

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

**ADI WORLDLINK, LLC; SAMSUNG
ELECTRONICS AMERICA, INC. f/k/a SAMSUNG
TELECOMMUNICATIONS AMERICAS, LLC**

Respondents

and

Case 07-CA-157722

**TIM CURRY, OZIAS FOSTER, ROYCE ELLISON,
MERVIN L. MCGIRT, CLARENCE COOK, KEVIN
ASTROP, Individuals.**

Region 7 Charging Parties

and

Case 20-CA-156284

**NATHAN NESBIT, CHRIS CARETHERS,
LAMAR HALL, LEON TOWNSEND, STEVEN LE,
SEAN GOODSON, Individuals**

Region 20 Charging Parties

**SAMSUNG ELECTRONICS AMERICA, INC.’S RESPONSE TO NOTICE TO SHOW
CAUSE, OPPOSITION TO THE GENERAL COUNSEL’S MOTION FOR SUMMARY
JUDGMENT, AND MOTION FOR SUMMARY JUDGMENT IN FAVOR OF SAMSUNG**

Respondent Samsung Electronics America, Inc. (“Samsung”) did not violate the National Labor Relations Act (“NLRA”) by moving to dismiss the Charging Parties’ collective action allegations in the American Arbitration Association (“AAA”) arbitrations on the basis of an arbitration agreement that did not permit collective actions. Although the National Labor Relations Board has previously held that class and collective action waivers in arbitration agreements violate the NLRA, such waivers are actually permissible because there is no substantive right to a class or collective action, and because the Federal Arbitration Act (“FAA”)

mandates the enforcement of the arbitration agreements on their own terms. In addition, Samsung is not liable for moving to dismiss the Charging Parties' collective action allegations because it had a First Amendment right to do so.

Accordingly, Samsung respectfully requests that the Board deny the General Counsel's Motion for Summary Judgment ("Motion"). Samsung also respectfully requests the Board to enter summary judgment in favor of Samsung.¹

STATEMENT OF FACTS

Charging Parties Tim Curry, Ozias Foster, Royce Ellison, Mervin L. McGirt, Clarence Cook, Kevin Astrop, Nathan Nesbit, Chris Carethers, Lamar Hall, Leon Townsend, Steven Le, and Sean Goodson signed Respondent Adi WorldLink, LLC's ("WorldLink") Labor Services Agreement ("Agreement"), which states, in relevant part:

Pursuant to the Federal Arbitration Act, I agree to use binding arbitration to resolve any dispute of any sort that I may have with either Employer and/or Client relating to or arising in any way from this Agreement, my employment or status as an independent contractor, or the termination of my employment or independent contractor relationship

The parties do not agree to class action treatment of any claim subject to this arbitration provision, and neither party may pursue any claims covered by this Agreement as a class representative or a member of a class.

Order Consolidating Cases, Second Amended Consolidated Complaint and Notice of Hearing ("Compl.") ¶ 6.

¹ Although Samsung had not moved for summary judgment before the Board issued its July 26, 2016 Notice to Show Cause, Samsung was preparing a summary judgment motion, and the deadline for submitting a summary judgment motion had not passed. On July 5, 2016, the Regional Director entered an order rescheduling the hearing to October 4, 2016, and, therefore, Samsung's summary judgment motion was due on September 6, 2016. *See* NLRB Rules & Regulations § 102.24(b) ("All motions for summary judgment or dismissal shall be filed with the Board no later than 28 days prior to the scheduled hearing."). In addition, Samsung reserves its right to assert any defense not raised herein in future proceedings in this matter.

Despite the Agreement, on April 27, 2015, the Region 7 Charging Parties filed a collective action with the AAA in Case Number 01-15-0003-3446, alleging a violation of the Fair Labor Standards Act (“FLSA”), and on May 6, 2015, the Region 20 Charging Parties filed a collective action with the AAA in Case Number 01-15-0003-4540, also alleging a violation of the FLSA. *Id.* ¶ 9.

On June 19, 2015, Respondents filed a Joint Motion to Dismiss Collective Action Allegations and to Limit Proceeding to Individual Claims and Motion to Sever (“Joint Motion to Dismiss”) in the two AAA arbitrations. *Id.* ¶ 10. The Joint Motion to Dismiss was granted in each arbitration. *See* Respondent Adi WorldLink, LLC’s Brief in Support of Motion for Summary Judgment, Ex. C.

On February 26, 2016, the Board filed the operative Second Amended Consolidated Complaint. The Board’s Second Amended Consolidated Complaint alleges that Samsung violated the NLRA only by filing the Joint Motion to Dismiss. *See* Compl. ¶¶ 6-8 (referring only to WorldLink as maintaining the Agreement and requiring employees to sign it), 10-12.

ARGUMENT

I. Federal law entitles employers to contract for and enforce a class-arbitration waiver.

In *D.R. Horton, Inc.*, 357 NLRB 2277, 2289 (2012), *enforcement denied in relevant part*, *D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344 (5th Cir. 2013), the Board held that an employer “violate[s] Section 8(a)(1) by requiring employees to waive their right to collectively pursue employment-related claims in all forums, arbitral and judicial.” The Board’s *D.R. Horton* rule is that the NLRA guarantees a right to collective legal action that displaces the FAA’s ordinary application. *Id.* at 2280. Respectfully, the Board’s *D.R. Horton* decision is mistaken, and the Board should follow the Circuit Courts of Appeals that have rejected it, as these Circuit Court

rulings are based on Supreme Court precedents on arbitration that apply here and that the Board must follow. *See Pathmark Stores, Inc.*, 342 NLRB 378, 378 (2004) (“It has been the Board’s consistent policy for itself to determine whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court’s opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise . . .”). The Supreme Court’s unambiguous teaching requires courts to enforce arbitration contracts as written, subject to only three exceptions. None are satisfied here.

A. Federal law requires the enforcement of arbitration contracts on their own terms.

Federal law allows parties to bind themselves to arbitration as they wish, and unequivocally obligates both courts and agencies to respect these contracts on their own terms. *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2308-09 (2013). The FAA “reflects the overarching principle that arbitration is a matter of contract. And consistent with that text, courts must rigorously enforce arbitration agreements according to their terms, including terms that specify *with whom* [the parties] choose to arbitrate their disputes, and the rules under which that arbitration will be conducted.” *Id.* at 2309 (alterations in original) (internal quotation marks and citations omitted).

In *Italian Colors*, the Supreme Court endorsed precisely the type of arbitration agreement that the General Counsel seeks to invalidate here—an agreement to arbitrate individually that excluded class actions in litigation *and* arbitration. *Id.* at 2308. The Court recognized only three circumstances where the FAA’s policy of enforcing arbitration contracts as written might yield. First, the Court noted that an arbitration agreement may be invalid—that is, that the FAA would not *necessarily* save the agreement—when it “prospective[ly] waive[s] . . . a party’s right to pursue statutory remedies.” *Id.* at 2310 (emphasis and citation omitted). Second, the Court cited

the FAA's own exclusion, the so-called "savings clause," which says that all arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id.* at 2309 (quoting 9 U.S.C. § 2). Third, the Court acknowledged that, at times, the Act's guarantees can be overridden by a "contrary congressional command." *Id.* Such a command arises when another law "evinces an intention to preclude" the particular kind of arbitration agreement. *Id.* (citation omitted).

There are no other exceptions to the FAA. Agreements otherwise "*shall be valid . . . and enforceable.*" 9 U.S.C. § 2 (emphasis added). The FAA does not "sanction . . . a judicially created superstructure" of other requirements prior to its enforcement, whether by the courts or by the Board. *Italian Colors*, 133 S. Ct. at 2312. And by definition, the Board may not exceed the limits placed by Congress and recognized by the Supreme Court. If the Board's *D.R. Horton* doctrine is to survive, it must satisfy one of these three exceptions to the FAA's "liberal federal policy favoring arbitration." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (citation omitted). None provide the Board's *D.R. Horton* doctrine with refuge.

B. Nothing in federal law exempts employer-employee arbitration agreements from the FAA's scope.

The Board's holding in *D.R. Horton* is that Section 7 of the NLRA, which guarantees to workers the right "to engage in . . . concerted activities for the purpose of collective bargaining or other mutual aid or protection," 29 U.S.C. § 157, includes the right to participate in class-wide litigation or arbitration, *D.R. Horton*, 357 NLRB at 2283. Section 8(a)(1) of the NLRA prohibits an employer from interfering with or restraining employees' exercising of their Section 7 rights. 29 U.S.C. § 158(a)(1). Therefore, according to the Board, Section 8(a)(1) prohibits employers from making or enforcing arbitration agreements with class-arbitration waivers, notwithstanding the FAA. *D.R. Horton*, 357 NLRB at 2283-85.

Tracking the above-listed exceptions to the FAA’s general rule, the Board offered three rationales for its *D.R. Horton* holding: first, that Section 7 provides a “substantive right” to collective arbitration, *id.* at 2278, 2285; second, that its rule falls within the Act’s savings clause, as *all* contracts violating the NLRA are void, *id.* at 2284, 2287; and third, that the NLRA (or, alternatively, the Norris-LaGuardia Act) provides a contrary congressional command authorizing the Board to ignore the FAA, *id.* at 2287-88. None of these claims withstand scrutiny. Indeed, with one exception, every federal appellate court to consider any of the positions the Board took in *D.R. Horton* has rejected or cast doubt upon them.²

1. The NLRA does not create a substantive right to class-based arbitration.

The Board’s principal support for *D.R. Horton* was that Section 7 vests in employees a substantive right to “collective legal action,” which is part of “the core substantive right” protected by Section 7. *D.R. Horton*, 357 NLRB at 2286. Because the right to a collective adjudication is the “statutory right” to be vindicated, the Board’s reasoning went, an arbitration agreement waiving that right may be voided, the FAA notwithstanding.³

² See *Cellular Sales of Mo., Inc. v. N.L.R.B.*, 824 F.3d 772, 776 (8th Cir. 2016) (reiterating its rejection of the Board’s *D.R. Horton* decision); *Murphy Oil USA Inc. v. N.L.R.B.*, 808 F.3d 1013, 1018 (5th Cir. 2015) (same); *D.R. Horton, Inc. v. N.L.R.B.*, 737 F.3d 344, 362 (5th Cir. 2013) (declining to enforce the Board’s petition and rejecting its reasoning); *Richards v. Ernst & Young, LLP*, 744 F.3d 1072, 1075 n.3 (9th Cir. 2013) (expressly reserving the issue but “not[ing] that the two courts of appeals, and the overwhelming majority of the district courts, to have considered the issue have determined that they should not defer to the [Board’s] decision in *D.R. Horton*”); *Sutherland v. Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013) (“Like the Eighth Circuit, however, we decline to follow the decision in *D.R. Horton*.”); *Owen v. Bristol Care, Inc.*, 702 F.3d 1050, 1053-54 (8th Cir. 2013) (describing *D.R. Horton* as carrying “little persuasive authority” in that case, and stating that “nearly all” district courts had rejected *D.R. Horton*). But see *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147, 1161 (7th Cir. 2016) (invalidating arbitration agreement as violating Sections 7 and 8 of the NLRA).

³ Indeed, a corollary of the Board’s position is that such a contract must be voided on related, though slightly different, grounds. See *infra* Part II.B.2.

This is a strange way to conceive of collective adjudication. It is strange in that collective adjudication is routinely considered a procedural right, or even a procedural device, and neither a substantive right nor a remedy. “The right of a litigant to employ [a class action under Rule 23] is a procedural right only, ancillary to the litigation of substantive claims.” *Deposit Guar. Nat’l Bank, Jackson, Miss. v. Roper*, 445 U.S. 326, 332 (1980). It is strange because collective adjudication is “an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only,” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011) (citation omitted), and so the existence of a substantive right to deviate from this norm in arbitration—an alternative to traditional litigation preferred for its informality and speed—would be counterintuitive, at a minimum. And it is strange because the very device that the Board claimed Section 7 has secured access to—collective litigation or arbitration—did not exist when the NLRA was passed. *See D.R. Horton*, 737 F.3d at 362 (“Of some importance is that the NLRA was enacted and reenacted prior to the advent in 1966 of modern class action practice.”).

Considering class-wide adjudication to be a substantive (as opposed to procedural) right contradicts not only modern class-action jurisprudence, but also historical practice. Long before either the NLRA or the modern class action, federal courts used various means to allow numerous plaintiffs (or defendants) to proceed in a single action. Federal courts could entertain representative suits and could join parties permissively under certain circumstances. But these devices were undoubtedly procedural. Whether the actions could proceed depended on the *underlying* substantive rights claimed: a federal court could entertain a representative action based upon the size of a class only where the class shared a substantive legal claim—“there must be a common interest or a common right[] which the [suit] seeks to establish or enforce.” *Smith*

v. Swarmstedt, 57 U.S. 288, 302 (1853). And historical joinder practice required a common subject matter in the underlying object of the suit. 7 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1651 (3d ed. 2015). There was no historical suggestion that these limitations somehow restrained a potential party’s *substantive* rights.

Thus, these restrictions survived in the modern Federal Rules of Civil *Procedure*. The representative action in part gave rise to the class action, which permits—like the representative action—a class to proceed where membership in the class is impracticably vast, and the class shares some common questions of law or fact. Fed. R. Civ. P. 23(a)(1)-(2). Similarly, a federal court may permissively join parties who assert a common right to relief, question of law, or question of fact. Fed. R. Civ. P. 20(a)(1)(A)-(B). But these limitations imply some cases outside their scope: cases where parties might care to litigate together, but lack a sufficiently common question to establish a class or permit joinder. And the Rules Enabling Act permits these rules—and their limitations—only where they “shall not abridge, enlarge or modify any substantive right.” 28 U.S.C. § 2072(b). No historical sources suggest that these restraints on class-wide litigation or permissive joinder abridge a substantive right to litigate with another party.

But *D.R. Horton* lacks the courage of its convictions.⁴ If Section 7 guarantees a *substantive* right to class adjudication through class arbitration, then it guarantees the same right in a potential class action. Where Rule 23(a)(2) requires a common question of law or fact,

⁴ The Seventh Circuit’s opinion is similarly flawed. Largely adopting the oft-rejected positions in *D.R. Horton*, the Seventh Circuit concluded that a contract that “precludes employees from seeking any class, collective, or representative remedies” violates the NLRA. *Lewis*, 823 F.3d at 1161. But first, this mischaracterizes the nature of a class action, which is a procedural device, not a remedy. *Deposit Guar. Nat’l Bank*, 445 U.S. at 332. And second, Section 8 prohibits not only those actions that completely blockade the exercise of a Section 7 right, but also those that merely “interfere with” or “restrain” it. 29 U.S.C. § 157. The Seventh Circuit’s approach thus prohibits not only class-arbitration waivers, but also class-action waivers—or even agreements not to litigate (and instead to arbitrate). This absurd conclusion cannot be reconciled with *Concepcion* or *Italian Colors*.

Section 7 requires that workers merely intend to act together to improve their collective lot. And where Rule 20 requires a common right to relief or a common question, Section 7 requires merely the intent to act for mutual aid or protection. In other words, *D.R. Horton* requires the belief that Congress, through the NLRA, displaced centuries-old limitations on the various procedural means to litigate with fellow employees. That cannot be right. As one Circuit Court has explained, “Congress’s decision to . . . include the procedural right to a collective action . . . does not somehow transform that procedural right into a substantive right.” *Walthour v. Chipio Windshield Repair, LLC*, 745 F.3d 1326, 1336 (11th Cir. 2014) (holding that the FLSA “does not set forth a non-waivable substantive right to a collective action”). That Circuit Court so held regarding a collective-action device provided *expressly* within the FLSA—the act under which the Charging Parties brought their claims—and not one raised by dubious implication, as in the NLRA. *See id.* at 1336-37. At the risk of repetition, it would be passing strange for Congress to include a mere (waivable) procedural right in the statute underpinning the Charging Parties’ claims, but smuggle in a more robust (non-waivable) substantive right to collective arbitration in Section 7’s vaguer language. Congress did no such thing, and *D.R. Horton*’s contention that collective litigation is somehow a substantive right should be rejected.

2. **The Board’s *D.R. Horton* rule does not fall within the FAA’s savings clause.**

The second rationale supporting the Board’s *D.R. Horton* rule is closely related to its first. The FAA’s savings clause allows courts to refuse to enforce arbitration contracts on those “grounds as exist at law or in equity for the revocation of any contract.” *D.R. Horton*, 357 NLRB at 2287 (quoting 9 U.S.C. § 2). The Board reasoned that all contracts that violate rights guaranteed by the NLRA are void for contravening public policy, and so a contract that violates

an employee's Section 7 right to be free of class-based arbitration waivers is void on a generally applicable public policy defense. *Id.*

The Board's second argument was entirely derivative of its first. Even assuming the rest of the Board's premises, the Agreement here would violate the NLRA only if that Act protects a substantive right to collective arbitration in the first place. If this is so, then an agreement to waive that right waives a statutory right within the meaning of *Italian Colors*, and may be invalidated on that basis. If it is not, then the first *Italian Colors* exception cannot invalidate the agreement, but the contract cannot contravene public policy, as it does not violate a right protected by the NLRA. The Board's second argument adds nothing.

The Board's second argument does, however, suffer an additional flaw—it characterizes a generally applicable contract defense for purposes of the FAA's savings clause in the precise way that the Supreme Court rejected in *Concepcion*. California courts—the forum for *Concepcion*—had, for many years, applied a general test for determining when a contract is unconscionable, including a procedural and substantive element. *Concepcion*, 563 U.S. at 340. In *Discover Bank*, the California Supreme Court determined that arbitration agreements that precluded collective arbitration were unconscionable, relying on the contracting parties' unequal bargaining power and the potential for a company to escape liability for small damage amounts systematically to satisfy the general two-part California test. *Id.* (citing *Discover Bank v. Superior Court*, 113 P.3d 1100, 1110 (Cal. 2005)).

The *Concepcions*, who sought to avoid the arbitration agreement, argued that the *Discover Bank* doctrine—which held that arbitration contracts of adhesion with class-based waivers were *per se* unconscionable—fell within the FAA's savings clause. After all, they reasoned, unconscionability is a generally applicable contract defense, and California courts

merely applied this generally applicable defense to the typical facts of arbitration contracts. *Id.* at 341.

But the Supreme Court rejected this characterization of the *Discover Bank* rule. Rules that outright prohibit “the arbitration . . . of a certain type of claim” yield a “straightforward” analysis: “The conflicting rule is displaced by the FAA.” *Id.*; *Discover Bank*, 113 P.3d at 1114. The closest analogy to the Board’s position was thus the Supreme Court’s easiest case. More complex were those cases “when a doctrine normally thought to be generally applicable,” such as voidness for contravening public policy, “is alleged to have been applied in a fashion that disfavors arbitration.” *Concepcion*, 563 U.S. at 341.

These interpretations, too, were displaced by the FAA. For example, an “obvious illustration . . . would be a case . . . finding . . . unenforceable as against public policy consumer arbitration agreements that fail to provide for judicially monitored discovery.” *Id.* at 341-42. The Court hypothesized many variants of these rules that might destroy the purpose of arbitration, and settled on a clear principle: those state-law rules that frustrated the FAA’s strong preference for arbitration were preempted. *Id.* at 343. “In other words, the act cannot be held to destroy itself.” *Id.* (citation omitted).

Concepcion precludes the characterization of the *D.R. Horton* rule as merely a generally applicable contract defense. Formulations of general doctrines that fundamentally disfavor arbitration fall outside the savings clause’s scope. The Board’s *D.R. Horton* rule is, indeed, a significantly easier case than *Discover Bank*. It expressly targets arbitration agreements as arbitration agreements; it disfavors the very device (a class-based arbitration waiver) approved in *Concepcion*, 563 U.S. at 344, 351-52. It undoubtedly circumvents the FAA, and is, like the *Discover Bank* rule, outside the FAA’s savings clause. *See generally Sutherland*, 726 F.3d at

297 (reasoning that “Supreme Court precedents inexorably lead to the conclusion that the waiver of collective action claims is permissible in the FLSA context,” and applying *Concepcion*).

3. The NLRA contains no “contrary congressional command” displacing the FAA.

The General Counsel bears the burden of showing why the FAA should not apply. *See Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 227 (1987). And the *D.R. Horton* rule finds no basis in the NLRA’s text or history, so the General Counsel cannot meet its burden.

The NLRA’s text—protecting employees’ right “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,” 29 U.S.C. § 157—cannot suffice. For one, as the Supreme Court has long observed, “the term ‘concerted activit[y]’ is not defined in the Act.” *N.L.R.B. v. City Disposal Sys., Inc.*, 465 U.S. 822, 830 (1984). For another, the remaining terms in Section 7 aside from “other concerted activities” each refer to collective bargaining: “the right to self-organization, to form, join or assist labor organizations, [or] to bargain collectively through representatives of their own choosing.” 29 U.S.C. § 157. These remaining terms imply to an ordinary reader that the term “other concerted activities” includes matters like them—which “freedom from arbitration contracts with class-based arbitration waivers” is not. *See Edison v. Doublerly*, 604 F.3d 1307, 1309 (11th Cir. 2010) (citing the *noscitur a sociis* canon, and quoting that “a word is known by the company it keeps . . . in order to avoid the giving of unintended breadth to the Acts of Congress” (citation omitted)).

And the Supreme Court has deemed clearer provisions than “other concerted activity” insufficient to show a command to displace the FAA. The Securities Act of 1933, providing in relevant part that any provision binding any person to waive compliance with any provision of this subchapter, did not displace the FAA. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 482 (1989). Nor did materially identical language in the Securities Exchange

Act of 1934. *See McMahon*, 482 U.S. at 231-33. Nor did the Sherman Act, which bans “[e]very contract, combination . . . or conspiracy, in restraint of trade,” 15 U.S.C. § 1, and which provides for treble damages and attorneys’ fees. Indeed, the Court most recently declared that the Sherman Act clearly did not do so because, like Section 7, the antitrust laws “make no mention of class actions,” and “were enacted decades before the advent of Federal Rule of Civil Procedure 23.” *Italian Colors*, 133 S. Ct. at 2309.

The parallels continue in the lack of historical support. Section 7 predated the modern class and collective action, so the legislative history of course contains no suggestion of Section 7’s application to arbitration contracts, or to arbitration contract waivers. *See generally* 79 Cong. Rec. 2368, 2371-72, 3183-85 (1935); S. Rep. No. 573 (1935) (legislative history of the Wagner Act, Section 7’s predecessor); *see also Walthour*, 745 F.3d at 1335 (finding no command based on legislative history where the FLSA’s history “support[ed] only a general congressional intent to aid employees who lacked sufficient bargaining power” relative to employers).

Nor can the Norris-LaGuardia Act supply the necessary congressional command. That Act merely prohibits so-called yellow-dog contracts that prohibit employees from joining labor unions. *See* 29 U.S.C. § 103.⁵ Of course, the Board is not entitled to deference in its interpretation of the Norris-LaGuardia Act. *See D.R. Horton*, 737 F.3d at 362 n.10 (“It is undisputed that the [Norris-LaGuardia Act] is outside the Board’s interpretive ambit. We also conclude that the Board’s reasoning drawn from [that Act] is unpersuasive.” (internal citation

⁵ Although the General Counsel claims that the Agreement here is a “yellow dog” contract and cites yellow-dog contract cases in support of its argument that Samsung violated the NLRA, Motion at 11, the Agreement is not a yellow-dog contract, and these cases are inapplicable. In *Barrow Utilities and Electric Cooperative*, 308 NLRB 4, 11 n.5 (1992), the Board stated, “Any promise by a statutory employee to refrain from union activity or to report the union activities of others would be void by operation of law.” Samsung has not extracted such a promise here. And in *Hecks, Inc.*, 293 NLRB 1111, 1120 (1989), “employees [were] ‘requested’ to promise in writing to be bound by, inter alia, the Respondent’s antiunion policy,” which Samsung has not done here.

omitted)). This provides even less textual support for a contrary congressional command than Section 7 of the NLRA. *See also Owen*, 702 F.3d at 1053 (observing that the “decision to reenact the FAA suggests that Congress intended its arbitration protections to remain intact even in light of the earlier passage of three major labor relations statutes,” and thus finding no command displacing FAA).

In any event, the Board’s reliance on the Norris-LaGuardia Act is, again, a repackaging of its claim that Section 7 guarantees a substantive right to a class action. The Board stated: “Provisions of the NLRA derived from the earlier Norris-LaGuardia Act manifest a strong federal policy against agreements in the nature of yellow-dog contracts, in which individual employees are required . . . to cede their right to engage in such collective action.” *D.R. Horton*, 357 NLRB at 2287. The Board’s logic ran like this: the Norris-LaGuardia Act prohibits yellow-dog contracts; the key feature of yellow-dog contracts is that they require workers to give up nonwaivable substantive labor rights; we have determined that the right to class arbitration is a nonwaivable substantive labor right; therefore, congressional policy against yellow-dog contracts supplies a command to displace the FAA. The argument fails because it assumes what it purports to prove: that Section 7 demonstrates a substantive right to class-wide arbitration or litigation and, by extension, clearly displaces the FAA (which it does not).

The Board’s *D.R. Horton* rule can show no congressional command displacing the FAA, any more than it can convert collective litigation mechanisms from procedural devices to substantive rights, or shoehorn a specialized rule of “no class-based waivers” into a savings clause permitting generalized contract defenses. If the FAA is not displaced—and its exceptions are not met—then it must be obeyed. The *D.R. Horton* rule should be rejected.

II. The First Amendment entitles Samsung to enforce the Agreement judicially.

The General Counsel’s allegation that Samsung violated Section 8(a)(1) by attempting to enforce the Agreement first requires the acceptance of the untenable proposition that Section 7 vests in employees a right to class-wide adjudication. Without this, the allegation that Samsung violated Section 8(a)(1) by attempting to enforce the Agreement necessarily fails, because an employer cannot violate Section 8(a)(1) by interfering with a right that does not exist under Section 7.

But even if the General Counsel’s position were correct, which it is not, the First Amendment entitles a litigant to seek redress from the courts with virtual impunity. In *BE & K Construction Co. v. N.L.R.B.*, 536 U.S. 516, 531 (2002), the Supreme Court—rebuffing the Board’s asserted authority to declare meritorious lawsuits unfair labor practices—concluded that the First Amendment protected all lawsuits *except* those “that were both objectively baseless *and* subjectively motivated by an unlawful purpose.” By requiring that a lawsuit be “objectively baseless” to give up First Amendment protection, the Court did not merely shield successful suits, but also those that are unsuccessful as long as they are “reasonably based.” *Id.* at 528. By requiring that a lawsuit be “subjectively motivated by an unlawful purpose” before surrendering First Amendment protection, the Court suggested that it would strip away protections only from those baseless lawsuits that were “subjectively intended to abuse process.” *Id.* at 537 (Scalia, J., concurring).

The Joint Motion to Dismiss and Samsung’s position that the Agreement is lawful are not “objectively baseless.” Federal appellate authority has overwhelmingly rejected the Board’s ruling in *D.R. Horton*.⁶ And the overwhelming weight of other federal courts has rejected the

⁶ As of June 2015, when Samsung attempted to enforce the Agreement, the Second, Fifth, Eighth, and Ninth Circuits had either disapproved of or casted doubt on the Board’s *D.R. Horton* rule—multiple times in several of those Circuits. *See supra* note 2. Moreover, the Eleventh Circuit has approvingly cited *Sutherland* and *Owen*, which had rejected the Board’s *D.R. Horton*

Board's position as well.⁷ Additionally, Samsung "was not retaliating" against the Charging Parties by filing the Joint Motion to Dismiss, but rather "defend[ing] itself against the employees' claims by seeking to enforce the Arbitration Agreement." *Murphy Oil*, 808 F.3d at 1021 (holding that employer's "motion to dismiss and compel arbitration did not constitute an unfair labor practice because it was not 'baseless'"). As the Fifth Circuit stated in rejecting an identical claim that an attempt to enforce an arbitration agreement fell outside the First Amendment's protections, one cannot "hold that an employer who followed the reasoning of [the

decision, and the Eleventh Circuit's holdings are irreconcilable with the core of the Board's *D.R. Horton* rule, which is that the right to class-wide adjudication is substantive, not procedural. *See Walthour*, 745 F.3d at 1336 (describing right to a collective action as procedural and not substantive). Only the Seventh Circuit has adopted the Board's position. *See Lewis*, 823 F.3d at 1161.

⁷ *See, e.g., Patterson v. Raymours Furniture Co., Inc.*, 96 F. Supp. 3d 71, 79-80 (S.D.N.Y. 2015); *Brown v. Citicorp Credit Servs., Inc.*, No. 1:12-CV-00062, 2015 WL 1401604, at *2 (D. Idaho Mar. 25, 2015); *Dixon v. NBCUniversal Media, LLC*, 947 F. Supp. 2d 390, 403 n.11 (S.D.N.Y. 2013); *Birdsong v. AT&T Corp.*, No. C12-6175, 2013 WL 1120783, at *6 n.4 (N.D. Cal. Mar. 18, 2013); *Ryan v. JPMorgan Chase & Co.*, 924 F. Supp. 2d 559, 566 (S.D.N.Y. 2013); *Noffsinger-Harrison v. LP Spring City, LLC*, No. 12-CV-161, 2013 WL 499210, at *5-6 (E.D. Tenn. Feb. 7, 2013); *Miguel v. JPMorgan Chase Bank*, No. 12-CV-3308, 2013 WL 452418, at *8-9 (C.D. Cal. Feb. 5, 2013); *Torres v. United Healthcare Servs., Inc.*, 920 F. Supp. 2d 368, 378-79 (E.D.N.Y. 2013); *Long v. BDP Int'l, Inc.*, 919 F. Supp. 2d 832, 852 n.11 (S.D. Tex. 2013); *Cohen v. UBS Fin. Servs., Inc.*, No. 12 Civ. 2147, 2012 WL 6041634, at *4 (S.D.N.Y. Dec. 4, 2012); *Johnson v. TruGreen Ltd. P'ship*, No. 1:12-cv-00166, 2012 U.S. Dist. LEXIS 188280, at *17-27 (W.D. Tex. Oct. 25, 2012); *Carey v. 24 Hour Fitness USA, Inc.*, No. H-10-3009, 2012 WL 4754726, at *2 (S.D. Tex. Oct. 4, 2012); *Tenet Healthsys. Philadelphia, Inc. v. Rooney*, No. 12-mc-58, 2012 WL 3550496, at *4 (E.D. Pa. Aug. 17, 2012); *Delock v. Securitas Sec. Servs. USA, Inc.*, 883 F. Supp. 2d 784, 789 (E.D. Ark. 2012); *Luchini v. Carmax, Inc.*, No. CV F 12-0417, 2012 WL 2995483, at *7 (E.D. Cal. July 23, 2012); *Spears v. Mid-Am. Waffles, Inc.*, No. 11-2273, 2012 WL 2568157, at *2 (D. Kan. July 2, 2012); *De Oliveira v. Citigroup N. Am., Inc.*, No. 12-CV-251, 2012 WL 1831230, at *2 (M.D. Fla. May 18, 2012); *Coleman v. Jenny Craig, Inc.*, No. 3:11-cv-1301, 2012 WL 3140299, at *3-4 (S.D. Cal. May 15, 2012); *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831, 841-45 (N.D. Cal. 2012); *Brown v. Trueblue, Inc.*, No. 10-CV-0514, 2012 WL 1268644, at *4-6, *9 (M.D. Pa. Apr. 16, 2012); *Jasso v. Money Mart Express, Inc.*, 879 F. Supp. 2d 1038, 1046-49 (N.D. Cal. Apr. 13, 2012); *Palmer v. Convergys Corp.*, No. 7:10-CV-145, 2012 WL 425256, at *3 n.2 (M.D. Ga. Feb. 9, 2012); *LaVoice v. UBS Fin. Servs., Inc.*, No. 11 Civ. 2308, 2012 WL 124590, at *6 (S.D.N.Y. Jan. 13, 2012).

Fifth Circuit's] *D.R. Horton* decision [which rejected the Board's *D.R. Horton* rule] had no basis in fact or law or an 'illegal objective' in doing so." *Id.*

In sum, as the Fifth Circuit ruled in *Murphy Oil*, Samsung "had at least a colorable argument that the Arbitration Agreement was valid when its defensive motion was made, as its response to the lawsuit was not 'lack[ing] a reasonable basis in fact or law,' and was not filed with an illegal objective under federal law." *Id.* Because Samsung had a First Amendment right to enforce the Agreement, it did not violate the NLRA in doing so.

CONCLUSION

For the foregoing reasons, the Board should deny the General Counsel's Motion for Summary Judgment, and instead enter summary judgment in favor of Samsung.

Respectfully submitted on August 22, 2016 by:

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CERTIFICATE OF SERVICE

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