursuant to a Joint Stipulation of Facts, a copy of which is attached as Exhibit 1.

II. SUMMARY OF ARGUMENT

The claims by the Charging Party in the present matter are not properly litigable, and must be dismissed for lack of jurisdiction. Thus, all of Martinez' allegations are either time-barred or fail to state a legally cognizable claim under the National Labor Relations Act ("NLRA" or "Act"). In the absence of any legally cognizable claim by a Charging Party there is no jurisdictional basis to consider any remaining claims arguably raised by the Complaint herein. Proceeding in the absence of any cognizable claim by a Charging Party is the equivalent of a unilateral request for an advisory opinion or declaratory judgment, neither of which are contemplated by or authorized under the Act.

Assuming, *arguendo*, that there is statutory jurisdiction over the instant Complaint it must nonetheless be dismissed on either of two alternative grounds. First, both the Charging Party and the General Counsel have repeatedly waived the opportunity to raise the claims set forth in the Complaint in the proper judicial forum; and, having failed to properly raise such claims are estopped from doing so here. And, second, under the circumstances present here, the General Counsel's actions in pursuing the instant matter are a direct violation of the Respondents' First Amendment rights. Such transgressions cannot be countenanced and compel dismissal of the Complaint.

Finally, while it would be improper, for the reasons noted above, to reach the substance of the underlying claims, such substance is independently without merit, and contrary to the overwhelming weight of controlling federal law. Thus, the Complaint's animating predicate that the DPR's class action waiver violates the Act is simply incorrect as a matter of law.

III. ARGUMENT

A. The Complaint Does Not State Any Legally Cognizable Claim with Respect to the Charging Party

The Charging Party was employed at Respondents' Northridge, California restaurant from November 8, 2012 until May 28, 2013. Jt. Stip. at 13. There is no allegation and there is no evidence that the Charging Party's employment ceased on May 28, 2013 as the result of any unfair labor practice, any strike, or any then-current labor dispute. Indeed, it did not. The Charging Party voluntarily quit his employment with Respondents.⁴ Similarly, there is no allegation and no evidence that at any point after May, 28, 2013 the Charging Party became employed again by any of the Respondents, or, for that matter, by any other employer. Indeed, the Charging Party never became re-employed by any of the Respondents following his May 28, 2013 voluntary separation. Thus, following that date, the Charging Party was no longer an "employee" as defined by Section 2(2) of the Act. 29 USC § 152 (2); and, there is no evidence to a different effect.

The Charging Party filed the unfair labor practice charge upon which the instant Complaint is predicated on August 20, 2015. To the extent the Charge or Complaint with respect to the Charging Party relies on any act or occurrence alleged to have taken place while the Charging Party was employed by Respondents, i.e. from November 8, 2012 until May 28, 2013, such claim is plainly time-barred pursuant to NLRA Section 10(b) since any such acts or occurrences, by definition, took place more than six months prior to the filing of the underlying Charge. 29 USC § 160 (b).

⁴ For simplicity, and since this brief is filed on behalf of all Respondents, this post-hearing brief often refers in the plural to "Respondents." In doing so, Respondents preserve all arguments relating to joint employer, single employer, or other relevant Board doctrines and do not in any way admit that they are a single or joint enterprise.

To the extent the Charge or Complaint is based upon any act or occurrence alleged to have taken place at any time after May 28, 2013, up to and including the present, it simply fails to state any claim cognizable under the Act with respect to the Charging Party since he was no longer an “employee” with respect to any of the allegations set forth in the Complaint. When the Charging Party voluntarily quit his employment with Respondents on May 28, 2013 he ceased being an “employee” under the Act. 29 USC § 152, Sec. 2 (3). The rights and prohibitions set forth in the Act simply do not extend to individuals who are not “employees”, nor to entities that are not “employers”. From May 28, 2013 forward, Martinez was not an “employee” of any of the Respondents; nor, were any of the Respondents Martinez’ “employer”. 29 USC § 152, Sec. 2(2). By definition, Martinez has no cognizable claim under Section 8(a)(1) of the Act since he was not an employee, and Respondents were not his employer. Section 7 does not accord rights to persons that are non-employees; and, Section 8(a)(1) does not proscribe actions directed at non-employees. This includes any claim related to the “maintenance” of an unlawful DRP since a person who is not the employee of a given employer has no statutory right to act in concert with the employees of that employer.

The Respondents acknowledge that under certain circumstances, not present here, the term “employee” has been subject to broad construction. However, such construction is not without limit. As the Supreme Court noted in *Pittsburgh Plate Glass*, 404 US 157 (1971), with respect to retirees: “No decision under the Act is cited, and none to our knowledge exists, in which an individual who has ceased to work without expectation of further employment has been held to be an ‘employee’”. Here, the Charging Party ceased work and left the employ of Respondents some nineteen months before bringing the instant charge. There is nothing in the record which would remotely support the conclusion that he has any expectation of further

employment with the Respondents or with any other employer. Thus, there is no record evidence that since May 28, 2013 the Charging Party has been an employee of Respondents, or even an employee in the generic sense of the term.

However, the Respondents are also aware that the current Board has attempted to discount the arguments advanced here by adopting, without further elaboration, an ALJ's conclusion, that in partially similar circumstances, a former employee was nonetheless a statutory employee. *Neiman Marcus Group*, 362 NLRB No. 157 (2015). The decision, which is currently pending appeal before the US Circuit Court of Appeals for the Fifth Circuit, confines the pivotal finding of the Charging Party's "employee" status to a single footnote in the ALJ's Decision. *Ibid*, ALJD, at fn. 12. Thus, citing only *Frye Electric, Inc.*, 352 NLRB 345, 357 (2008), and *Briggs Mfg. Co.*, 75 NLRB 569 (1947), the ALJ characterizes as "unavailing" the argument that a former employee who was not employed at the time she filed her charge was still an "employee". The Board, as noted, makes no comment and cites no precedent in apparently adopting this conclusion. Slip Op at 2.⁵ It does little save essentially asserting that it does not matter that the individual filed the underlying charge more than six months after her employment terminated. An examination of the case law cited by the ALJ, however, reveals that it is fundamentally distinguishable. Thus, in *Frye Electric, Inc.*, 352 NLRB 345, 357, the Board rejected the Respondent's defense that it could not have unlawfully interrogated an individual because prior to the subject interrogation it had unlawfully terminated him and therefore he was not an employee. In *Briggs* 75 NLRB 569, 571 the Board rejected a defense that an individual who would have been reinstated but for his employer's unlawful

⁵ The Board majority improperly conflates the question of employee status with the question of timeliness under Section 10(b). It then compounds this error by misapprehending the notion of a continuing violation. See, *infra*, at 7-9.

discrimination under 8(b)(4) was not an employee. These instances, however, are all fundamentally different from both the present one. Thus, in each instance the arguable lack of “employee” status is the direct result of discriminatory conduct by the putative employer. Under such circumstances it makes both equitable and statutory sense to construe the term “employee” broadly enough that a Respondent cannot avoid liability by engaging in discriminatory conduct which affirmatively deprives the Charging Party of achieving or maintaining the employee status which is a prerequisite to the claim. Here, however, no such considerations apply, and the cited authority is fundamentally distinguishable. Thus, Martinez did not fail to become an employee, or cease to be an employee, as the result of any discriminatory conduct by the Respondents. To the contrary, he voluntarily quit his employment and voluntarily terminated his statutory status as an employee. There simply is no controlling precedent that supports the notion that a former employee who has voluntarily ended their employment and maintains, his non-employee status for reasons unrelated to any discriminatory conduct by his former employer, nonetheless, continues to remain a statutory employee *ad infinitum*. *PPG, supra*.

In addition to Martinez’ lack of employee status, his charge is also untimely under Section 10(b) on several different grounds. First, it was filed more than six months after the Charging Party signed the subject DRP which contains the waiver requirement alleged to constitute the violation of the Act. *See Bowen Products*, 113 NLRB 731 (1955). Second, it was filed more than six months after the Charging Party was on notice that the waiver precluded his subsequent lawsuit. And, third, it was filed more than six months after the Charging Party’s employment terminated, and, filed in relation to a lawsuit that, itself, was commenced more than six months after the termination of the Charging Party’s employment.

The Board has previously discounted the latter claim by simply noting that the maintenance of an unlawful policy is a “continuing violation”, and, thus, not time-barred. See, *Neiman Marcus supra*, at fn 6. The argument, however, is not subject to so facile a disposition and it impermissibly conflates that act which allegedly constitutes an unfair labor practice from its eventual *effect*, and misapprehends the nature of the continuing violation doctrine. Thus, for example, if an employer promulgates an unlawful policy and places the employee on notice that he or she is subject to the policy, the 10(b) period begins to run at that point. *Bowen, supra*. It does not run, nor is it “revived” with respect to some future *effect* of the policy. *Bowen, supra*. Here, Martinez was plainly made aware of the policy now claimed to violate the Act at the time he executed the DRP, and at various other points all more than six months prior to the filing of the present charge. The policy “applied” to him at that point, and he acknowledged that it did, when he signed the DRP. Section 10(b) runs from the applicability of the policy to the charging party, not some *effect* that occurs years later. *Bowen, supra*. Moreover, Martinez’ class action lawsuit is *not* barred because Respondents “continued” the DRP policy as a condition of employment. It is barred because on February 23, 2013 Martinez signed a contract agreeing to such terms. It is utterly immaterial to Martinez’ claim that after February 23, 2013 Respondents may or may not have required others to sign a similar contract. Martinez’ contractual obligation, and any alleged legal infirmity surrounding it were temporally fixed on February 23, 2013. The continuing nature of the underlying policy is simply immaterial to Martinez’ claim. The *effect* of the policy as to Martinez would be the same whether the policy continued or ended the day after he made his contractual commitment. Martinez’ claims here fail not only because he was not an employee, but because a contrary result would conflate applicability with effect, and

misapprehend the relevance of the continuing violation doctrine in an effort to improperly avoid the preclusive effect of Section 10(b) of the Act.

B. In the Absence of a Charging Party, the Instant Matter Must Be Dismissed as the Administrative Law Judge Lacks Statutory Authority to Render an Advisory Opinion or Declaratory Judgment Requested by the General Counsel

As set out fully in Argument I, *supra*, there is no jurisdiction and no cognizable claim or viable underlying Charge with respect to Martinez. His claims are meritless both because they are time-barred, and because he lacks employee status. Thus, the sole Charging Party in the present matter must be dismissed from the case for want of jurisdiction. In the absence of a Charging Party, and in the particular circumstances of this case, there can be no further action with respect to the Complaint.

The processes of the NLRA do not authorize either the Board or its General Counsel to act on their own motion with respect to the initiation of unfair labor practice proceedings. Indeed, the Board may not, pursuant to Section 9 of the NLRA, act in the absence of a proper unfair labor practice charge. Following the filing of a jurisdictionally proper charge, should a Complaint be issued the General Counsel becomes the representative of the Charging Party. The statute does not confer upon the Board or General Counsel the right to initiate or to pursue unfair labor practice claims in its own name. It is statutorily authorized to do so *only* as the representative of the Charging Party and for the purpose of vindicating the rights of the Charging Party and/or those he represents. Here, for the reasons set forth in detail, *supra*, there was never a jurisdictionally proper Charge upon which to predicate the pursuit of this claim. For the reasons set forth in detail, *supra*, the claim herein was jurisdictionally infirm *ab initio*. Moreover, the only person seeking to invoke the processes of the Board has been Martinez. He demonstrably has done so only on his own behalf and there is neither an allegation nor any evidence that he did

so, either expressly or impliedly, in a representative capacity. Martinez' personal claims under the Act are simply non-existent, and as set forth, *supra*, he must be dismissed from the instant action on jurisdictional grounds. Thus, not only is there no proper charge to serve as the jurisdictional predicate, there is no proper charging party either. Under such circumstances, and as detailed, *infra*, the General Counsel has no authority to continue prosecuting this matter.

Respondents would note, and readily concede, that there are circumstances in which a Charging Party's initial charge may be found to lack merit, but the ensuing investigation uncovers claims that form a legitimate basis for the issuance of a Complaint, albeit one on different grounds than those advanced by the Charging Party. In those circumstances, however, the Charging Party is invariably an "employee", or a representative of "employees" at the time the charge is filed. As an employee, or the representative of employees, the prosecution of even initially unasserted claims is nonetheless one pursued on behalf of employees. Here, however, Martinez was not an employee, nor was he acting as the representative of any statutory employees of the Respondents. No employee of any Respondent has ever invoked the Board's processes with respect to Respondent's DRP. Thus, there is no statutorily proper Complaint, because there was never a jurisdictionally proper Complainant. In the absence of a proper Complainant, the conclusion that the General Counsel is improperly seeking to pursue the instant claim on its own behalf is transparently self-evident.

Since there is no proper complainant here, the continued prosecution of this claim is not warranted or permitted. When a matter loses "its character as a present, live controversy," a judicial body that continues to entertain the matter does nothing more than render an advisory opinion on an abstract question of law. *See Princeton Univ. v. Schmid*, 455 U.S. 100 (1982). Under the Board's regulations, there is one, and only one, circumstance in which such an

advisory opinion may be sought from the Board: when an agency or court of any state or territory is in doubt about whether the Board would assert jurisdiction over a matter. 29 C.F.R. § 102.98. This is not such a case.

Board precedent is clear. When a charge is filed outside the 10(b) limitations period, the underlying matter *must be dismissed*. See, e.g., *Sheet Metal Workers' Int'l Ass'n*, 290 NLRB 381 (1988) (dismissing allegations that are time-barred by 10(b)); *Am. Automatic Fire Protection, Inc.*, 302 NLRB 1014 (1991) (finding charge barred as outside the 10(b) limitations period). Here, since the charging party's claim is time-barred under Section 10(b), any decision in this matter would be an improper advisory opinion. There are no other charging parties and no other allegations in the Complaint to suggest that Respondents have enforced the DRP against other employees. See *In re Townley Sweeping Service Inc.*, 339 NLRB 301 (2003) (dismissing case as seeking an improper advisory opinion); *Decoster*, 325 NLRB 350 (1998) (dismissing case as seeking an improper advisory opinion); see also *Metropolitan Taxicab Board of Trade*, 342 NLRB 1300 (2004) (Liebman, concurring) (noting that, in that matter, "[t]he Board's decision – an advisory opinion for all practical purposes – . . . can provide the public with only limited useful guidance. We have better things to do."). Accordingly, there is no longer a justiciable question in this case and no continuing jurisdiction.

C. Both the Charging Party and General Counsel Have Waived Any Claim of Legal Infirmity with Regard to Respondent's DRP and Are Estopped From Pursuing Such a Claim in the Present Action

As set forth, *infra*, the pursuit of this matter and the requested remedies are improper and beyond the authority of the Board. Moreover, in the present context, the procedural history of the instant matter reveals that both the General Counsel and Martinez have effectively waived the instant unfair labor practice claims, and/or should be estopped from asserting or pursuing them.

“A waived claim or defense is one that a party has knowingly and intelligently relinquished.” *Wood v. Milyard*, 132 S. Ct. 1826, 1834 (2012). Estoppel is a flexible equitable doctrine that may be used to avoid injustice. Generally, estoppel may be invoked when a party has relied on an adversary’s conduct “in such a manner as to change his position for the worse,” and that reliance must have been reasonable. *See Heckler v. Community Health Servs. Of Crawford Co., Inc.*, 467 U.S. 51, 60 (1984). Here, with respect to the General Counsel, since at least August of 2015, he has been fully aware that Martinez’ underlying wage claims were the subject of a federal court motion to compel arbitration pursuant to a DRP that contained a class action waiver; and, that the federal court had granted the Respondent’s Motion to Compel just a week before the filing of the charge. The General Counsel was further clearly aware that under extant Board law the DRP’s class action waiver violated the NLRA, and, thus, that the District Court’s enforcement of the DRP contravened controlling Board law. Despite this knowledge, and despite the fact that the General Counsel had notice and full opportunity under the Federal Rules of Civil and Appellate Procedure to intervene in the District Court proceedings, to seek reconsideration by Judge Wu of his Order, and/or to appeal Judge Wu’s Order, the General Counsel has done absolutely nothing with respect to the federal court proceedings. Moreover, despite knowing that the underlying matter was proceeding to arbitration pursuant to an allegedly improper order from the District Court and pursuant to a DRP that was facially unlawful under extant Board, the General Counsel, once again, did not seek to intervene in the arbitral proceeding.

With respect to the Charging Party, he, too, was well aware of the claim that the DRP contravened extant Board law at a point in time well within the applicable period to either seek reconsideration or appellate review of Judge Wu’s Order; or, in the alternative to seek the

General Counsel's intervention in the proceedings before Judge Wu, or in the subsequent arbitration proceedings. He took none of these actions. Rather, both the Charging Party, and most particularly the General Counsel, have taken no action to raise the Board claim in the federal court action or the associated arbitral proceeding for the eleven months that have elapsed since entry of Judge Wu's Order.

The General Counsel clearly has authority to take all the actions delineated above and to independently seek to enjoin an on-going unfair labor practice. Despite notice and ample and repeated opportunity to do so, he took no action at all. Undoubtedly, the General Counsel took no affirmative action because he well knows that the claim that Respondent's conduct violated the Act is totally contrary to controlling of federal law; and, the claim that Respondent's DRP violated the Act is contrary to the overwhelming weight of federal law⁶. Whatever the reason, the fact remains that for nearly a year both the General Counsel and Charging Party have failed to assert their claims herein in the appropriate forum. Thus, both the General Counsel and Charging Party were aware of Judge Wu's Order, and well aware the claimed infirmity with such Order, and both had more than ample opportunity to raise such infirmity in the federal court proceedings. They did not. Rather, both seek to utilize this administrative proceeding in an effort retroactively oust the federal court of jurisdiction and to circumvent its valid orders. Having waived the opportunity to raise such claims before the federal court, both the Charging Party and the General Counsel should be estopped from attempting to raise such claims in this proceeding, long after the District Court has acted.

⁶ See, Arguments IV and V, *infra*.

D. Both the Initiation and Continuing Pursuit of the Instant Claim, and the Remedies Sought Violate Respondent's Constitutional Right to Petition and Compel the Dismissal of the Complaint

The General Counsel has effectively “doubled down” on his waiver of the arbitration-related claims involved herein by pursuing the present action and by seeking remedies that are unquestionably beyond the Board’s authority. Both actions impermissibly interfere with Respondent’s constitutional rights and require dismissal of the Complaint.

When Respondents invoked the authority of the federal courts to compel arbitration, they were unquestionably engaged in “petitioning” for the redress of grievances. *California Motor Transport Co. v. Trucking Unlimited*, 404 US 508 (1972). Such petitioning is fully protected by the First Amendment. *Eastern Railroad Presidents v. Noerr Motor Freight, Inc.*, 365 US 127 (1961). Their petition was genuine. There is absolutely no argument that Respondents’ action constituted “sham” petitioning. *Professional Real Estate Investors, Inc. v. Columbia Pictures, Inc.*, 508 US 49, (1993). Far from being a “sham” petition, Respondents’ petitioning was the precise opposite - it was *successful*. The government simply cannot interfere with, or restrain, or punish the Respondents for engaging genuine petitioning. Doing so is simply unconstitutional and violates the Respondents’ First Amendment rights. Most significantly in the present context, it is now well-settled that the NLRB cannot use its unfair labor practice processes to interfere with or punish an employer for exercising its constitutional right to petition the federal courts. *Venetian Casino Resort, LLC v. NLRB*, 484 F3d 601 (DC Cir. 2015); see also, *Noerr Pennington, supra*. Yet, this is precisely what the present proceeding aims to do. Thus, it seeks to both interfere with and undo the Respondent’s *successfully completed* petitioning, and to punish Respondent’s for having engaged in constitutionally protected petitioning in the first place. While such interference, restraint and retaliation against Respondents for the exercise of their

constitutional rights cannot be tolerated or permitted under any circumstances, it is particularly egregious here. Thus, not only was the Respondents' First Amendment petitioning both *genuine* and *completed*, further still, and as detailed above, the General Counsel has had ample opportunity to raise and address his concerns with respect to Respondent's DRP in a manner both respectful of the authority of the federal courts, and consistent with the preservation of Respondent's constitutional rights. He declined to do so. Neither the General Counsel, nor the Charging Party can, as a matter of law, successfully claim that an employer's successful petitioning is not genuine simply because they disagree with its result. Under the circumstances present here, the Respondents did nothing more than exercise their First Amendment right to engage in constitutionally protected, successful and completed petitioning. Prosecution of the instant claim directly interferes with those rights and compels the dismissal of this action.

E. Respondent's DRP Does Not Violate the National Labor Relations Act

Well-reasoned precedent from dozens of Federal and state courts as well as further experience should persuade the Board that *D.R. Horton I* and *Murphy Oil I* were wrongly decided and should now be overruled.

1. The Validity of the Class Action Waiver Must Be Determined Under the FAA and Not Under *D.R. Horton* or the NLRA

The FAA requires that agreements like the DRP be enforced. The FAA provides such agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The statute reflects an "emphatic federal policy" in favor of arbitration. *KPMG LLP v. Cocchi*, 565 U.S. ___, 132 S. Ct. 23, 25 (2011). Under the FAA, parties are generally free, as a matter of contract, to agree to the procedures governing their arbitrations. *Volt Info. Sciences, Inc.*, 489 U.S. at 479 (parties to an arbitration may "specify by contract the rules under which that arbitration will be conducted");

Baravati, 28 F.3d at 709. (“Indeed, short of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes.”).

Arbitration agreements implicating federal statutory rights, including those containing class action waivers, are enforceable “unless congress itself has evinced an intention,” when enacting the statute to “override” the FAA mandate by a “clear congressional command.” *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.*, 105 S. Ct. 3346, 3354-3355 (1985); *American Express*, 133 S. Ct. at 2309. So long as the arbitral forum affords the parties the ability to vindicate statutory rights underlying their claims, parties are held to their bargain to arbitrate – even to arbitrate claims under federal statutes. *CompuCredit Corporation, et al. v. Greenwood*, 132 S. Ct. 665, 671 (2012). A congressional intent to preclude waiver of judicial remedies for the statutory rights at issue may be “deducible from [the statute’s] text or legislative history” or “from an inherent conflict between arbitration and the statute’s underlying purpose.” *Shearson/American Express, Inc. v. McMahon*, 107 S. Ct. 2332, 2337 (1987). The policies and purposes behind the FAA extend to employment arbitration agreements as the FAA requires that parties be held to their bargain even if there may be “unequal bargaining power between employers and employees.” *Gilmer v. Interstate/Johnson Lane Corp.*, 111 S. Ct. 1647, 1655 (1991).

Applying these principles, numerous courts have enforced mandatory employment arbitration agreements containing class action waivers under the FAA. *See Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002); *see also Vilches v. The Travelers Cos., Inc.*, 413 F. App’x 487, 494 & n.4 (3d Cir. 2011) (class action waiver was not unconscionable); *Caley v. Gulfstream*

Aerospace Corp., 428 F.3d 1359, 1378 (11th Cir. 2005) (same); *Horenstein v. Mortg. Mkt., Inc.*, 9 F. App'x 618, 619 (9th Cir. 2001) (“Although plaintiffs who sign arbitration agreements lack the procedural right to proceed as a class, they nonetheless retain all substantive rights under the statute.”).

Numerous courts – including at least four Courts of Appeals – have enforced mandatory employment arbitration agreements containing class action waivers under the FAA while explicitly declining to follow the Board’s holding in *D.R. Horton I* reasoning that there is nothing in the NLRA itself or its legislative history that remotely suggests that Congress sought to override the FAA’s mandate. While the Seventh Circuit recently concluded that the employer’s arbitration agreement containing a class action waiver violated Sections 7 and 8 of the NLRA, *Lewis v. Epic Systems Corp.*, --- F.3d ---, 2016 WL 3029464 (7th Cir. May 26, 2016), the vast majority of federal court precedent has rejected *D.R. Horton I*. See *D.R. Horton II*, *supra*, 737 F.3d 344, 362 (5th Cir. 2013) (“The NLRA should not be understood to contain a congressional command overriding application of the FAA.”); *Murphy Oil II*, 808 F.3d 1013, 1016 (5th Cir. 2015) (“[A]n employer does not engage in unfair labor practices by maintaining and enforcing an arbitration agreement prohibiting employee class or collective actions and requiring employment-related claims to be resolved through individual arbitration.”); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1055 (8th Cir. 2013) (rejecting plaintiff’s “invitation to follow the NLRB’s rationale in *D.R. Horton*” and enforcing arbitration agreement containing class action waiver); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2nd Cir. 2013) (declining to follow the Board’s decision in *D.R. Horton*); see also *Richards v. Ernst & Young, LLP*, 744 F.3d 1072, 1075 n.3 (9th Cir. 2013) (observing that federal courts “have determined that they should not defer to the NLRB’s decision in *D.R. Horton* on the ground that it conflicts

with the explicit pronouncements of the Supreme Court concerning the policies undergirding the Federal Arbitration Act.”).

D.R. Horton I wrongly concluded its ban on class action waivers is allowable under the FAA because the ban is not limited to arbitration agreements. *Id.* at 9. But in *AT&T Mobility, LLC v. Concepcion*, 131 S. Ct. 1740, 1746-48 (2011) the Supreme Court expressly rejected the same attempt to circumvent the FAA and struck down a nearly identical California rule prohibiting class action waivers. *Concepcion*, 131 S. Ct. at 1746-48. *Concepcion* recognized that courts could exhibit hostility to arbitration agreements by announcing facially neutral rules ostensibly applicable to all contracts. *Id.* at 1747. The *Concepcion* Court held a rule mandating the availability of class procedures is incompatible with arbitration. *Id.* at 1750–52. Arbitration is intended to be less formal than court proceedings to allow for the speedy and inexpensive resolution of disputes. *Id.* at 1751. Such informality makes arbitration poorly suited to conducting class litigation with its heightened complexity, due process issues, and stakes. *Id.* at 1751–52. The Court held:

The overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings. Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.

Id. at 1748.

D.R. Horton I attempted to distinguish *Concepcion* by arguing its decision did not require class arbitration. *D.R. Horton I, supra*, slip op. at 12. Rather, the panel claimed it required only the availability of class procedures in some forum, thus forcing employers to *either* (i) permit class arbitration, *or* (ii) waive the arbitral forum to the extent an employee seeks to invoke class procedures in court. *Id.* But that was a distinction without a difference. Like the California law, *D.R. Horton I* “condition[s] the enforceability of certain arbitration agreements” on the

availability of class procedures. *Concepcion*, 131 S. Ct. at 1744. *D.R. Horton I*'s addition of the option of avoiding class arbitration only by agreeing *to forgo arbitration* does not reduce the degree to which its ban on class action waivers "interferes with fundamental attributes of arbitration" and "creates a scheme inconsistent with the FAA." *Concepcion*, 131 S. Ct. at 1748. To the contrary, requiring a party to abandon the arbitral forum altogether as the only way to avoid class arbitration is an even greater obstacle to the FAA's policies than mandating class arbitration alone.

D.R. Horton I incorrectly interpreted the FAA in two additional ways:

- *D.R. Horton I* asked whether another federal statute might manifest a public policy that would void an arbitration agreement irrespective of the FAA. *D.R. Horton I, supra*, slip op. at 11-12. But "[t]here is not a single decision, since [the Supreme] Court washed its hands of general common-lawmaking authority, in which [it has] refused to enforce on 'public policy' grounds an agreement that did not violate, or provide for the violation of, some positive law." *Eastern Associated Coal Corp. v. United Mine Workers of Am.*, 531 U.S. 57, 68 (2000) (Scalia, J., concurring). Because the FAA reflects an "emphatic federal policy in favor of arbitral dispute resolution," *KPMG LLP*, 132 S. Ct. at 25, an administrative agency cannot deviate from the congressional commands in the FAA based on the agency's own assessment of public policy and absent an equally clear congressional directive in another statute to the contrary. See *CompuCredit*, 132 S. Ct. 665-671 (when Congress restricts the use of arbitration, it does so clearly).
- *D.R. Horton I* also concluded the Norris-LaGuardia Act (NLGA) voided employment arbitration agreements with class action waivers and partially repealed the FAA so that it does not apply to employment arbitration agreements containing class action waivers. *D.R. Horton I, supra*, slip op. at 5-6, 12. However, the NLGA is "outside the Board's interpretive ambit," 737 F.3d at 362 n.10, and as *Murphy Oil I* conceded, the Board is not entitled to deference in interpreting the NLGA, *Murphy Oil I, supra*, slip op. at 10. Moreover, *D.R. Horton I* failed to cite any court decision treating the NLGA as repealing the FAA. *D.R. Horton I*'s reliance on its novel interpretation of the NLGA should be rejected.

For all of these reasons, *D.R. Horton I* should be overturned because it is contrary to the FAA.

2. ***D.R. Horton I* and *Murphy Oil I* Were Wrongly Decided Under Extant Board Precedent**

D.R. Horton I was wrong for an additional basic reason: the NLRA does not provide employees a non-waivable right to invoke class procedures. The Board's decision to the contrary in *D.R. Horton I* thus exceeded the Board's authority to construe the Act. *See NLRB v. Fin. Inst. Emps. of Am., Local 1182*, 475 U.S. 192, 202 (1986) (a Board decision must be rational and consistent with the Act and not an "unauthorized assumption . . . of major policy decisions properly made by Congress"). Based on NLRA precedent, *D.R. Horton I* and *Murphy Oil I* were wrongly decided for numerous reasons.

First, while the NLRA may protect the rights of employees to collectively *assert* that they have certain legal rights in an attempt to obtain concessions concerning the terms and conditions of their employment, NLRB precedent does not establish a right to seeking and obtaining a collective *adjudication* of employment-related legal claims. Indeed, the cases cited by *D.R. Horton I* show only that Section 7 protects employees from retaliation for concertedly asserting they have certain legal rights against their common employer with respect to the terms and conditions of their employment, not that employees have a right under the NLRA to seek a collective adjudication of their individual legal claims. The decisions cited by *D.R. Horton I*, like *Salt River Valley*, simply demonstrate the general proposition that employers may not retaliate against employees for concertedly asserting legal rights relating to the terms and conditions of their employment. *D.R. Horton I, supra*, slip op. at 2-3 & n.3.⁷

⁷ *See Mohave Elec. Co-op, Inc. v. NLRB*, 206 F.3d 1183 (D.C. Cir. 2000) (employer violated NLRA by discharging employee for filing petition jointly with co-worker); *Brad Snodgrass, Inc.*, 338 NLRB 917 (2003) (employer violated NLRA by laying off employees in retaliation for

Second, the NLRA cannot mandate certification of a class action, thus, the premise of *D.R. Horton I and Murphy Oil I* are flawed. *D.R. Horton I* correctly recognized that under the Federal Rules, a court may deny an employee’s motion for class certification irrespective of the NLRA. *D.R. Horton I, supra*, slip op. at 10. Consequently, *D.R. Horton I* held that Section 7 can only guarantee employees a more limited right: “to take the collective action inherent in seeking class certification, whether or not they are ultimately successful under Rule 23” and “to act concertedly by invoking Rule 23, Section 216(b), or other legal procedures.” (*Id.* (emphasis added).) *D.R. Horton I* holds that employees can exercise their alleged Section 7 right to seek class certification even if certification fails, unless certification fails based on a class waiver. But *D.R. Horton I* never explains why the reason for the denial of class certification matters under the NLRA. *D.R. Horton I* does not, and cannot, rationally explain why an employee’s failure to obtain class certification—which according to *D.R. Horton I* is not guaranteed by the NLRA—becomes an NLRA violation if the failure is based on a class action waiver but does not if the failure is based on an employer’s opposition to class certification on other grounds. The reason

union’s filing grievances on their behalf); *Le Madri Rest.*, 331 NLRB 269 (2000) (employer violated NLRA by discharging two employees who were named plaintiffs in lawsuit against employer); *Uforma/Shelby Bus. Forms*, 320 NLRB 71 (1985) (employer violated NLRA by eliminating third shift in retaliation for union’s pursuit of a grievance); *United Parcel Serv., Inc.*, 252 NLRB 1015 (1980) (employer violated NLRA by discharging employee for initiating class action lawsuit, circulating petition among employees, and collecting money for retainer, among other activities); *Clara Barton Terrace Convalescent Ctr.*, 225 NLRB 1028 (1976) (employer violated NLRA by suspending employee without pay for submitting letter to management complaining on behalf of other employees about job assignments); *Trinity Trucking & Materials Corp.*, 221 NLRB 364 (1975) (alleging employer violated NLRA by discharging three employees who had filed suit against employer); *El Dorado Club*, 220 NLRB 886 (1975) (employer violated NLRA by discharging employee in retaliation for testifying at fellow employee’s arbitration hearing); *Spandsco Oil & Royalty Co.*, 42 NLRB 942 (1942) (employer violated NLRA by discharging three union members for filing a lawsuit); *see also Brady v. Nat’l Football League*, 644 F.3d 661 (8th Cir. 2011) (noting in *dicta* that filing lawsuit concerning terms and conditions of employment was protected activity).

for the denial of class certification should be irrelevant if the Section 7 right at issue is simply the right to concertedly *seek* class certification and *invoke* Rule 23 or similar rules.

3. D.R. Horton I's Construction of Section 7 was Unreasonable

Even if the Board had some authority under the NLRA to define Section 7 rights as guaranteeing employees' access to adjudicatory procedures (which it does not), *D.R. Horton I's* holding that employees have a non-waivable right to invoke class procedures was an unreasonable construction of Section 7.

(i) D.R. Horton I unreasonably assumed class-action procedures are necessary to serve employees' interests under the NLRA.

D.R. Horton I treated class action procedures as necessary to employees' interests under the NLRA. It reasoned that “[e]mployees are both more likely to assert their legal rights and also more likely to do so effectively if they can do so collectively.” *D.R. Horton I, supra*, slip op. at 3.⁸ It also claimed that “[e]mployees surely understand . . . that named plaintiffs run a greater risk of suffering unlawful retaliation than unnamed class members” and “in a quite literal sense, named-employee-plaintiffs protect the unnamed class members.” *D.R. Horton I, supra*, slip op. at 3 n.5. However, *D.R. Horton I's* assumptions are unfounded.

(ii) D.R. Horton I ignored the intended purposes and functions of class procedures.

In holding that the NLRA grants employees a non-waivable right to class procedures, *D.R. Horton I* never considered the purposes of class action procedures. Such procedures serve to allow courts to balance the interests of judicial efficiency with the demands of due process in

⁸ *D.R. Horton I* did not identify any evidence to support this proposition, and it cited a single decision, *Special Touch Home Care Services*, 357 NLRB No. 2 (2011). However, that case concerned potential retaliation against employees who intended to participate in a strike against their employer, not file a class action lawsuit.

adjudicating claims common to multiple litigants. MCLAUGHLIN ON CLASS ACTIONS §1:1 (8th ed.) (explaining class actions are “a mechanism for a single, binding adjudication of multiple claimants’ rights, while assuring due process to absent class members and repose to defendants”). *D.R. Horton I*, however, viewed such procedures solely as a potential “weapon” for employees to exert group pressure on employers. *See D.R. Horton I, supra*, slip op. at 2 n.3 (noting that concerted protected activity “is often an effective weapon for obtaining that to which the participants, as individuals, are already ‘legally’ entitled” (quoting *Salt River v. NLRB*, 206 F.2d 325, 328 (9th Cir. 1953))). The Board in *D.R. Horton I* did not point to any basis in the NLRA, the Federal Rules, or precedent for its novel presumption that class action procedures exist to serve substantive concerns under the NLRA and therefore cannot be waived under the NLRA regardless of the intended purposes of those procedures. *See Amchem Prods.*, 521 U.S. at 613-15 (current class action procedures originated only in 1966).

(iii) *D.R. Horton I* ignored the negligible role class procedures play under the NLRA.

D.R. Horton I failed to demonstrate that class action procedures, in practice, serve the NLRA’s purposes. The core purpose of Section 7’s right to engage in concerted activity is to allow employees, if they so choose, to join together in an attempt to increase their bargaining power over the terms of their employment. *See NLRB. v. City Disposal Systems Inc.*, 465 U.S. 822, 835, 104 S.Ct. 1505, 1513 (1984) (“[I]n enacting § 7 of the NLRA, Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment.”) Contrary to *D.R. Horton I*’s speculation, class procedures are not necessary to serve that purpose.

Class action procedures are rarely suitable for litigation over the bargained-for terms of non-unionized employees' employment. Class certification is routinely denied with respect to breach of contract and similar claims by at-will employees because such claims are inherently individualized. *See, e.g., Vega v. T-Mobile USA, Inc.*, 564 F.3d 1256, 1272 (11th Cir. 2009).⁹ Moreover, most employment claims amenable to class treatment involve fixed, *statutory* rights, not obligations dependent on employees' individual or collective bargaining power. *See, e.g.*, 42 U.S.C. § 2000e-2 (prohibited practices under Title VII); 42 U.S.C. § 12112 (prohibited practices under the ADA); 29 U.S.C. § 215 (prohibited acts under FLSA); 29 U.S.C. § 623 (prohibited practices under the ADEA). Such statutes mandate certain terms and conditions of employment as a matter of law. These same employment statutes almost universally contain anti-retaliation provisions and one-way fee-shifting provisions to permit employees to pursue their claims effectively on an individual basis. *See, e.g.*, 42 U.S.C. § 2000e-3(a) (Title VII anti-retaliation

⁹ *See also Cutler v. Wal-Mart Stores, Inc.*, 927 A.2d 1, 10 (Md. Ct. Spec. App. 2007) (affirming denial of class certification in missed-breaks case, in part, because “absent a contract applicable to the entire class of Wal-Mart employees, the existence, formation, and terms of any implied employment contract would vary among employees” and “the alleged breaches of these implied contracts by supervisors and managers at individual Wal-Mart stores also give rise to individual, not common, factual and legal issues”); *Wal-Mart v. Lopez*, 93 S.W.3d 548, 557 (Tx. Ct. App. 2002) (reversing trial court’s certification of class action as abuse of discretion in missed-breaks case because, among other things, “[a]ny determination concerning a ‘meeting of the minds’ [on a breach of oral contract claim] necessarily requires an individual inquiry into what each class member, as well as the Wal-Mart employee who allegedly made the offer, said and did”); *Cohn v. Massachusetts Mut. Life Ins. Co.*, 189 F.R.D. 209, 215 (D. Conn. 1999) (no predominance where the resolution of plaintiffs’ breach of contract claims was dependent upon the representations made to each plaintiff individually); *Brooks v. Southern Bell Tel. & Tel. Co.*, 133 F.R.D. 54, 57 (S.D. Fla. 1990) (finding that commonality was not met where “[i]t [was] not only conceivable, but probable, that [the] court [would] be required to hear evidence regarding the existence, terms, modifications and limitations of each alleged contract of the over 5,000 prospective class members”).

provisions). Such anti-retaliation and fee-shifting provisions adequately protect employees and give sufficient incentive to employees (and their counsel) to pursue their claims individually.

Finally, to the extent there is such a thing as “concerted legal activity,” *D.R. Horton I* wrongly equated it with class action, collective action, and joinder procedures. *D.R. Horton I, supra*, slip op. at 10. However, there are many ways in which employees may act concertedly in asserting legal claims that do not depend on, and have nothing to do with, collective adjudication procedures. For example, irrespective of individual arbitration agreements, employees can work together in asserting their common legal rights by pooling their finances, making settlement demands and negotiating as a group, sharing information, and seeking safety in numbers.

(iv) ***D.R. Horton I* unreasonably concluded employees cannot waive access to class procedures under the NLRA.**

In addition, the Supreme Court has already held that unions may waive Section 7 rights pursuant to collective bargaining agreements, including the right to strike and an individual employee’s right to a judicial forum. The effect of *D.R. Horton I* is that a union can waive an individual’s rights, ***but that same individual cannot do so***. This is illogical under contract law principles and contrary to *14 Penn Plaza*, which found “[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative.” *14 Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258 (2009). Whatever employees’ right might be under the NLRA to access class procedures, there is no reasonable basis to prohibit employees from agreeing to waive such access as one component of a legitimate, good-faith arbitration agreement.

(v) ***D.R. Horton I* failed to consider the parties’ substantial interests in utilizing individualized arbitration.**

D.R. Horton I also ignored the substantial interests weighing *in favor* of individual employment arbitration and failed to recognize the harm that its holding might do to those interests.

D.R. Horton I did not acknowledge that individualized arbitration provides benefits to both parties – the employer and the employee – by providing a relatively low-cost and quick method of adjudicating disputes. *E.g.*, *Stolt-Nielsen*, 559 U.S. 662, 685 (2010) (“In bilateral arbitration, parties forgo the procedural rigor and appellate review of the courts in order to realize the benefits of private dispute resolution: lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes.”). The Supreme Court has recognized that class arbitration is antithetical to the advantages parties expect when they agree to arbitrate and impairs the use of arbitration to achieve efficiency, confidentiality, and informality. *Concepcion*, 131 S. Ct. at 1751 (“[C]lass arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.”).

As potential defendants, employers have additional legitimate interests in agreeing to individual arbitration that *D.R. Horton I* failed to acknowledge and consider. An employee’s filing of a class action may impose significant costs and burdens on an employer, for example, by placing it under a duty to identify, collect, and preserve potentially relevant evidence relating to an entire putative class. Such duties may arise without certification ever being granted. *See, e.g.*, *Pippins v. KPMG LLP*, 2011 WL 4701849, at *3 & 6 (S.D.N.Y. Oct. 7, 2011) (employer incurred over \$1.5 million to preserve putative class members’ hard drives prior to any certification decision). The Supreme Court has recognized class actions in an arbitral forum pose

even greater risks to defendants due to the more limited procedures in arbitration. *See Concepcion*, 131 S.Ct. at 1752 (explaining that “class arbitration greatly increases risks to defendants” due to the absence of multilayered review” and that “[f]aced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims”).

Employers thus have a legitimate interest in agreeing to procedures – such as individualized arbitration – allowing the parties to obtain an adjudication of the employee’s claim on its merits while also avoiding substantial costs and risks unrelated to the strength of that claim. *D.R. Horton I* makes no mention of any of these valid concerns and legitimate interests underlying the use of individual arbitration agreements.¹⁰

¹⁰ To the extent *D.R. Horton I* attempted to grant employees a substantive right under the NLRA to deploy judicial procedures *as an economic weapon* in negotiating settlement agreements – a use that has nothing to do with the intended purposes of those procedures – that was beyond the Board’s authority. So, too, would be the Board’s attempt to bar employers from using individual arbitration agreements simply because they may have the effect of blunting that economic weapon. *See, e.g., Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965) (“Sections 8(a)(1) and (3) do not give the Board a general authority to assess the relative economic power of the adversaries in the bargaining process and to deny weapons to one party or the other because of its assessment of that party’s bargaining power.”); *NLRB v. Brown*, 380 U.S. 278, 283 (1965) (“[T]here are many economic weapons which an employer may use that . . . interfere in some measure with concerted employee activities . . . and yet the use of such economic weapons does not constitute conduct that is within the prohibition of either § 8(a)(1) or § 8(a)(3). Even the Board concedes that an employer may legitimately blunt the effectiveness of an anticipated strike by stockpiling inventories, readjusting contract schedules, or transferring work from one plant to another, even if he thereby makes himself ‘virtually strikeproof.’”); *NLRB v. Ins. Agents’ Int’l Union*, 361 U.S. 477, 499-500 (1960) (“[W]hen the Board moves in this area . . . it is functioning as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands. . . . [T]his amounts to the Board’s entrance into the substantive aspects of the bargaining process to an extent Congress has not countenanced.”). Just as the NLRA permits employers to blunt the effectiveness of an employee strike, so, too, does it permit an employer to implement an arbitration agreement even though it may blunt employees’ ability to impose higher litigation costs on the employer to extract higher cost-of-defense settlements.

(vi) ***D.R. Horton I*'s assertion that its decision would have a narrow impact was unreasonable and wrong.**

D.R. Horton I also unreasonably underestimated the scope and significance of its decision mandating that NLRA-covered employees have access to class action procedures in some forum. *D.R. Horton I* suggested the size of a class in employment disputes would be relatively small, unlike class actions involving commercial claims. *D.R. Horton I, supra*, slip op. at 11-12. (suggesting the average employment-related class and collective actions would involve only 20 members). That was simply untrue. Class-wide employment litigation can involve thousands of putative participants, especially in FLSA conditionally certified collective actions. *See, e.g., Rindfleisch v. Gentiva Health Servs., Inc.*, 17 Wage & Hour Cas.2d (BNA) 1081, 1084 (N.D. Ga. Apr. 13, 2011) (conditionally certifying FLSA collective action of up to 10,000 employees). *D.R. Horton I* also wrongly reasoned that its decision implicates “[o]nly a small percentage of arbitration agreements.” *D.R. Horton I, supra*, slip op. at 12. In fact, *D.R. Horton I* impacts a large percentage of the workforce – every employee covered by the NLRA and not subject to a collective bargaining agreement – by deeming those employees to possess a non-waivable, substantive right under the NLRA to access certain procedures in litigating their employment claims. Indeed, *D.R. Horton I* and its Board progeny threaten to destroy arbitration as an effective tool for achieving relatively quick and inexpensive adjudications of employment claims.

4. *D.R. Horton I* and *Murphy Oil I* Conflict with Federal Law and Were Therefore Wrongly Decided

In addition to conflicting with the FAA, *D.R. Horton I* and *Murphy Oil I* also conflict with other federal laws.

First, *D.R. Horton I* and *Murphy Oil I* are at odds with the Rules Enabling Act (“REA”), in which Congress delegated authority to the Supreme Court to promulgate the Federal Rules of

Civil Procedure. 28 U.S.C. § 2072(b). The REA expressly provides that the Federal Rules “shall not abridge, enlarge or modify any substantive right.” *Id.* Thus, Rule 20 (permissive joinder) and Rule 23 (class actions) regulate only procedure and do not impact substantive rights. *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, 559 U.S. 393, 408 (2010). In *D.R. Horton I*, contrary to the principle that the Federal Rules are valid only insofar as they “really regulat[e] procedure,” the Board held employees possess a *substantive* right under the NLRA to class action procedures. *D.R. Horton I*, *supra*, slip op. at 10 (“Any contention that the Section 7 right to bring a class or collective action is merely ‘procedural’ must fail.”). However, since the NLRA does not create class action procedures, employees could not have any purported right to bring a class action in federal court *but for* Rule 23 of the Federal Rules. *D.R. Horton I*’s holding thus treats Rule 23 as expanding employee’s rights under Section 7 to engage in protected concerted activity. Consequently, the Board’s interpretation conflicts with the REA by construing the Federal Rules as enlarging employees’ substantive rights.¹¹

Second, *D.R. Horton I* and *Murphy Oil I* are at odds with courts’ interpretation of Rule 23, the Federal Rules generally, and other standards governing procedures for adjudication. Courts have held repeatedly and expressly that litigants do not have a substantive right to class action procedures under Rule 23 and such procedures are waivable. *E.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 612-13 (1997); *Deposit Guar. Nat’l Bank, Jackson, Miss. v. Roper*, 445

¹¹ *See, e.g.*, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845, 119 S.Ct. 2295, 2314 (1999) (“[N]o reading of the Rule can ignore the [REA’s] mandate . . .”). Moreover, to the extent the Board concluded employees possess a substantive right under the NLRA to class action and joinder procedures created under *state* law, the Board’s interpretation impermissibly treated state law as modifying and enlarging substantive rights under a federal statute. *See, e.g.*, *Shady Grove* 559 U.S. at 408 (“[O]f course New York has no power to alter substantive rights and duties created by other sovereigns.”).

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.”); *Frazar v. Gilbert*, 300 F.3d 530, 545 (5th Cir. 2002) (“A class action is merely a procedural device; it does not create new substantive rights.”), *rev’d on other grounds, Frew ex rel. Frew v. Hawkins*, 540 U.S. 431 (2004). *D.R. Horton I* disregarded this substantial body of precedent interpreting rules and statutes outside the Board’s jurisdiction and expertise. The treatment of procedures as non-negotiable is also inconsistent with Supreme Court and other case law holding parties are generally free, as a matter of contract, to agree to the procedures that will govern their arbitrations. *E.g., Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989); *Baravati v. Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994).

Third, *D.R. Horton I* and *Murphy Oil I* also conflict with the FLSA’s collective action procedures. Courts regularly hold those procedures, like Rule 23’s class action procedures, do not provide substantive rights and are waivable.¹² *D.R. Horton I* also entirely failed to discuss the procedures that govern collective actions under the FLSA (and, by incorporation, the

¹² See *Long John Silver’s Restaurants, Inc. v. Cole*, 514 F.3d 345, 350–51 (4th Cir. 2008); *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1378 (11th Cir. 2005); *Carter v. Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir.2004) (holding that arbitration agreement was not unenforceable under the FAA where it required employees to arbitrate their FLSA claims individually because “the inability to proceed collectively” did not “deprive[] them of substantive rights available under the FLSA.”); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 503 (4th Cir. 2002); *Horenstein v. Mortg. Mkt., Inc.*, 9 Fed.Appx. 618, 619 (9th Cir. 2001); *Copello v. Boehringer Ingelheim Pharmaceuticals Inc.*, 812 F.Supp.2d 886, 894 (N.D. Ill. 2011) (“[W]hile FLSA prohibits substantive wage and hour rights from being contractually waived, it does not prohibit contractually waiving the procedural right to join a collective action.”); *Damassia v. Duane Reade, Inc.*, 250 F.R.D. 152, 164-65 (S.D.N.Y. 2008) (holding that the opt-in procedures of FLSA are procedural, not substantive); *Sjoblom v. Charter Communications, LLC*, 2007 WL 4560541, at *5-6 (W.D. Wis. Dec. 19, 2007) (concluding that the opt-in provisions of § 216(b) are not clearly substantive); *Westerfield v. Washington Mutual Bank*, 2007 WL 2162989, at *1 (E.D.N.Y. July 26, 2007) (“Section 216(b) by its terms governs procedural rights.”).

ADEA). The FLSA does not establish any procedures for identifying and notifying putative collective action members of their opportunity to opt-in to an FLSA collective action. Rather, such procedures have been developed by courts through their inherent authority to manage their cases. *Hoffmann-La Roche, Inc. v. Sperling*, 493 U.S. 165 (1989). The various ad hoc procedures for “certifying” a Section 216 collective action have thus been developed by federal courts applying their discretionary authority.¹³ *D.R. Horton I* holds that employees have a substantive right under the NLRA to invoke these ad hoc procedures without explanation. The NLRA cannot reasonably be construed to provide employees a substantive right to invoke notification and certification procedures developed by courts in the exercise of judicial discretion.

5. Darden has not violated the NLRA

Darden has not violated the NLRA based on *D.R. Horton I* and for any other reason.

(i) The DRP does not violate the NLRA because *D.R. Horton I* was wrongly decided.

For all of the reasons set forth above, the NLRA does not provide employees a non-waivable right to access class procedures, contrary to *D.R. Horton I*'s erroneous conclusion. As the ALJ in *D.R. Horton* held before the Board issued its *D.R. Horton I* decision, there has never previously been any “Board decision holding that an arbitration clause cannot lawfully prevent class action lawsuits or joinder of arbitration claims.” *D.R. Horton I, supra*, slip op. at 16. The Board should revert to that view, and the complaint in this case should be dismissed.

¹³ See, e.g., *Mooney v. Aramco Services Co.*, 54 F.3d 1207, 1212-16 (5th Cir. 1995) (describing various methods used by district courts to determine whether employees are similarly situated in a collective action under the ADEA, which incorporates § 216(b)), *overruled on other grounds by Desert Palace, Inc. v. Costa*, 539 U.S. 90, 90-91 (2003).

(ii) The DRP cannot reasonably be read by employees to prohibit them from filing unfair labor practice charges with the Board.

The DRP also does not violate the NLRA because employees would not reasonably read the DRP as restricting their access to file charges with the Board. If a work rule does not explicitly restrict activities protected by Section 7 of the Act, the Board will find the rule or policy unlawful only if (1) employees would reasonably construe the language to prohibit protected 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 activity. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004).

Here, none of these three circumstances exists. The Company did not promulgate the DRP in response to union activity. Nor has the rule been applied to restrict the exercise of Section 7 activity. Finally, no employee could reasonably misinterpret the DRP as prohibiting Section 7 activity, including the filing of unfair labor practice charges with the Board. *See, e.g., Tiffany & Co.*, 200 L.R.R.M. (BNA) ¶ 2069 (NLRB Div. of Judges Aug. 5, 2014) (finding a confidentiality clause lawful when it expressly excluded protected concerted activity from its coverage).

Neither the General Counsel nor the Charging Party offers any evidence that any employee has ever misinterpreted the DRP as prohibiting his or her filing claims with the Board or any other federal, state, or municipal government agency. The Fifth Circuit recently made clear that it would *not* be reasonable for employees to read an arbitration agreement like the DRP as prohibiting them from filing charges with the Board where the agreement states explicitly that it does not do so. The Court explained:

Reading the Murphy Oil contract as a whole, it would be unreasonable for an employee to construe the Revised Arbitration Agreement as prohibiting the filing of Board charges when the agreement says the opposite.

Murphy Oil II, 808 F.3d at 1020.

No employee could reasonably misconstrue the DRP as limiting his or her right to file a ULP charge with the Board.

(iii) The General Counsel Cannot, on this Stipulated Record, Establish that Martinez Was Engaged in Protected Concerted Activity.

Protected concerted activity under Section 7 of the Act is any activity that is “engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.” *Meyers Indus., Inc. & Prill*, 268 NLRB 493 (1984). Concerted activity occurs when “individual employees seek to initiate or to induce or prepare for group action.” *Meyers Indus., Inc. & Prill*, 281 NLRB 882 (1986). Concerted activity cannot be presumed, and must, instead, be established by some evidence of group activity, or an individual seeking to initiate or invoke group activity, or an individual raising a group complaint. Whether an employee has engaged in concerted protected activity is a factual question based on the record evidence. *Meyers*, 281 NLRB at 886. There is no evidence of concerted activity in this case. While Martinez filed a putative collective action, he was not a current employee at the time of the filing, he had no co-plaintiff, and there is no evidence that any other current or former employee of Respondents was involved in the action. The mere fact that the action was a putative collective action does not result in a presumption of concerted activity. *See Krispy Kreme Doughnut Corp v. NLRB*, 635 F.2d 304, 309 (4th Cir. 1980).

(iv) Darden’s enforcement of the DRP through its motion to compel arbitration does not violate the NLRA.

Because Darden’s DRP does not violate the NLRA, Darden’s motion to compel arbitration does not violate the NLRA, as it would not have “an objective illegal under federal

law.” *Bill Johnson’s Restaurants v. NLRB*, 461 U.S. 731, 737 n.5 (1983); *see also Haynes Building Services, LLC*, 363 NLRB No. 125, slip op. at 7 (2016) (“Because I believe the Respondent’s Agreement, as applied, was lawful under the NLRA, I would find it was similarly lawful for the Respondent to seek to enforce the Agreement by informing the Charging Party’s attorney that if the Charging Party did not agree to dismiss the class action lawsuit and arbitrate his claims on an individual basis, the Respondent would file a motion to compel arbitration.”) (Miscimarra, dissenting).

In addition, finding merit to this allegation would deprive Darden of its own rights, including its First Amendment right to petition and litigate. The Supreme Court has explained the limits on the Board’s power to deem employer litigation an unfair labor practice. As recently summarized by the Fifth Circuit,

To be enjoined . . . the lawsuit prosecuted by the employer must (1) be “baseless” or “lack[ing] a reasonable basis in fact or law,” and be filed “with the intent of retaliating against an employee for the exercise of rights protected by” Section 7, or (2) have “an objective that is illegal under federal law.”

Murphy Oil II, 808 F.3d at 1021 (quoting *Bill Johnson’s Restaurants*, 461 U.S. at 737 n.5, 744, 748.) As in *Murphy Oil II*, there is no basis to find that Darden’s enforcement of its DRP was baseless, retaliatory, or with an objective that is illegal under federal law. Ultimately, the evidence shows that certain employees filed lawsuits in breach of the DRP and that Darden, relying on extensive federal case law, defended itself in those lawsuits by seeking to enforce the DRP.

Any allegation that Darden’s motion to compel arbitration was unlawful would be based entirely on the Board’s decision in *D.R. Horton I*. However, the Fifth Circuit recently rejected a similar finding in *Murphy Oil II*. There, the Fifth Circuit explained:

[T]he Board’s holding is based solely on *Murphy Oil*’s enforcement of an agreement that the Board deemed unlawful because it required employees to

individually arbitrate employment-related disputes. Our decision in *D.R. Horton* forecloses that argument in this circuit. 737 F.3d at 362. Though the Board might not need to acquiesce in our decisions, it is a bit bold for it to hold that an employer who followed the reasoning of our *D.R. Horton* decision had no basis in fact or law or an “illegal objective” in doing so. The Board might want to strike a more respectful balance between its views and those of circuit courts reviewing its orders.

808 F.3d at 1021.

Here, Darden likewise relied on multiple federal and state court decisions in moving to compel arbitration under the DRP. Although the Board may disagree with those decisions, that disagreement does not mean that Darden had no basis in fact or law or an “illegal objective” in relying on them. Those decisions, including *D.R. Horton II* and *Murphy Oil II*, remain good law that has not been overruled by the Supreme Court. Moreover, the Supreme Court has repeatedly made clear that these types of agreements, even if they include class or collective action waivers, are lawful and enforceable under the FAA. See *American Express Co. v. Italian Colors Restaurant*, 570 U.S. ___, 133 S.Ct. 2304 (2013) and *Concepcion*, 131 S.Ct. 1740.

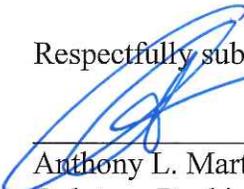
Because Darden had a constitutional right to petition the courts, and its motions did not fall under any *Bill Johnson’s* exception, any request for an ALJ decision, recommended remedy, and/or proposed order in this case must be rejected.

IV. CONCLUSION

For the foregoing reasons the instant matter should be dismissed in its entirety.

Dated: August 10, 2016

Respectfully submitted:



Anthony L. Martin

Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
3800 Howard Hughes Parkway, Suite 1500
Las Vegas, NV 89169

CERTIFICATE OF SERVICE

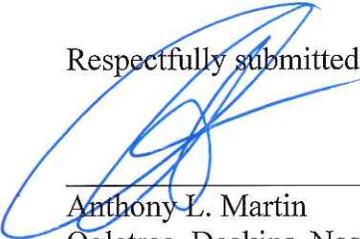
I HEREBY CERTIFY that on this 10th day of August, 2016, the foregoing **RESPONDENT'S BRIEF BEFORE THE ADMINISTRATIVE LAW JUDGE** was filed electronically and that true and correct copies of the same were sent via email to the following:

Hon. Joel P. Biblowitz, Associate Chief
Administrative Law Judge
National Labor Relations Board
Division of Judges
120 West 45th Street, 11th Floor
New York, New York 10036-5503
*Uploaded into NLRB e-file and transmitted by
e-mail to joel.biblowitz@nlrb.gov*

Matthew J. Matern, Esq.
Matern Law Group
1230 Rosecrans Ave., Suite 200
Manhattan Beach, CA 90266 *Transmitted by e-mail to
mmatern@maternlawgroup.com*

Eric Brooks, Esq.
Counsel for the General Counsel
National Labor Relations Board, Region 2
26 Federal Plaza, Room 3614
New York, New York 10278
*Transmitted by e-mail to
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Respectfully submitted:



Anthony L. Martin
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3800 Howard Hughes Parkway, Suite 1500
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25702274.3

EXHIBIT 1

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 31**

DARDEN RESTAURANTS, INC.;
GMRI, INC.;
YARD HOUSE USA, INC.;
YARD HOUSE NORTHRIDGE, LLC

and

Case 31-CA-158487

FILIBERTO MARTINEZ, An Individual

**JOINT MOTION AND SUBMISSION OF STIPULATION OF FACTS AND EXHIBITS
TO THE ADMINISTRATIVE LAW JUDGE**

This is a Joint Motion pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations entered into by the parties to this case, Darden Restaurants, Inc. (Respondent Darden), GMRI, Inc. (Respondent GMRI), Yard House USA Inc. (Respondent Yard House USA), and Yard House Northridge, LLC (Respondent Yard House Northridge) (collectively called Respondents); Filiberto Martinez, an Individual (Charging Party); and Counsel for the General Counsel of the National Labor Relations Board (General Counsel). By this Joint Motion, the parties jointly waive a trial and submit this case to the Administrative Law Judge ("ALJ") on a stipulated record for issuance of a decision. The granting of this Motion will effectuate the purposes of the National Labor Relations Act ("NLRA") and avoid unnecessary cost and delay.

If this Motion is granted, the parties expressly agree that the record in this case includes this Joint Motion and Stipulation of Facts and Exhibits, as set forth herein and attached hereto, and expressly incorporated by reference herein. All parties agree that the ALJ will set a time for the filing of briefs in this matter and the parties are expressly reserving their right to file briefs, which is a condition precedent to this Motion. Following consideration of the briefs and the applicable record in this case, the ALJ shall issue his or her findings of facts, conclusions of law, and a recommended order.

I. RECORD EXHIBITS:

The parties agree that the following documents are true for purposes of this matter only. The parties do not concede the relevancy of admission of any document recited, and this stipulation is made without prejudice to any objection any party may have as to the relevance of any documents admitted hereto. Any party urging that particular documents are irrelevant will do so in its brief.

The Record Exhibits in this case consist of the following:

Exhibit	Description
A	The Charge Against Employer, filed August 20, 2015.
B	Affidavit of Service of the Charge, dated August 21, 2015.
C	The Complaint and Notice of Hearing, dated February 26, 2016.
D	Affidavit of Service of the Complaint, dated February 26, 2016.
E	Respondent Darden's Answer to the Complaint, with Certificate of Service, dated March 11, 2016.
F	Respondent GMRI's Answer to the Complaint, with Certificate of Service, dated March 11, 2016.
G	Respondent Yard House USA's Answer to the Complaint, with Certificate of Service, dated March 11, 2016.
H	Respondent Yard House Northridge's Answer to the Complaint, with Certificate of Service, dated March 11, 2016.
I	Order Rescheduling Hearing to June 29, 2016, dated May 6, 2016.
J	Affidavit of Service of Order Rescheduling Hearing, dated May 6, 2016.
K	Order Rescheduling Hearing to June 30, 2016, dated June 14, 2016.
L	Affidavit of Service of Order Rescheduling Hearing, dated June 14, 2016.
M	Respondents' Dispute Resolution Process (DRP), issued in February 2013.
N	Charging Party's Dispute Resolution Process Acknowledgement, February 23, 2013. ¹
O	Charging Party's Summons and Class Action Complaint, alleging violations of the California Labor Code, Industrial Welfare Commission Wage Orders, and California Business and Professional Code, filed March 6, 2015 in Superior Court of the State of California, County of Los Angeles, Case No. BC-574023.
P	Respondents' and Charging Party's <i>Joint Initial Status Conference Class Action Response Statement</i> dated May 6, 2015, filed May 7, 2015.
Q	Respondents' <i>Notice of Removal of Action Pursuant to 28 U.S.C. Sections 1332, 1441, and 1446</i> , Case No. 2:15-cv-3434 (U.S.D.C., C.D. Cal.), dated May 7, 2015.
R	Respondents' <i>Motion to Compel Binding Arbitration; Memorandum of Points and Authorities</i> , in Case No. 2:15-cv-3434 (U.S.D.C., C.D. Cal.) dated May 8, 2015, including the following documents: <ol style="list-style-type: none"> 1. Declaration of Gilbert Vance; 2. Declaration of Melissa Ingalsbe; 3. Declaration of Anthony G. Morrow; 4. Declaration of Jesse M. Caryl; 5. Declaration of Randolph Babitt; 6. Request for Judicial Notice; 7. Notice of Lodging a Proposed Order; and 8. Proposed Order.
S	Charging Party's <i>Plaintiff's Opposition to Defendants' Motion to Compel Arbitration</i> , dated June 4, 2015, including Declaration of Matthew J. Matern.

¹ Exhibit N is Charging Party's signature on a Spanish-language translation of page 11 of the English-language DRP.

T	Respondents' <i>Defendants' Reply in Support of Their Motion to Compel Binding Arbitration; Memorandum of Points and Authorities</i> , dated June 5, 2015, including Declaration of Jesse M. Caryl.
U	U.S. District Court Judge George H. Wu's <i>Order Granting Respondents' Motion to Compel Binding Arbitration</i> , dated August 13, 2015.
V	Charging Party's Earnings Statement Issued By Respondent Yard House Northridge for pay period 12/10/12 to 12/23/12.
W	Charging Party's Earnings Statement Issued By Respondent GMRI and Respondent Yard House USA for pay period 1/14/13 to 1/20/13.
X	Parties' <i>Joint Status Conference Statement Regarding Arbitration</i> , in Case No. 2:15-cv-3434 (U.S.D.C., C.D. Cal.) dated February 18, 2016.
Y	Employment Documents Provided By Respondent Darden to Charging Party Counsel on June 12, 2013.

II. STIPULATION OF FACTS

The parties agree that the following facts are true for purposes of this matter only. The parties do not concede the relevancy of admission of any fact recited, and this stipulation is made without prejudice to any objection any party may have as to the relevance of any facts stated herein. Any party urging that particular facts are irrelevant will do so in its brief.

1. On August 20, 2015, the Charging Party filed the charge and copies were served by U.S. mail on Respondent Darden, Respondent GMRI, Respondent Yard House USA, and Respondent Yard House Northridge on August 21, 2015. (Exhibits A and B.)
2. On February 26, 2016, the Acting Regional Director for Region 31 issued a Complaint and Notice of Hearing, and a copy was served by U.S. mail on Respondent Darden, Respondent GMRI, Respondent Yard House USA, and Respondent Yard House Northridge on the same day. (Exhibits C and D.)
3. On March 11, 2016, Respondent Darden, Respondent GMRI, Respondent Yard House USA, and Respondent Yard House Northridge filed their Answers to the Complaint. (Exhibits E, F, G and H.)
4. (a) At all material times, Respondent Darden has been a Florida corporation and through its direct and indirect ownership of various subsidiaries has a place of business in Los Angeles, California, where it has been engaged in operating public restaurants selling food and beverages.

(b) In the calendar year ending December 31, 2015, Respondent Darden through its direct and indirect ownership of various subsidiaries has derived gross revenues in excess of \$500,000 and has purchased and received for its California location, goods valued in excess of \$5,000 directly from points outside the State of California.

(c) At all material times, Respondent Darden has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

5. (a) At all material times, Respondent GMRI has been a Florida corporation, and through its direct and indirect ownership of various subsidiaries, has a place of business in Los Angeles, California, where it has been engaged in operating public restaurants selling food and beverages.

(b) In the calendar year ending December 31, 2015, Respondent GMRI through its direct and indirect ownership of various subsidiaries has derived gross revenues in excess of \$500,000 and has purchased and received for its California location, goods valued in excess of \$5,000 directly from points outside the State of California.

(c) At all material times, GMRI has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
6. (a) At all material times, Respondent Yard House USA has been a Delaware corporation, and through its direct and indirect ownership of various subsidiaries, has a place of business in Los Angeles, California, where it has been engaged in operating public restaurants selling food and beverages.

(b) In the calendar year ending December 31, 2015, Respondent Yard House USA has derived gross revenues in excess of \$500,000 and has purchased and received for its California location, goods valued in excess of \$5,000 directly from points outside the State of California.

(c) At all material times, Respondent Yard House USA has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
7. (a) At all material times, Respondent Yard House Northridge has been a California corporation with a place of business in Los Angeles, California, where it has been engaged in operating public restaurants selling food and beverages.

(b) In the calendar year ending December 31, 2015, Respondent Yard House Northridge has derived gross revenues in excess of \$500,000 and has purchased and received for its California location, goods valued in excess of \$5,000 directly from points outside the State of California.

(c) At all material times, Respondent Yard House Northridge has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
8. Employees employed by the Respondents, including the Charging Party, are not represented by a labor organization.
9. At material times, Respondent Yard House Northridge, Respondent Yard House USA, and Respondent GMRI have required employees, including the Charging Party, to submit employment related and compensation related disputes to arbitration. The terms of the agreement are described in the Dispute Resolution Process (DRP), Exhibit M. The DRP

states that examples of legal claims covered by the DRP include, but are not limited to: claims that arise out of the Civil Rights Act of 1964, Americans With Disabilities Act, Fair Labor Standards Act, Age Discrimination in Employment Act, and Family Medical Leave Act. (Joint Exhibit M, page 2.)

10. The DRP also states:

Class, Collective, and Representative Actions

There will be no right or authority for any dispute to be brought, heard or arbitrated by any person as a class action, collective action or on behalf of any other person or entity under the DRP. The arbitrator has no jurisdiction to certify any group of current or former employees, or applicants for employment, as a class or collective action in any arbitration proceeding. (Joint Exhibit M, page 3.)

11. Employees, including the Charging Party, must agree to abide by the terms of the DRP as a term and condition of employment.

12. The Charging Party signed the following acknowledgement on or about February 23, 2013:

This agreement contains the requirements, obligations, procedures and benefits of the Dispute Resolution Process (DRP). **I acknowledge that I have received and/or have had the opportunity to read this arbitration agreement. I understand that this arbitration agreement requires that disputes that involve the matters subject to the agreement be submitted to mediation or arbitration pursuant to the arbitration agreement rather than to a judge or jury in court.** I agree as a condition of my employment, to submit any eligible disputes I may have to the DRP and to abide by the provisions outlined in the DRP. I understand this includes, for example, claims under state and federal laws relating to harassment or discrimination, as well as other employment-related claims as defined by the DRP. Finally, I understand that the Company is equally bound by all of the provisions of the DRP.² (Joint Exhibit N.) (*Emphasis in original.*)

13. The Charging Party was employed at Respondents' Northridge, California facility from November 8, 2012 until May 28, 2013.

14. The DRP is a condition of employment of all employees who are employed by any of the Respondents.

15. On or about March 2, 2015, the Charging Party filed a class-action lawsuit in Case No. BC-574043, captioned *Filiberto Martinez, et al. v. Darden Restaurants, Inc., et al.*, (Superior Court of the State of California, County of Los Angeles), alleging that the Respondent Darden, Respondent Yard House Northridge, Respondent Yard House USA, and

² The Charging Party's acknowledgement was in Spanish. The language quoted above is the English translation of the Spanish-language acknowledgement signed by the Charging Party.

Respondent GMRI violated the California Labor Code, Industrial Welfare Commission Wage Orders, and the California Business and Professional Code. (Joint Exhibit O.)

16. On or about May 6, 2016, Charging Party and Respondent Darden, Respondent Yard House Northridge, Respondent Yard House USA, and Respondent GMRI jointly submitted a Joint Initial Status Conference Class Action Response Statement to the Superior Court. (Joint Exhibit P.)
17. On or about May 7, 2015, Respondent Darden, Respondent Yard House Northridge, Respondent Yard House USA, and Respondent GMRI, acting jointly³, filed a *Notice of Removal of Action Pursuant to 28 U.S.C. Sections 1332, 1441, and 1446*, Case No. 2:15-cv-3434 (U.S.D.C., C.D. Cal., herein the U.S.D.C.) (Joint Exhibit Q.)
18. On or about May 8, 2015, Respondent Darden, Respondent Yard House Northridge, Respondent Yard House USA, and Respondent GMRI, acting jointly, submitted a *Motion to Compel Binding Arbitration; Memorandum of Points and Authorities* to the U.S.D.C. (Joint Exhibit R.)
19. On or about June 4, 2015, Charging Party submitted its *Opposition to Respondents' Motion to Compel Arbitration* to the U.S.D.C. (Joint Exhibit S.)
20. On or about June 5, 2015, Respondent Darden, Respondent Yard House Northridge, Respondent Yard House USA, and Respondent GMRI, acting jointly, submitted its *Reply* to the U.S.D.C. (Joint Exhibit T.)
21. On or about August 13, 2015, U.S.D.C. Judge George H. Wu issued his *Order* granting Respondent Darden, Respondent Yard House Northridge, Respondent Yard House USA, and Respondent GMRI's Motion to Compel Binding Arbitration. (Joint Exhibit U.)
22. Charging Party and Respondents filed a *Joint Status Conference Statement Regarding Arbitration*, in Case No. 2:15-cv-3434 (U.S.D.C., C.D. Cal.) dated February 18, 2016. (Joint Exhibit X.)
23. All documents attached as Joint Exhibits are true and correct copies of the documents described. The parties agree to the authenticity of the Joint Exhibits.

³ "Acting jointly" refers to the fact that all four Respondents jointly asserted in litigation that Charging Party's lawsuit should be removed to federal court and that Charging Party was required to submit his wage and hour claims to arbitration under the terms of the DRP. Counsel for the General Counsel does not allege, and the parties do not stipulate, that the four Respondents are joint employers under current Board law and the Act. However, this does not prevent any party from raising this theory and/or arguing joint employer status in any other proceeding or civil litigation related to the DRP.

III. STATEMENT OF ISSUES IN THIS CASE:

Without waiving objections to the materiality or relevance based on the foregoing factual stipulations, the Parties agree and stipulate to the following issues presented in this matter:

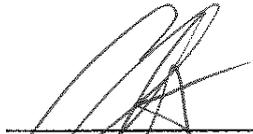
1. Whether Respondent Yard House Northridge's, Respondent Yard House USA's, and Respondent GMRI's maintenance of the DRP interferes with, restrains, and coerces employees in the exercise of rights guaranteed under Section 7 of the Act in violation of Section 8(a)(1) of the Act.
2. Whether Respondent Yard House Northridge's, Respondent Yard House USA's, and Respondent GMRI's requirement that employees, including the Charging Party, sign the DRP as a condition of employment interferes with, restrains, and coerces employees in the exercise of rights guaranteed under Section 7 of the Act in violation of Section 8(a)(1) of the Act.
3. Whether Respondent Darden's, Respondent Yard House Northridge's, Respondent Yard House USA's, and Respondent GMRI's filing of its May 8, 2015 *Motion to Compel Binding Arbitration* of Charging Party's class action lawsuit interferes with, restrains, and coerces employees in the exercise of rights guaranteed under Section 7 of the Act in violation of Section 8(a)(1) of the Act.
4. Whether Respondent Darden or Respondent Yard House USA are proper parties to this matter.
5. Whether the remedies sought by the General Counsel in this case are appropriate.
6. Whether the charges are time barred under Section 10(b) of the Act.
7. Whether the Board and/or Martinez are estopped from pursuing this particular matter.

Respectfully submitted,



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