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November 20, 2013

VIA ECF DOCUMENT FILING SYSTEM

United States Court of Appeals for the Ninth Circuit
Attn: Molly C. Dwyer, Clerk of the Court
James R. Browning Courthouse
95 Seventh Street
San Francisco, CA 94103

Re: *Johnmohammadi v. Bloomingdale's, Inc.*
Case No. 12-55578, Appellant's Response to Appellee's Notice of Supplemental Authority

Dear Ms. Dwyer:

Appellant Fatemeh Johnmohammadi submits the following Notice of Supplemental Authority pursuant to Fed. R. App. P. 28(j).

Subsequent to the filing of the briefs in this matter, there have been ALJ decisions in NLRB proceedings, other than those referenced in the briefs and Appellee's Fed. R. App. P. 28(j) letter, addressing the NLRB's *D.R. Horton* case. These ALJ decisions, like the ALJ decision in the NLRB's *Bloomingdale's* case, are all presently pending before the NLRB.

Gamestop Corp. JD (SF)-42-13 (August 29, 2013), Exhibit 1 hereto, following *D.R. Horton* and expressly disagreeing with the ALJ decision in *Bloomingdale'*s.

Securitas Security Services USA, JD(SF)-52-13 (November 8, 2013) Exhibit 2 hereto following *D.R. Horton* in a context where current employees were given an opportunity to opt out of arbitration.

Cellular Sales of Missouri JD-57-13 (August 19, 2013) Exhibit 3 hereto following *D.R. Horton* and expressly providing at 6-8, that *American Express Co. v. Italian Colors Restaurant*, (2013), 133 S.Ct. 2304 (decided after briefing in this case) does not impact the *D.R.Horton* analysis.

FAA Concord H, Inc. JD(SF)-48-13 (October 23, 2013) Exhibit 4 hereto following *D.R. Horton* and expressly providing at 20, that *American Express Co. v. Italian Colors Restaurant*, (2013), 133 S.Ct. 2304 (decided after briefing in this case) does not impact the *D.R.Horton* analysis.

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Chesapeake Energy Corporation JD-78-13 (November 8, 2013) Exhibit 5 hereto, contrary to Exhibits 3 and 4 hereto, using *American Express*, *supra* to justify deviating from *D.R. Horton*.

Very truly yours,

/s/ Dennis F. Moss

EXHIBIT 1

JD(SF)–42–13
Sacramento, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

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

and **Case 20-CA-080497**

MICHELLE KRECZ-GONDOR, an Individual

Joseph D. Richardson,
for the Acting General Counsel.
Ross Friedman (Morgan, Lewis & Bockius LLP),
For the Respondent.
Christian Schreiber (Chavez & Gertler LLP),
for the Charging Party.

DECISION

STATEMENT OF THE CASE

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

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

[2] All dates are in 2012 unless otherwise indicated.

and April 8, 2013, respectively, denying all material allegations and setting forth affirmative defenses.

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

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

FINDINGS OF FACT

I. Jurisdiction

At all times material, Respondent GameStop Corp., a Delaware corporation with offices and places of business throughout the State of California and the United States, including one in Sacramento, California, has been engaged in business as a videogame retailer. Respondent GameStop Corp. admits, and I find, that during the calendar year ending December 31, GameStop Corp., in conducting its business operations described above derived gross revenues in excess of $500,000 and sold and shipped from its California facilities products valued in excess of $5,000 directly to points outside the State of California. Respondent GameStop Corp. admits, and I find, that it is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act. (Stips. 2(a)-(b); 3(g).)

Also at all times material, Respondent GameStop, Inc., a Minnesota corporation and a wholly-owned subsidiary of GameStop Corp., maintains offices and places of business throughout the State of California and the United States, including one in Sacramento, California, and has been engaged in business as a videogame retailer. Respondent GameStop, Inc. admits, and I find, that during the calendar year ending December 31, GameStop, Inc., in conducting its business operations described above derived gross revenues in excess of $500,000 and sold and shipped from its California facilities products valued in excess of $5,000 directly to points outside the State of California. Respondent GameStop, Inc. admits, and I find, that it is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act. (Stips. 3(a)-(b); 3(g).)

Further, at all times material, Respondent Sunrise Publications, Inc., a Minnesota corporation and a wholly-owned subsidiary of GameStop, Inc., maintains offices and places of business throughout the United States, including its principal offices in Minneapolis, Minnesota, and has been engaged in business as a publisher of print and online magazines. Respondent Sunrise Publications, Inc. admits, and I find, that during the calendar year ending December 31, Sunrise Publications, Inc., in conducting its business operations described above derived gross revenues in excess of $500,000 and sold and shipped from its Minneapolis, Minnesota facility products valued in excess of $5,000 directly to points outside the State of Minnesota. Respondent Sunrise Publications, Inc. admits, and I find, that it is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act. (Stips. 3(c)-(d); 3(g).)

In addition, at all times material, Respondent GameStop Texas Ltd. (L.P.), a Delaware corporation and a wholly-owned subsidiary of GameStop, Inc., maintains offices and places of business throughout the United States, including its principal offices in Grapevine, Texas, and has been engaged in business as a videogame retailer. Respondent GameStop Texas Ltd. (L.P.) admits, and I find, that during the calendar year ending December 31, GameStop Texas Ltd. (L.P.), in conducting its business operations described above derived gross revenues in excess of $500,000 and sold and shipped from its Grapevine, Texas facility products valued in excess of $5,000 directly to points outside the State of Texas. Respondent GameStop Texas Ltd. (L.P.) admits, and I find, that it is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act. (Stips. 3(e)-(g).)

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

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

SUMMARY DESCRIPTION

> It is our goal that your workplace disputes or claims be handled responsibly and on a prompt basis. In furtherance of this goal, GameStop has established an internal dispute resolution program, GameStop C.A.R.E.S. ….
>
> The goal of GameStop C.A.R.E.S. is always to resolve workplace disputes or claims on a fair and prompt basis. GameStop C.A.R.E.S. does not change any substantive rights, but simply moves the venue for the dispute out of the courtroom and into arbitration. GameStop believes that GameStop C.A.R.E.S. will benefit employees and management alike by encouraging prompt, fair and cost-effective solutions to workplace issues.

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

> GameStop C.A.R.E.S. covers all GameStop employees in the U.S. and Puerto Rico, including employees of GameStop, Inc., GameStop Texas, L.P. and Sunrise Publications, Inc.
>
> **[p.2]** These [Rules] govern procedures for the resolution and arbitration of all workplace disputes or claims. The Rules are a mutual agreement to arbitrate Covered Claims (as defined below). The Company and you agree that the procedures provided in these Rules will be the sole method used to resolve any Covered Claim as of the Effective Date of the Rules, regardless of when the dispute or claim arose. The Company and you agree to accept an arbitrator's award as the final, binding and exclusive determination of all Covered Claims. These Rules do not preclude any employee from filing a charge with the state,

local or federal administrative agency such as the Equal Employment Opportunity Commission.

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

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

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

....

WHAT IS A COVERED CLAIM?

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

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

WHAT IS NOT A COVERED CLAIM?

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

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

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

STEP 1: OPEN DOOR POLICY

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

STEP 2: INTERNAL REVIEW

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

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

...

Charges Filed with the EEOC or State Agency

Some Covered Claims are claims that may be filed with the Equal Employment Opportunity Commission (EEOC) or an equivalent state agency, such as a claim

for discrimination or harassment. For these Covered Claims, you may either file a complaint with these agencies or proceed to use GameStop C.A.R.E.S. If you choose to proceed directly to the GameStop [**p.6**] C.A.R.E.S. steps of internal review and arbitration, you will be asked to sign a voluntary waiver of the right to file charges with an agency…..

STEP 3: ARBITRATION AND OPTIONAL NON-BINDING MEDIATION

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

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

[p.8] - **MEDIATION AND ARBITRATION PROCEDURES**

Arbitration Procedures

….

[p.12] 16. Confidentiality.

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

….

19. Optional Expenses and Refund of Fee.

If the arbitrator finds totally in your favor, the Company will reimburse the $125 arbitration fee to you. In addition to the arbitration fee, you [**p. 13**] may also have expenses which are your responsibility to pay, but only if you decide to incur the costs. Examples include:

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

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

under law, then the arbitrator has the same authority as a judge to award reasonable attorneys' fees and other costs to the Company.

[p.14] **CALIFORNIA EMPLOYEES**

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

....

DEFINITIONS.

...

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

....

(Jt. Exh. M.)

The Program Brochure (the Brochure), among other things, provides that the Program is the result of Respondent's "philosophy of treating associates fairly and respectfully." (Jt.Exh. 1 at 2.) The Brochure goes on to state that "[b]oth associates and management benefit from programs that offer prompt, economical and responsible solutions to problems." Id. It further discloses that the Respondent's Program "is designed as a user-friendly way to resolve disputes with all of the remedies of litigation, but without the delays and cost." Id. It goes on to state that the neutral arbitrator will make a final decision and can award the same remedies as a court and that the Program "reduces legal costs for everyone." Id. The Brochure also provides that "Covered Claims are most legal issues and are defined in the Rules" and concludes by pointing out that by accepting an offer of employment or by continuing employment with Respondent and its affiliates, the employee agrees to use the Program and resolve workplace disputes and claims, including legal and statutory claims, arising out of the employee's employment regardless of the date such dispute or claim arose, and to accept an arbitrator's award as the final, binding and exclusive determination of all claims. The Brochure does not mention the Opt-Out option for California employees or the exclusion from Covered Claims of matters within the jurisdiction of the National Labor Relations Board. The Brochure further provides that if there are any differences between the Brochure and the Program Rules, the Rules shall control. (Jt.Exh. "N" at 3.)

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

At all material times, Respondents have required employees employed at facilities located in all fifty U.S. states, the District of Columbia, and Puerto Rico, as a condition of employment, to execute a written acknowledgment of receipt for the C.A.R.E.S. Program

(Acknowledgment), although Respondents' California-based employees could opt out of the C.A.R.E.S. Program by following the procedure specified therein at page 14 of the Program Rules. (Stip. 7.)

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

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

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

II. Issues

1. Whether the GameStop C.A.R.E.S. Program maintained by Respondents, which permits California-based employees such as the Charging Party to opt-out of the C.A.R.E.S. Program, requires employees, as a condition of employment, to waive their right to resolution of employment-related disputes by collective or class action in violation of Section 8(a)(1) of the Act?

2. Whether the GameStop C.A.R.E.S. Program maintained by Respondents would reasonably be read by employees to prohibit them from filing unfair labor practice charges with the Board in violation of Section 8(a)(1) of the Act?

III. Analysis

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

Respondents argue that the Board lacks jurisdiction over the unfair labor practice claims alleged here because they are barred by Section 10(b) of the Act since the Charging Party signed the Acknowledgement and Program agreement on April 1, 2010 outside the 6-month 10(b) period of filing her charge on May 7, 2012. (R.Br. at 16-18.) Acting General Counsel responds

that the 2007 implementation date for the Program is irrelevant as its continued application to all of Respondents' employees makes the continuing rule subject to an ongoing violation within the 10(b) period.

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

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

The first issue, set forth in stipulation 1 and paragraphs 3(a), 4 and 5 of the complaint, is whether in view of the Board's decision in *D.R. Horton,* the Respondents' maintenance of the Program, as a condition of employment which contains provisions requiring employees to resolve employment-related disputes exclusively through individual arbitration proceedings, and to relinquish any right to resolve such disputes through collective, representative, or class action, violates Section 8(a)(1) of the Act by precluding employees from acting collectively or as a class or otherwise exercising their Section 7 rights under the Act.[3]

[3] As has been argued frequently over the past year, the Respondents also argue that *D.R. Horton*, discussed herein, is void because the Board lacked a quorum when it issued the decision. This argument derives from the D.C. Circuit's decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), which the Board has rejected and so must I. See, e.g., *Bloomingdale's Inc.*, 359 NLRB No. 113 (2013); *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. at fn.1 (2013). Though the Fourth Circuit recently agreed with *Noel Canning* when it decided *NLRB v. Enterprise Leasing Co. Southeast, LLC*, Nos. 12–1514, 12–2000, 12–2065, 2013 WL 3722388 (4th Cir. 2013), the Board has noted that at least three courts of appeals have reached a different conclusion on similar facts. *Bloomingdales,* supra, (citing *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), cert. denied 544 U.S. 942 (2005); *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *U.S. v. Allocco*, 305 F.2d 704 (2d Cir. 1962)). Earlier in this case, I rejected the same argument by Respondents and I ruled in my April 9, 2013 Order Denying Respondents' Motion to Stay this proceeding, citing many of the same cases. Consistent with Board precedent, the Respondents' defense based on *Noel Canning* and a lack of quorum fails. Also, Respondents additionally or alternatively argue that *D.R. Horton* was wrongly decided, noting that the Eighth Circuit and lower courts have declined to follow it to date in matters, I note, are unrelated to the NLRA. See, e.g., *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013). However, I reject any claim that the *D.R. Horton* decision was wrongly decided as I am bound by Board precedent unless and until it is reversed by the Board itself or the Supreme Court. See *Pathmark Stores, Inc.*, 342 NLRB 378 fn. 1 (2004).

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

1. The Program as Applied to Respondents' Non-California Employees Is Mandatory and Unlawful Under *D.R. Horton*

In the instant case, there is no dispute that the Program is a condition of employment. It is self-executing upon implementation of the Program in 2007 or accepting and continuing employment. The Program is also a mandatory condition of employment because it is a term of employment to which all non-California employees are bound at the beginning of their employment with Respondents and continuing thereafter.

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

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

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

arbitrations as a condition of employment, I find *D.R. Horton* is directly applicable and the Program unlawful. Id. at 12.

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

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

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

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

2. <u>The Program, as Applied to Respondents' California Employees, Is Also Mandatory and Unlawful</u>

The Program defines Respondents' employees to be "any employee, former employee, or applicant for employment, of the Company in the U.S. and Puerto Rico on or after the Effective Date." (Jt. Exh. "M" at 14.) It does not specifically exclude their California employees from the mandatory terms of the Program except finally embedded at the end of the Program Rules at page 14 one finds the opt-out right available only to California employees if they take

affirmative action to give notice to the Respondents via certified mail. Therefore, if a California employee does nothing under the Program Rules, he or she defaults to the mandatory arbitration terms and forgoes any right to engage in protected concerted conduct and pursue a collective or representative claim or seek collective remedies at the NLRB.

Moreover, neither the Brochure nor the Acknowledgment clearly informs the Charging Party or other California employees that they are eligible to opt-out of Respondent's Program as California employees. (Jt. Exh. "O".) The documents also do not clearly state that California employees are reserved the right to engage in protected concerted conduct in a collective or representative action at the NLRB as part of the Program. Once again, buried at page 14 of the Program Rules is there language about a California employee's opt-out right. Consequently, I find that the Acknowledgment and Brochure are ambiguous and do not clearly inform California employees like Charging Party here that they can opt-out of the Program. As a result, I further find that due to this ambiguity as to a California employee's opt-out rights and an employee's continued ability to retain their Section 7 rights as part of the Program, the Program, as a term and condition of employment, is a form of mandatory arbitration that is unlawful under *D.R. Horton* even for California employees like the Charging Party.

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

3. Respondents' Arbitration Program, as Applied to California Employees, Also Violates Section 8(a)(1) of the Act as the Opt-Out Language and Confidentiality Provisions Make It Involuntary and in Violation of Public Policy.

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

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

(a) The Status Quo

First of all, one must understand that there has been an influx in analogous opt-out or waiver provisions in connection with company-imposed arbitration programs where the challenged practice involves employees being required to take affirmative actions, through a form of "notice" rule, by mailing to the employer via certified mail, a written notice that they are opting out of the mandatory arbitration program, just to maintain the "status quo" that has existed to them for decades – the substantive rights under Sections 7 and 8(a)(1) of the Act to engage in protected concerted conduct for the purpose of collective bargaining or other mutual aid or protection without employer interference, restraint, or coercion.

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

In contrast, under Respondents' Program, the charging party must pay $125 to initiate arbitration if the labor dispute is not worked out in-house and individually within the Company in the first 2 steps where the charging party is either alone or must pay for a lawyer to proceed. (Jt. Exh. "M" at 4-6.) In addition, under the Respondents' Program, the charging party is liable for the Respondents' attorney fees and costs if the Company prevails under certain conditions. (Jt. Exh. "M", at 12.) Finally, under the Respondents' Program, the charging party is subject to three steps or proceedings, possibly 4, if either party elects to pursue non-binding mediation. (Jt. Exh. "M" at 4-6.)

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

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

Inc. and *Mastec Services* cases and respectfully disagree with my colleague in the *Bloomingdales, Inc.* case as explained hereafter.

(b) General Policy Behind the Act and NLA

Section 7 of the Act guarantees employees the right to invoke procedures generally available under state or federal law for concertedly pursuing employment-related legal claims without employer coercion, restraint, or interference. *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), slip op. at 10; see also *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567-68 (1978). By imposing on employees, as a condition of employment, a policy that precludes collective, representative, and class-wide actions and compels them to affirmatively send a notice via certified mail just to maintain the status quo, Respondents have unlawfully denied employees their right to act collectively and voluntarily. Section 8(a)(1) prohibits employers from compelling individual employees, as a condition of employment, to waive their Section 7 substantive right to protected concerted conduct for mutual aid and protection triggered by workplace terms and conditions.

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

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

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

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

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

(c) The NLRA vs. the FAA

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

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

Moreover, the Program is unlawful on public policy grounds because it operates as a prospective waiver of the Respondents' employees' right to pursue future protected concerted conduct in the form of collective or representative actions or seek remedies provided by the NLRA such as cease and desist orders and notice provisions to fellow employees. Respondents' employees cannot be lawfully compelled to affirmatively act (opt-out, via certified mail, within

[4] Generally speaking under established precedent, the Board finds deferral to arbitration appropriate when the following conditions are met: the parties' dispute arises within the confines of a long and productive collective-bargaining relationship; there is no claim of animosity to employees' exercise of Section 7 rights; the parties' agreement provides for arbitration in a broad range of disputes; the parties' arbitration clause clearly encompasses the dispute at issue; the party seeking deferral has asserted its willingness to utilize arbitration to resolve the dispute; and the dispute is well suited to resolution by arbitration. See *Sheet Metal Workers, Local 18 (Everbrite, Inc.)*, 359 NLRB No. 121 (May 13, 2013) citing *United Technologies*, 268 NLRB 557, 558 (1984); accord: *Collyer Insulated Wire*, 192 NLRB 837, 842 (1971).

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

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

(d) The Opt-Out Requirement is Unlawful

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

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

I further find that the Respondents' opt-out policy would have a reasonable tendency to chill employees from exercising their statutory rights because Respondents' employees are required to take affirmative action that draws attention to themselves such as sending notice that they are opting out of the Program via certified mail to Respondents. In addition, Respondents' requirement that their California employees affirmatively opt-out of the Program to preserve their Section 7 rights is an unlawful burden on the employees' right to engage in collective

litigation. Respondents do not cite any cases on point that hold differently or address employees' Section 7 right to act concertedly, including their substantive statutory right to bring collective or class claims, or whether that right can be irrevocably waived with respect to all future claims. I find that by imposing the immediate and affirmative requirement on employees to maintain their Section 7 rights, or lose them entirely, Respondents interfere with their employees' exercise of those statutory rights.

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

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

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

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

(e) The Program's Confidentiality Language

Finally, the Acting General Counsel raises further challenges the legality of the Program's confidentiality provisions and points out that "even for employees who avail themselves to the opt-out provision, the . . . Rules substantially interfere with Section 7 activity

by interfering with concerted activity between opting-out and non-opting out employees." (AGC Br. at 8.) In addition, the Acting General Counsel later argues that because an employee who proceeds to arbitration may not disclose any information obtained during that proceeding, or the results of the arbitration, this would presumably prevent non-opting-out employees who had prevailed in arbitration from advising their co-workers with regard to similar work-related claims, including employees who had opted opted-out. (AGC Br. at 10.)

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

The relevant Program provision states:

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

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

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

4. Respondents' Employees Would Reasonably Read the Arbitration Program to Prohibit Them from Filing Unfair Labor Practice Charges with the Board in Violation of Section 8(a)(1) of the Act.

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

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

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

In the instant case, I find that the Program is unlawful on its face as it interferes with and restricts Respondents' employees from engaging in protected concerted conduct under Section 7 of the Act and explicitly precludes them from pursuing class, collective, or representative actions in all forums.

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

Looking at the Program as a whole, I find the Rules to be overbroad, confusing, and ambiguous so that a reasonable employee would read them as prohibiting him or her from filing unfair labor practice charges with the Board. For example, as pointed out by the Acting General Counsel, page 2 of the Rules provides that they "govern procedures for the resolution and arbitration of all workplace disputes or claims," and that all "Covered Claims" must be arbitrated. (Jt. Exh. "M" at 2.) Covered claims under the Rules include "any claim asserting the

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

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

CONCLUSIONS OF LAW

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

(2) The Respondents violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory and binding arbitration policy which required employees to resolve employment-related disputes exclusively through individual arbitration proceedings and to relinquish any right they have to resolve such disputes through collective or class action.

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

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

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

REMEDY

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

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employees' Section 7 rights to engage in protected concerted conduct through collective or representative actions with collective remedies. The Program's misleading language is akin to the slick advertising campaign of the 1960's and 1970's where a cigarette manufacturer targeted teenagers with a trendy cartoon camel.

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

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

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

1. Cease and desist from

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

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

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

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

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

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

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

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

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

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

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

(e) Within 14 days after service by the Region, post at all of its facilities located in the United States and its territories copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 20 after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, inasmuch as Respondents customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the posted hard

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

copy notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since April 1, 2010.

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

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

Gerald M. Etchingham
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law by maintaining and enforcing certain provisions of our C.A.R.E.S. Arbitration Program including its Rules, Brochure, and Acknowledgment documents and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

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

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

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

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

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

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

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

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

WE WILL notify present and future employees individually that our existing prohibition against bringing or participating in class or collective actions in any arbitral or judicial forum that relate to their wages, hours, or other terms and conditions of employment currently contained in the C.A.R.E.S. Arbitration

EXHIBIT 2

JD–(SF)–52–13
San Francisco, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

SECURITAS SECURITY SERVICES USA, INC.

and **Cases 31-CA-072179**
31-CA-088081

CHARLES DUNAWAY, an Individual

and **Cases 31-CA-072180**
31-CA-088082

WALTER LINARES, an Individual

Rudy I. Fong-Sandoval, Esq.,
for the Acting General Counsel.
William J. Emanuel, Esq., and
Elizabeth D. Parry, Esq. (Littler
Mendelson, P.C.), of **Los Angeles,**
California, for the Respondent.
Dennis F. Moss, Esq., of **Ventura California,**
Ira Spiro, Esq., and Linh Hua, Esq.
(Spiro Moore, LLP), **of Los Angeles, California,**
for the Charging Parties.

DECISION

Statement of the Case

Gerald A. Wacknov, Administrative Law Judge. This matter is based on a stipulated record. The initial charges in this matter were filed on January 9, 2012. Since the submission of this matter to me on June 18, 2013, briefs have been received on about August 22, 2013, from counsel for the General Counsel (General Counsel), counsel for the Respondent, and counsel

for the Charging Parties. Upon the stipulated record, and consideration of the briefs submitted, I make the following

Findings of Fact

I. Jurisdiction

At all material times, Securitas has been a corporation with an office and place of business in Westlake Village, California. During the year ending December 31, 2012, Securitas performed services valued in excess of $50,000 in states other than California. At all material times, Securitas has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act.

II. Alleged Unfair Labor Practices

A. Issues

The principal issues in this proceeding are whether the Respondent has violated and is violating Section 8(a)(1) of the Act by maintaining two dispute resolution agreements; by attempting to enforce one of the agreements in state court litigation; and by including language in both agreements that employees reasonably could believe bar or restrict their right-to-file charges with the National Labor Relations Board.

B. Facts

The parties entered into the following stipulation of facts:

1. At all material times, Securitas has been a corporation with an office and place of business in Westlake Village, California. During the year ending December 31, 2012, Securitas performed services valued in excess of $50,000 in states other than California. At all material times, Securitas has been an employer engaged in commerce within the meaning of the National Labor Relations Act.

2. The Charging Parties in this proceeding, Charles Dunaway ("Dunaway") and Walter Linares ("Linares"), are former employees of Securitas. Dunaway was hired by Securitas on or about November 28, 2006, and his employment was terminated on or about October 15, 2008. Linares was hired by Securitas on or about July 12, 2001, and his employment was terminated on or about January 21, 2009.

3. On June 26, 2009, Dunaway and Linares, together with one other individual, filed a class action in Los Angeles County Superior Court against Securitas on behalf of certain employees and former employees of Securitas in California. This action, which is still pending, is entitled Walter Linares, Charles Dunaway, and Sandra Blacksher, etc. v. Securitas Security Services USA, Inc., Case No. BC4 16555. Dunaway and Linares were former employees of Securitas when this action was filed.

4. On or about June 14, 2011, Securitas implemented a form of agreement entitled Securitas USA Dispute Resolution Agreement, which Securitas refers to informally as the new hire agreement. This form has been distributed to employees hired by

Securitas in California after June 14, 2011. It does not include an opt-out provision and the affected employees have been required to sign it.

5. On or about June 14, 2011, Securitas also implemented a form of agreement entitled Securitas Security Services USA, Inc. Dispute Resolution Agreement, which Securitas refers to informally as the current employee agreement. This form was distributed to employees who were employed by Securitas in California on June 14, 2011. The form states that employees could opt out of the coverage of the agreement by calling a toll free telephone number within 30 days after receiving it. According to the records of Securitas, approximately 1393 employees in California opted out of the coverage of the agreement, and approximately 12,787 employees in California did not opt out.

6. On January 9, 2012, Dunaway filed the unfair labor practice charge in Case 31–CA–072179 and Linares filed the charge in Case 31–CA–072180, both alleging a violation of Section 8(a)(1) of the Act. Securitas was served with copies of both these charges on about January 13, 2012. On March 23, 2012, these charges were amended to add an allegation that Section 8(a)(4) of the Act had been violated, but that allegation was withdrawn from the charges on or about August 29, 2012. Securitas was served with copies of amended charges on about March 28, 2012. On August 24, 2012, Dunaway filed the charge in Case 31–CA–088081 and Linares filed the charge in 31–CA–088082, both served on Respondent on about August 28, 2012, both alleging a violation of Section 8(a)(1) of the Act. Dunaway and Linares were former employees of Securitas when all of these charges and amendments were filed with the Board.

7. On August 21, 2012, Securitas filed a motion with the Superior Court in the class action described above to amend the class definition to exclude the employees who are subject to arbitration under the current employee agreement.

ISSUE 1: Did Securitas violate Section 8(a)(1) of the Act by maintaining two Dispute Resolution Agreements since about June 1, 2011.

ISSUE 2: Did Securitas violate Section 8(a)(1) of the Act by, since about August 21, 2012, enforcing one of its Dispute Resolution Agreements when it asserted the agreement in state court litigation brought against Securitas by Charging Parties?

Beginning on June 14, 2011, and continuing thereafter the new employee mandatory dispute resolution agreement entitled Securitas USA Dispute Resolution Agreement (new hire agreement) has been distributed to the Respondent's newly hired employees. They are required to sign it as a condition of employment. It is a 2 1/3 page, single spaced document. It begins as follows:

SECURITAS USA DISPUTE RESOLUTION AGREEMENT

1. This Agreement is governed by the Federal Arbitration Act, 9 U.S.C. § 1 et seq. and evidences a transaction involving commerce. This Agreement applies to any dispute arising out of or related to Employee's employment with Securitas Security Services USA, Inc. or one of its affiliates, subsidiaries or parent companies ("Company) or

termination of employment. Nothing contained in this Agreement shall be construed to prevent or excuse Employee from utilizing the Company's existing internal procedures for resolution of complaints, and this Agreement is not intended to be a substitute for the utilization of such procedures. Except as it otherwise provides, this Agreement is intended to apply to the resolution of disputes that otherwise would be resolved in a court of law, and therefore this Agreement requires all such disputes to be resolved only by an arbitrator through final and binding arbitration and not by way of court or jury trial. Such disputes include without limitation disputes arising out of or relating to interpretation or application of this Agreement, but not as to the enforceability, revocability or validity of the Agreement or any portion of the Agreement. The Agreement also applies, without limitation, to disputes regarding the employment relationship, any city, county, state or federal wage- hour law, trade secrets, unfair competition, compensation, breaks and rest periods, uniform maintenance, training, termination, or harassment and claims arising under the Uniform Trade Secrets Act, Civil Rights Act of 1964, Americans With Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Employee Retirement Income Security Act, Genetic Information Non- Discrimination Act, and state statutes, if any, addressing the same or similar subject matters, and all other state statutory and common law claims (excluding workers compensation, state disability insurance and unemployment insurance claims). Claims may be brought before an administrative agency but only to the extent applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate.

Paragraph 4 of the agreement is as follows:

4. In arbitration, the parties will have the right to conduct adequate civil discovery, bring dispositive motions, and present witnesses and evidence as needed to present their cases and defenses, and any disputes in this regard shall be resolved by the Arbitrator. However, there will be no right or authority for any dispute to be brought, heard or arbitrated as a class, collective or representative action ("Class Action Waiver"). Notwithstanding any other clause contained in this Agreement, the preceding sentence shall not be severable from this Agreement in any case in which the dispute to be arbitrated is brought as a class, collective or representative action. Although an Employee will not be retaliated against, disciplined or threatened with discipline as a result of his or her exercising his or her rights under Section 7 of the National Labor Relations Act by the filing of or participation in a class, collective or representative action in any forum, the Company may lawfully seek enforcement of this Agreement and the Class Action Waiver under the Federal Arbitration Act and seek dismissal of such class, collective or representative actions or claims. Notwithstanding any other clause contained in this Agreement, any claim that all or part of the Class Action Waiver is unenforceable, unconscionable, void or voidable may be determined only by a court of competent jurisdiction and not by an arbitrator.

The agreement concludes as follows:

8. This Agreement is the full and complete agreement relating to the formal resolution of employment- related disputes. In the event any portion of this Agreement is deemed unenforceable, the remainder of this Agreement will be enforceable. If the Class Action Waiver is deemed to be unenforceable, the Company and Employee agree that this Agreement is otherwise silent as to any party's ability to bring a class, collective or representative action in arbitration.

I HAVE READ AND I UNDERSTAND AND AGREE TO ALL OF THE TERMS CONTAINED IN THIS DISPUTE RESOLUTION AGREEMENT.

Employee Name: _____
Signature:
Date:_____

On about June 14, 2011, the Securitas Security Services USA, Inc. Dispute Resolution Agreement (current employee agreement) was distributed to all of the Respondent's then current employees (as noted, on and after that date only the new hire agreement has been distributed to the employees). The current employee agreement is a 3 1/2 page, single-spaced, document. The initial pages are identical to the new employee agreement, and the remainder of the agreement is as follows:

7. This Agreement is intended broadly to apply to all controversies hereafter arising out of or related to your employment relationship with the Company as well as an agreement to submit to arbitration any existing controversy arising from or related to your employment as is permitted under Section 2 of the Federal Arbitration Act. In some cases, claims have been made in court (non-arbitration) litigation on behalf of Company employees in which those employees desire to represent claims of other employees in class, collective or other representative actions (referred to as 'Actions"). If you are a named party plaintiff, or have joined as a party plaintiff this Agreement shall not apply to those Actions, and you may continue to participate in them without regard to this Agreement. If you have retained counsel with respect to any claim that may be subject to this agreement you should consult that counsel. You may consult private counsel with respect to any aspect of this Agreement.

This Agreement, however, shall apply to all Actions in which you are not a plaintiff or part of a certified class. The Company is aware of the following Actions in-which class or representative claims have been alleged, which generally involve employee claims for unpaid wages:

California: Michael J. Holland, David Richardson and Geraldine Evans v. Securitas Security Services USA, Inc., filed 7/18/2008, Los Angeles Superior Court Case No. BC394708; Walter Linares, Charles Dunaway and Sandra Blacksher v. Securitas Security Services USA, Inc., 6/26/2009; Los Angeles Superior Court Case No. BC432135; Christine Brisco v. Securitas Security Services USA, Inc., filed 2/18/2010, Los Angeles Superior Court Case No. BC4165555; Stephen Goodwin; William Wolff; Christopher Coffelt; Randall Der, Donna Forman v. Securitas Security Services USA, Inc., filed 9/25/2009, UISDC, Eastern District of California Case No. 2:09-. CV-02685-KJM-DAD; Forrest Huff v. Securitas Security Services USA, Inc., filed 7/12/2010, Santa Clara Superior Court Case No. 110O-CV-1 72614; Marvin Melara v. Securitas Security Services USA, Inc., filed 10/26/2010, Los Angeles Superior Court Case No. BC448078; Miguel Luna Candelas v. Securitas Security Services USA, Inc., filed 5/5/2011, Los Angeles Superior Court Case No. BC481J352.

Florida: Jean Loriston v. Securitas Security Services USA, Inc., filed 12/30/2010, UISDC, Middle District of Florida Case No. 6:10-CVO-01956-PCF-KRS; Kenisha Adams

v Securitas Security Services USA, Inc., filed 5/23/2011, USDC, Middle District of Florida Case No. 1:1 1-CV-21 858- PAS-KRS

Illinois: Crystal Howard, Paul Galloway, Robert Newson and Alvan Young v. Securitas Security Services USA, Inc.; filed on 1/20/2009. USOC, Northern District of Illinois Case No. 08-C-2746; Stephanie Hawkins, Darsemia Jackson and Menja Wallace v. Securitas Security Services USA, Inc., filed 5/12/2008, USDC, Northern District of Illinois Case No. 09-C-3633

Iowa and Wisconsin: Jesse J. Molyneux and John Stellmach (WI) v. Securitas Security Services USA, Inc., filed 12/9/201 0, USDC, Southern District of Iowa Case No. 4: 10-CV-00588-JAJ-TJS

Pennsylvania: Frankie Williams and Kimberly Ord, filed 12/10/2010, USDC, Eastern District of Pennsylvania Case No. 2:1 0-CV-071 81 -HB

If you are not a named plaintiff, have not joined as a plaintiff or are not part of a certified class in any of these Actions but would like to potentially participate in one or more of the Actions as a class member or plaintiff, you may opt out of this Agreement by following the procedure set forth in Section 9, below. By not opting out of this Agreement as set forth in Section 9 below, however, you will be giving up the right to represent others in litigation and the right to participate in any class, collective or representative action in a court of law, including the Actions enumerated above in which you are not a named plaintiff, have not joined as a plaintiff or are not part of a certified class. If you choose not to opt out of this Agreement, you will be able to arbitrate whatever individual claims you have against the Company. Whatever you decide, you will not be retaliated against, disciplined or threatened with discipline if you choose to opt out of this Agreement or choose not to opt out of this Agreement. The choice is yours.

8. You may not wish to be subject to this Agreement. If so, you may opt-out of this Agreement. If you wish to opt-out, you must call the following toll free number 877-248-2721 in order to opt-out. In order to be effective, you must call the toll free number and opt-out within 30 days of your receipt of this Agreement. An Employee who timely opts out as provided in this paragraph will not be subject to any adverse employment action as a consequence of that decision and may pursue available legal remedies without regard to this Agreement. Should an Employee not opt out of this Agreement within 30 days of the Employee's receipt of this Agreement, continuing the Employee's employment constitutes mutual acceptance of the terms of this Agreement by Employee and the Company. An Employee has the right to consult with counsel of the Employee's choice concerning this Agreement.

9. It is against Company policy for any Employee to be subject to retaliation if he or she exercises his or her right to assert claims under this Agreement. If any Employee believes that he or she has been retaliated against by anyone at the Company, the Employee should immediately report this to the Human Resources Department.

10. This Agreement is the full and complete agreement relating to the formal resolution of employment-related disputes. In the event any portion of this Agreement is deemed unenforceable, the remainder of this Agreement will be enforceable. If the Class Action Waiver is deemed to be unenforceable, the Company and Employee agree that

this Agreement is otherwise silent as to any party's ability to bring a class, collective or representative action in arbitration.

The fifth page of the agreement contains only the concluding language:

ACKNOWLEDGMENT OF RECEIPT OF THE SECURITAS SECURITY SERVICES USA, INC. DISPUTE RESOLUTION AGREEMENT

BY SIGNING BELOW, I AM ACKNOWLEDGING RECEIPT OF THE SECURITAS SECURITY SERVICES USA, INC. DISPUTE RESOLUTION AGREEMENT, EFFECTIVE IMMEDIATELY.

Employee Name:_____
Signature:
Date:_____

Witness Name:
Signature:

III. Analysis and Conclusions

The Respondent maintains the charges are time barred by Section 10(b) of the Act, having been filed more than 6 months after June 14, 2011, the date both hiring agreements were implemented. Moreover, the Respondent maintains there is no record evidence that the new hire agreement, unlike the current employee agreement, has been enforced or has even continued in existence since its implementation date. The stipulation of the parties states that the new hire agreement "has been distributed to employees hired by Securitas in California after June 14, 2011." This language is sufficient to show that the intent of the parties was to stipulate that the Respondent has continued and is continuing to distribute the agreement to all new hires to the present date. I so find. As, I find, both agreements are invalid and currently remain in effect, and, in addition, the Respondent is currently attempting to enforce the current employee agreement before the Los Angeles County Superior Court, it is clear that the charges are not time barred with regard to either agreement. *Control Services*, 305 NLRB 435, 435 fn. 2, 442 (1991), enfd. mem. 961 F2d 1568 (3rd Cir. 1992); *The Guard Publishing Co.,* 351 NLRB 1110, 1110 fn. 2 (2007).

D. R. Horton, Inc., 357 NLRB No, 184 (2012), is the controlling Board decision in this matter. It is currently pending review before the Fifth Circuit Court of Appeals, having been argued on February 5, 2013. While the Respondent maintains that *D. R. Horton* was wrongly decided, I am required to follow it unless reversed by the Supreme Court. *Waco, Inc.,* 273 NLRB 746, 749 fn. 14 (1984); *Los Angeles New Hospital*, 244NLRB 960, 962 fn. 4 (1979), enfd. 640 F2d 1017 (9th Cir. 1981); *Pathmark Stores, Inc.*, 342 NLRB 378 fn. 1(2004). The Respondent maintains that two Supreme Court cases issued subsequent to the Board's *D. R. Horton* decision, *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665 (2012), and *American Express Co. v. Italian Colors Restaurant,* 133 S. Ct. 2304 (2013), establish precedent that effectively overrules *D. R. Horton*. I find no merit to the Respondent's contention, as the cited cases do not present issues pertaining to the interrelationship between the National Labor Relations Act (NLRA) and the Federal Arbitration Act (FAA).

The Board determined in *D. R. Horton* that "employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in all forums arbitral and judicial." 357 NLRB No. 184, slip op. at p. 12 (2012). The Respondent's new hire agreement does precisely that. Accordingly, it is unlawful.

The Respondent maintains that the *D. R. Horton* decision is limited to arbitration agreements imposed as a mandatory condition of employment; accordingly, because arbitration under the current employee agreement is voluntary it is therefore not a mandatory condition of employment and should be found to be lawful. In making this argument the Respondent relies on footnote 28 of *D.R. Horton*:

> [W]e do not reach the more difficult question…of…whether, if arbitration is a mutually beneficial means of dispute resolution, an employer can enter into an agreement that is not a condition of employment with an individual employee to resolve either a particular dispute or all potential employment disputes through non-class arbitration rather than litigation in court. *Id.* at p. 13, n 28.

The problems with the Respondent's argument are twofold. First, the current employee agreement, standing alone, is a mandatory condition of employment because, as stated on page 5, it is "effective immediately," that is, before the employee has made any decision to opt out of arbitration; and the decision-making process itself is also a mandatory condition of employment as it is required of employees and is not simply a ministerial, relatively inconsequential matter. Here, employees, as a condition of continued employment, are required to make a decision, under time-sensitive constraints, regarding certain significant class action rights they possess under the NLRA: do they want to preserve them so that they may be able to take advantage of them in the future, or forfeit them in favor of arbitration. Whichever alternative they choose impacts their employment relationship with the Respondent for the remainder of their employment, and, for those who do not opt out, precludes them from determining whether class action is more advantageous than arbitration in any given dispute.[1] That the Respondent recognizes the employee is confronted with a difficult dilemma is clearly reflected by the language in paragraph 8 of the agreement, the opt-out paragraph, as the employee is told he or she "has the right to consult with counsel of the Employee's choice concerning this Agreement."[2] Moreover, the employee's understanding that default arbitration is the Respondent's dispute resolution preference of choice makes the opt-out decision even more formidable; thus, the employee may be legitimately concerned that such matters as promotions, wage increases, and even tenure may be dependent on whether, for example, one of the candidates for promotion has stated a preference for class action status through the requisite opting out process in contravention of the Respondent's clear arbitration preference.[3]

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[1] In contrast, a voluntary arbitration agreement which is not a mandatory condition of employment might be one which an employee initiates, and which, in order to resolve a particular dispute, the employee and employer agree upon as a mutually beneficial means of dispute resolution.

[2] The employee is in the vulnerable position of being required to decide in advance of any particular dispute which method of dispute resolution might be more advantageous—clearly a "flip of the coin" decision. In effect, as collective activity and union activity are equally protected by the NLRA, this is no different than requiring an employee to currently decide whether he or she may exercise the right to seek union representation in the future.

[3] Recognizing that this could be a legitimate concern, the Respondent has inserted language in par. 8 of the agreement, the opt-out paragraph, purportedly designed to lessen the employee's apprehension, as follows: "An Employee who timely opts out as provided in this paragraph will

The Respondent contends that by choosing to not opt out and thereby automatically agreeing to the default arbitration alternative, the employee is simply exercising a right under the NLRA to refrain from engaging in concerted activity. The difficulty with this argument is that if the employee does not opt out, the current employee agreement requires the employee to forego participation in all future class action lawsuits, and is irrevocable. Therefore, the employee is precluded from ever engaging in class action lawsuits for the duration of his or her employment. That the employee is permanently locked in to this decision and, periodically, or upon reflection or changed circumstances, may not change his or her mind, places a severe restriction on the right to engage in concerted activity guaranteed by Section 7 of the NLRA, and is unlawful. *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.2d 534 (6th Cir. 2004).

Since June 14, 2011, and continuing to date the Respondent has arbitrarily established two classes of employees: those who have opted out of arbitration in favor of class action and those who, by default, have not or were given no option to do so. The employees who have not opted out are an impediment to the very purpose of concerted activity—the strategic and economic strength in numbers—and the Respondent is depriving the opted out employees of the right to their collective assistance in ever increasing numbers as no new hire since June 14, 2011, has been able to opt out. Accordingly, whether or not then current employees were given a legitimate opt-out option in the current employee agreement does not negate the fact that opted out employees are precluded from engaging in class-action litigation with all other employees and, by design, are being increasingly marginalized by the Respondent's unlawful conduct in maintaining the new hire agreement and enforcing the current employee agreement..

On the basis of the foregoing I conclude that the Respondent's current employee agreement is unlawful.[4] Concerted activity, with or without the election of a union, is the keystone of the NLRA,[5] and here, without overtly precluding class-action lawsuits by mandate, the Respondent is attempting to make such class action concerted activity among its employees as exacting as possible. The requirement that employees must make a difficult, and immediate (within 30 days), and irrevocable choice between class action concerted activity or individual arbitration, and that those opting out must reassert rights they already have and must, to their possible detriment, so advise the Respondent, places a significant and unnecessary burden on

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not be subject to any adverse employment action as a consequence of that decision and may pursue available legal remedies without regard to this Agreement." As a practical matter, this disclaimer of any adverse employment action is insufficient to eliminate the real concerns of an understandably skeptical employee; in fact, it may heighten such concerns or cause employees who had no such concerns to begin with to weigh the benefits of class action against the potential adverse consequences of opting out.

[4] The Respondent, in its brief, cites numerous non-Board Federal cases in which arbitration agreements with opt-out provisions were not invalidated. For example, in *Davis v. O'Melveny & Meyers,* 485 F.3d 1066, 1073 (9th Cir. 2007), the court found that an arbitration agreement was valid because employees had a meaningful opportunity to opt out of the arbitration provision. However, that case and the other cases cited by the Respondent do not address the validity of opt-out provisions in relation to employee's rights under the NLRA. Accordingly, the cited cases are inapposite.

[5] *D. R. Horton*, supra, slip op. p. 3: "These forms of collective efforts to redress workplace wrongs or improve workplace conditions are at the core of what Congress intended to protect by adopting the broad language of Section 7. Such conduct is not peripheral but central to the Act's purposes."

all employees, whichever alternative they may choose; and, in addition, as noted, maintaining the new hire agreement in conjunction with the current employee agreement places an ever-increasing additional undue burden on employees who opt for collective action.

Clearly, the current employee agreement is intended to restrain and limit the exercise of Section 7 rights, and the Respondent is applying it by attempting to restrict the class action lawsuit filed by the Charging Parties. It is therefore unlawful under *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). The cases cited by the Board in *D.R. Horton* in support of its determination that mandatory arbitration agreements are unlawful are equally applicable to the current employee agreement with its "voluntary" opt-out provision.

Secondly, regarding the Respondent's contention that the arbitration alternative is "voluntary," insofar as the stipulated record shows employees are not required to read the current employee agreement; and even if they begin reading it the opt-out language does not appear until page 4. Thus, I find, any opt-out provision is illusory at best. While the new hire agreement, mandating arbitration and containing no opt-out option, requires new hires to affirm that "I have read and I understand and agree to all of the terms contained in this dispute resolution agreement," the employees who have been given the current employee agreement with the opt-out option and who must exercise it in order to preserve Section 7class action rights under the NLRA, are simply advised as follows: "By signing below, I am acknowledging receipt of the Securitas Security Services USA, Inc. dispute resolution agreement, effective immediately." While they are required to acknowledge receipt of the agreement, they are not required to read, understand, or agree to it, and are told it is "effective immediately." Accordingly, it is reasonable to presume that the employees would not even be aware of any opt-out option, and would reasonably believe that "effective immediately" the dispute resolution agreement was imposed on them, as well as the new hires,[6] as a mandatory condition of employment.[7]

The Respondent maintains the opt-out provision is not illusory, as evidenced by the fact that, according to the records of Securitas, approximately 1393 employees in California opted out of the coverage of the agreement, and approximately 12,787 employees in California, or about 90 percent of the workforce, did not opt out. These numbers are of little value in assessing the merits of Respondent's argument, as the employees were simply required to sign for the receipt of the document but were not required to acknowledge that they read, understood, or agreed to it; accordingly, the Respondent is not in a position to argue that 90 per cent of its California employees made a considered decision to forego their class action rights under the NLRA by not opting out, or even understood they had the right to do so.

Accordingly, I find that, as with the new hire agreement, the holding in *D. R. Horton* is directly applicable to the current employee agreement, and that the agreement is unlawful solely because there is no attempt made by the Respondent to ensure that employees are cognizant of the fact that it is anything but a mandatory arbitration agreement. By this conduct the Respondent has violated and is violating Section 8(a)(1) of the Act.

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[6] There is no showing that the current employees and the new hires understood that they were not being given the identical agreement.

[7] Indeed, this very agreement was found unenforceable in an FLSA class action matter in *Williams v. Securitas Security Services*, 2011 WL 2713741 (E. D. Pa. 2011), the court stating, " Quite simply, this Agreement stands the concept of fair dealing on its head and is designed to thwart employees of Securitas from participating in the lawsuit."

Moreover, consistent with the foregoing and as alleged in the complaint, I find that the Respondent's motion to the court to amend the class definition to exclude employees who are subject to the current employee agreement also violates Section 8(a)(1) of the Act. *Bill Johnson's Restaurants v. NLRB,* 461 U.S. 731, 737 fn. 5 (1983); *Manno Electric*, 321 NLRB 278, 298 (1996), enfd. per curiam mem. 127 F.3d 34 (5th Cir. 1997).

The General Counsel also contends that both arbitration agreements violate Section 8(a)(1) of the Act because of their ambiguity. Thus, the General Counsel maintains that employees reading the documents would reasonably construe the language to prohibit the filing of unfair labor practice charges with the Board.

Both agreements, at Section 1, supra, state that the mandatory agreement to arbitrate disputes "applies to any dispute arising out of or related to Employee's employment," and conclude with the statement that "Claims may be brought before an administrative agency but only to the extent applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate." Read together, it is perfectly obvious that employees would construe the latter language to place an ambiguous limitation and restriction on "claims" and "access" to the Board, and that this language would reasonably tend to inhibit the filing of unfair labor practice charges with the Board. Accordingly, I find that this language is unlawful in violation of Section 8(a)(1) of the Act. *U-Haul Co. of California*, 347 NLRB 375, 377–378 (2006), enfd. mem. 255 F. Appx. 527 (D.C. Cir. 2007); *Bill's Electric, Inc.*, 350 NLRB 292, 296 (2007); *Dish Network Corp.,* 358 NLRB No. 29, slip op. at 7–8 (2012); *University Medical Center,* 335 NLRB 1318, 1320–1322 (2001), enf. denied in pertinent part, 335 F.3d 1079 (D.C. Cir. 2003).

Conclusions of Law and Recommendations

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent has violated Section 8(a) (1) of the Act as alleged.

The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I recommend that it be required to cease and desist therefrom and from in any other like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act. I shall also recommend the posting of an appropriate notice, attached hereto as "Appendix," at all locations where the agreements have been in effect. See, e.g., *U-Haul Co. of California*, 347 NLRB 375 fn. 2 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007).

ORDER[8]

The Respondent, Securitas Security Services USA, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining the mandatory arbitration agreement, effective on or about June 14, 2011, that requires employees to waive their right to maintain class or collective action in all forums, whether arbitral or judicial.

(b) Maintaining the arbitration agreement, effective on or about June 14, 2011, that requires employees to either exercise the opt-out provision or become subject to an arbitration process that precludes employees from maintaining class or collective action in all forums, whether arbitral or judicial.

(c) Maintaining ambiguously worked arbitration agreements that would tend to inhibit the filing of unfair labor practice charges with the Board.

(d) Restricting the right of employees to engage in concerted activity by attempting to enforce unlawful arbitration agreements in judicial forums.

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

2. Take the following affirmative action, which is necessary to effectuate the purposes of the Act.

(a) Rescind or revise the mandatory arbitration agreement, effective on or about June 14, 2011, that requires employees to waive their right to maintain class or collective action in all forums, whether arbitral or judicial.

(b) Rescind or revise the arbitration agreement, effective on or about June 14, 2011, that requires employees to either exercise the opt-out provision or become subject to an arbitration process that precludes employees from maintaining class or collective action in all forums, whether arbitral or judicial.

(c) Advise all affected employees, by all means that employees are customarily advised of matters pertaining to their terms and conditions of employment, that the agreements have been rescinded or revised and that employees are no longer prohibited from bringing and participating in class action lawsuits against the Respondent.

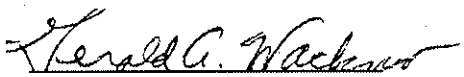
[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Withdraw all objections filed in judicial forums to the right of employees to engage in class or collective action.

(e) Within 14 days after service by the Region, post at all locations where notices to employees are customarily posted, and transmit to employees by all means that employees are customarily advised of matters pertaining to their terms and conditions of employment, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 31, after being duly signed by Respondent's representative, shall be posted and electronically transmitted to employees immediately upon receipt thereof, and shall remain posted for 60 consecutive days thereafter. Reasonable steps shall be taken by Respondent to ensure that the posted notices are not altered, defaced, or covered by any other material.

(f) Within 21 days after service by the Regional Office, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. November 8, 2013



Gerald A. Wacknov
Administrative Law Judge

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO:

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection

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

WE WILL NOT maintain an arbitration agreement that requires employees to either exercise the opt-out provision or become subject to an arbitration process that precludes employees from maintaining class or collective action in all forums, whether arbitral or judicial.

WE WILL NOT maintain arbitration agreements that employees reasonably could believe bar or restrict their right to file charges with the National Labor Relations Board.

WE WILL NOT interfere with the right of employees to engage in concerted activity by attempting to enforce unlawful arbitration agreements in judicial forums and WE WILL withdraw all objections thereto.

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

WE WILL rescind or revise the aforementioned arbitration agreements to make it clear to employees that the agreements do not constitute a waiver of their right in all forums to maintain class or collective actions and do not restrict employees' right to file charges with the National Labor Relations Board.

WE WILL notify employees of the rescinded or revised agreements, including providing them with a copy of the revised agreements or specific notification that the agreements have been rescinded.

SECURITAS SECURITY
SERVICES USA, INC.

_____
(Employer)

Dated_____ By_____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

11500 West Olympic Boulevard, Suite 600, Los Angeles, CA 90064-1824

(310) 235-7352, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (310) 235-7350.

EXHIBIT 3

JD–57–13
Pittsburg, MI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CELLULAR SALES OF MISSOURI, LLC

Respondent

and Case 14–CA–094714

JOHN BAUER, an Individual

Lyn Buckley, Esq.,
for the Acting General Counsel.
C. Larry Carbo III, Esq. and *Julie Offerman, Esq.,*
for the Respondent.
Mark A. Kistler, Esq.,
for the Charging Party.

DECISION

STATEMENT OF THE CASE

CHRISTINE E. DIBBLE, Administrative Law Judge.[1] This case was tried in Overland Park, Kansas, on May 14, 2013. The Charging Party, John Bauer (Bauer), filed the charge in Case 14–CA–094714 on December 11, 2012.[2] On March 7, 2013, Bauer filed an amended charge in this case. The Regional Director for Region 14 Subregion 17 of the National Labor Relations Board (the Board) issued the complaint and notice of hearing on March 22, 2013. The Respondent filed a timely answer on April 5, 2013, denying all material allegations in the complaint.

The complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (NLRA/the Act) when (1) since on or about January 1, 2012, the Respondent has required its current and former employees, including Bauer, as a condition of employment, to enter into individual arbitration agreements which fail to contain an exception for unfair labor

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[1] The Respondent argues that any actions taken by this Board, including its agents and delegates, lacks authority because the court in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), cert. granted 81 U.S.L.W. 3695 (U.S. June 24, 2013) (no. 12-1281), found the recess appointments of Members Sharon Block and Richard Griffin were unconstitutional and invalid. Thus, the Board lacks a quorum. The Board does not accept the decision in *Noel Canning*, in part, because there is a conflict in the circuits regarding this issue. *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. at **fn. 1 (2013).

[2] All dates are in 2012, unless otherwise indicated.

practice allegations and requires employees to waive their right to pursue class-wide or collective representative legal action in any forum, arbitral or judicial;[3] and (2) on or about January 11, 2013, the Respondent filed a motion with the United States District Court for the Western District of Missouri (the District Court) in Case No. 12-05111-CV-SW-BP seeking an order to dismiss the lawsuit filed by Bauer on November 9, 2012, and compel arbitration and dismissal of the class or collective action allegations, pursuant to the terms of the arbitration agreement described in paragraph 4(a) of the Board complaint.[4] (GC Exh. 1.)[5]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The parties stipulated to the following fact on the nature of the Respondent's business and jurisdiction:

1. The Respondent is a limited liability company with an office and places of business in Missouri and has been operating retail stores selling cell phone equipment and cell phone services at various locations in Missouri and Kansas including Pittsburg, Kansas.

2. In conducting its operations described in paragraph 1 above, during the 12-month period ending December 31, 2012, the Respondent derived gross revenues in excess of $500,000.

3. In conducting its operations described above in paragraph 1, during the 12-month period ending December 31, 2012, the Respondent purchased and received at its Pittsburg, Kansas facility goods valued in excess of $5000 directly from points outside the State of Kansas.

4. During calendar year 2012, and through March 31, 2013, the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Stipulated Background Facts

The parties stipulated to the following facts:

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[3] This allegation is alleged in pars. 4(a), (b), and (c), and 5 of the complaint.

[4] This allegation is alleged in paragraph 4(e) and 5 of the complaint.

[5] Abbreviations used in this decision are as follows: "Tr." for transcript; "R Exh." for Respondent's exhibit; "GC Exh." for General Counsel's exhibit; "GC Br." for the General Counsel's brief; "R Br." for Respondent's brief; and "R Ltr. Br." for Respondent's letter brief.

1. Since December 1, 2011, the following individuals have held the positions next to their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act: Hughes Bowen Hammon (Hammon), Regional Director; and Jose Ordonez (Ordonez), Regional Director. (GC Exh. 2)

2. Since approximately January 1, 2012, the Respondent has promulgated, maintained, and enforced individual agreements with its current and former sales representative employees that include the following provision:

> All claims, disputes or controversies arising out of, or in relation to this document or Employee's employment with Company shall be decided by arbitration. . . . Employee hereby agrees to arbitrate any such claims, disputes, or controversies only in an individual capacity and not as a plaintiff or class member in any purported class, collective action, or representative proceeding. . . . The parties agree that no arbitrator has the authority to . . . order consolidation, class arbitration or collective arbitration. . . . The right to arbitrate shall survive the termination of Employee's employment with the Company. (GC Exhs. 2, 3.)

3. Since approximately January 1, 2012, the Respondent has required sales representative employees to enter into the agreements described above in paragraph 2 as a condition of employment. (GC Exh. 2.)

4. In approximately January 2012, the Respondent and former employee, Bauer, entered into the individual arbitration agreement described above in paragraph 2. (GC Exhs. 2, 3.)

5. On approximately November 9, 2012, Bauer filed a complaint in the District Court captioned John Bauer on behalf of himself and all other persons similarly situated v. Cellular Sales of Knoxville, Inc., Cellular Sales of Missouri, LLC and Dane Scism, Case No. 12-cv-5111. (GC Exhs. 2, 4.)

6. On approximately January 11, 2013, the Respondent filed a motion with the District Court in the matter referenced above in paragraph 5, seeking an order to dismiss the lawsuit, compel arbitration, and dismiss class/collective action allegations, pursuant to the terms of the arbitration agreements described above in paragraphs 2 and 4. (GC Exhs. 2, 5.)

1. Respondent's operations and Bauer's employment history with Respondent

The evidence establishes that as of May 14, 2013, the Respondent employed approximately 106 sales representatives in its 21 retail stores in Missouri and Kansas. (Tr. 52–53.) The record is undisputed that on an unspecified date in November 2010, Bauer began working for the Respondent as an independent contractor. (Tr. 27.) During a meeting in December 2011, with independent contractors, Hammon and Ordonez notified them that they would be converted to "employee status." (Tr. 28, 42.) Bauer attended the meeting. Those in attendance were given a Compensation Schedule, which contained the arbitration clause at issue,

to sign. (GC Exh. 6.)[6] Additionally, the Compensation Schedule included a Sales Commission Schedule. The parties stipulated that on an unknown date in June, July, or August 2012, the language in the Sales Commission Schedule that appears at GC Exhibit 3 and identified as Exhibit A was changed by the Respondent. The Sales Commission Schedule revised language appears at GC Exhibit 7. The parties stipulated, however, that the language in the Compensation Schedule never changed. (Tr. 20–21.) Employees were informed that they had to sign the Compensation Schedule before they could be hired. (Tr. 28, 43.) On or about January 1, 2012, Bauer signed the Compensation Schedule and became an employee of the Respondent. (Tr. 25; GC Exh. 3.) Bauer worked as an employee in several of the Respondent's retail stores until about the end of May 2012. (Tr. 30.) The parties stipulated that Bauer's "last day at work was about the last day of May of 2012." (Tr. 25.)

III. DISCUSSION AND ANALYSIS

A. Does The Mandatory Arbitration Agreement Violate Section 8(a)(1) of the Act by Unlawfully Prohibiting Employees from Engaging in Protected Concerted Activities?

The General Counsel argues that the Respondent violated Section 8(a)(1) of the Act because it requires employees covered by the Act, as a condition of employment, to sign an agreement that prevents them from filing joint, class, or collective claims addressing their wages, hours, or other terms and conditions of employment against the Respondent in any arbitral or judicial forum. Further, the General Counsel contends that because the arbitration agreement does not contain an opt-out provision, it has the effect of leading employees to reasonably believe that they cannot file charges with the NLRB. Accordingly, the "very language of this agreement coerces all signatory employees by prohibiting them from engaging in concerted activity protected by Section 7 of the Act." (GC Br. 4.)

The Respondent contends the complaint must be dismissed because: (1) the Board lacks jurisdiction over the case in light of the ruling in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), cert. granted 81 U.S.L.W. 3695 (U.S. June 24, 2013) (No. 12-1281); (2) the Charging Party was not an employee within the meaning of the Act during the 10(b) period; (3) the Charging Party has not engaged in "concerted activity"; and (4) *D.R. Horton*, 357 NLRB No. 184 (Jan. 3, 2012), is not applicable and assuming it is applicable, it is contrary to controlling Supreme Court precedent and the FAA.[7]

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[6] GC Exh. 6 is a list of sales employees that signed the Compensation Schedule agreement with the Respondent effective from January 1, 2012, to May 10, 2013. The parties entered into a stipulation agreeing to the description of the document at GC Exh. 6. The parties also agreed that GC Exh. 6 contains an alphabetical list of employee names and their approximate hire dates. (Tr. 17.)

[7] On July 3 and 8, 2013, the Respondent filed letter briefs in addition to a Post-Hearing Brief. The letter brief filed on July 3, addressed the Order issued by the United States District Court for the Western District of Missouri in Case No. 12-5111-CV-SW-BP. The letter brief filed by the Respondent on July 8, addressed the most recent Supreme Court ruling on arbitration agreements. The General Counsel did not file responses. Although I did not authorize the parties to file additional briefs beyond the Post-Hearing Briefs, I have considered the Respondent's additional filings in my decision-making process.

Based on the evidence, I find that the Respondent's action violated Section 8(a)(1) of the Act when it mandated that employees covered by the Act had to waive, as a condition of employment, their right to file joint, class, or collective claims in any arbitral or judicial forum.

1. The Board's jurisdiction to issue the complaint at issue

The Respondent argues that the case should be dismissed because the Board did not have a valid quorum when the charges and complaint in this case were filed. *New Process Steel, L.P. v. NLRB*, 130 S.Ct. 2635 (2010). The Respondent contends that any actions taken by this Board, including its agents and delegates, lack authority because the court in *Noel Canning v. NLRB,* found that the recess appointments of Members Sharon Block and Richard Griffin were unconstitutional and invalid.

I reject the Respondent's argument on this point. The Board does not accept the decision in *Noel Canning*, in part, because it is the decision of a circuit court and there is a conflict in the circuits regarding this issue. *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. at fn. 1 (2013). Although the Fourth Circuit recently agreed with *Noel Canning* when it decided *NLRB v. Enterprise Leasing Co. Southeast, LLC*, Nos. 12–1514, 12–2000, 12–2065, 2013 WL 3722388 (4th Cir. 2013), the Board has noted that at least three courts of appeals have reached a different conclusion on similar facts. *Bloomingdales,* supra (citing *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), cert. denied 544 U.S. 942 (2005); *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *U.S. v. Allocco*, 305 F.2d 704 (2d Cir. 1962)). Therefore, Respondent's argument fails.

2. Charging Party is an employee within the meaning of the Act

The Respondent contends that the complaint must be dismissed because Bauer filed his initial charge more than 6 months after his execution of the Compensation Schedule, which contained the alleged discriminatory language. (R Br. 9.) In addition, the Respondent posits that pursuant to Section 2(3) of the Act, Bauer is considered an "employee" during the 10(b) period ***only*** if his employment "ceased as a consequence of, or in connection with, any current labor dispute or because of an unfair labor practice." (R Br. 10, quoting Section 2(3) of the Act.) The Respondent argues Bauer does not fit within this definition of employee on either point. The General Counsel counters that the Respondent had misinterpreted the meaning of the Act's definition of employee and Section 10(b).

Section 10(b) of the Act states in relevant part that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board. . . ." Although, the Respondent argues that Bauer was not an employee as defined by Section 2(3) of the Act during the 10(b) period, I find this argument fails. The Board defines "employee" broadly, including "former employees." The Respondent referenced *Little Rock Crate & Basket Co.*, 227 NLRB 1406 (1977), in its posthearing brief to support its argument that vaguely identifying an individual as "employee" does not cloak him or her with the protections of Section 7 of the Act.

Little Rock Crate & Basket Co., however, supports the General Counsel's assertion that "a charging party need not be an employee nor one impacted during the 10(b) period by the unfair labor practices alleged." (GC Br. 8.) *Little Rock Crate & Basket Co.* involved a charging party that was discharged in the morning but allowed to remain in the employer's facility until his final paycheck was available at noon that same day. The charging party began to distribute union literature to other employees while he waited on his paycheck. His former supervisor told him distribution of the literature on the employer's property was illegal and threatened to have him arrested. Despite his discharge the Board found the charging party was a statutory "employee" within the meaning of Section 2(3) of the Act. The Board noted it has "long held that that term [employees] means "members of the working class generally," including "former employees of a particular employer." *Little Rock Crate & Basket Co.*, supra at 1406. (See *Briggs Manufacturing Co.*, 75 NLRB 569, 570, 571 (1947) (finding that Sec. 2(3) of the Act provides that the term "employees" includes any employee unless the Act explicitly states otherwise; and in its generic sense the term is broad enough to include "members of the working class generally"). Therefore, under this principal, Bauer is clearly an employee within the meaning of the Act.

Further, the Compensation Schedule was effective within the 10(b) period for current and past employees; and the Respondent's attempt to enforce the collective and class restrictions of the Compensation Schedule in District Court was done during the 10(b) period. Thus, the Respondent's effort to "interfere with, restrain, or coerce" employees (and Bauer) in the exercise of their protected concerted activity occurred during the 10(b) period. The impact of the terms of the arbitration impacted his ability to engage in the protected concerted activity of joining with past and current employees to litigate issues involving the wages, hours, and other terms and conditions of their employment with the Respondent. See *D.R. Horton; Bloomingdale's Inc.*, Case JD(SF)-29-13 (June 25, 2013) (the NLRB issued a complaint brought by a charging party approximately 8 months after her termination contesting the class action waiver clause of an arbitration agreement. The complaint was heard and decided by an administrative law judge).

I find that Bauer was an employee within the meaning of the Act during the 10(b) period. Consequently, the Respondent's affirmative defense on this point fails.

3. *D.R. Horton*, Supreme Court precedent, and the FAA

The Respondent contends that *D.R. Horton* is contrary to the Federal Arbitration Act (FAA),[8] 9 U.S.C. §§ 1 et. seq., and controlling Supreme Court precedent. The Respondent notes that the majority of lower courts have also declined to adopt the holding in *D.R. Horton*. See, e.g., *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013); *Miguel v. JP Morgan Chase Bank*, 2013 WL 452418 (C.C. Cal. Feb. 5, 2013); *Carey v. 24 Hour Fitness USA, Inc.*, 2012 WL 4754726 (S.D. Tex. Oct. 4, 2012), and cases cited therein. Moreover, on June 20, 2013, the Supreme Court issued *American Express Co. v. Italian Colors Restaurant*, 133 S.Ct. 2304, which the Respondent argues supports enforcement of the arbitration agreement at issue.

[8] The FAA was enacted in 1925, 43 Stat. 883, and reenacted and codified in 1947 as Title 9 of the United States Code.

It is undeniable that increasingly the Supreme Court has shown great deference to enforcement of arbitration agreements. In *AT & T Mobility LLC v. Concepcion*, 131 S.Ct. 1740, 1749 (2011), the Supreme Court emphasizes that its cases "place it beyond dispute that the FAA was designed to promote arbitration." The Court and NLRB acknowledge that the provisions of the FAA evince a "liberal policy favoring arbitration agreements." *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 103 S.Ct. 927 (1983). The Supreme Court explains that the "principal purpose" of the FAA is to "ensur[e] that private arbitration agreements are enforced according to their terms." *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 109 S.Ct. 1248 (1989). Parties may agree to specify the issues that can be arbitrated and restrict "with whom a party will arbitrate its disputes." *Stolt-Nielsen S.A. v. Animal Feeds Intl. Corp.*, 130 S.Ct. 1758, 1763 (2010); *AT & T Mobility LLC*, supra.

American Express Co. involved merchants who accepted American Express cards and had agreements with American Express that contained an arbitration clause. The agreement included a provision precluding any claims from being arbitrated on a class action basis. Subsequently, the merchants filed a class action suit against American Express for violation of the federal antitrust laws. The merchants argued the provision waiving class arbitration should render the agreement unenforceable because the cost of individually arbitrating a federal statutory claim would exceed their potential recovery. American Express moved to force individual arbitration under the FAA. The Supreme Court held that arbitration is a matter of contract and the FAA precludes courts from invalidating a contractual waiver of class arbitration because "the plaintiff's cost of individually arbitrating a federal statutory claim exceeds the potential recovery." Id. at 2307. The Supreme Court also held that "unless the FAA's mandate has been "overridden by a contrary congressional command," courts cannot invalidate arbitration agreements simply because the claim is based on the violation of a federal statute. *American Express Co.* at 2310; *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 668–669 (2012).

In *D.R. Horton*, the Charging Party was required, as a condition of employment, to sign an arbitration agreement that did not have an opt-out clause. In addition, the arbitration agreement contained a clause precluding Charging Party and other employees covered by the Act from filing joint, class, or collective claims in arbitral and judicial forums. The Board explained that an employer violates Section 8(a)(1) of the Act when it requires employees as defined by the Act, as a condition of their employment, to sign an arbitration agreement that prohibits them from "filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial." Id. at 1.

I find that the Supreme Court does not expressly overrule the finding in *D.R. Horton.* The case at issue is distinguishable because the arbitration agreement precludes employees from exercising their substantive rights protected by Section 7 of the Act. The NLRA "protects employees' ability to join together to pursue workplace grievances, including through litigation. Id., slip op. at 2. By initiating arbitration on a classwide basis and filing a class action lawsuit in district court, both Bauer and the charging party in *D.R. Horton* were engaging in conduct that the Board has noted is "not peripheral but central to the Act's purposes." *D.R. Horton,* supra at 4. The Board went on to find that there was no conflict between the NLRA and the FAA "[s]o long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of class-wide arbitration." *D.R. Horton,* slip op. at 16. The agreement in this matter does not provide for such an option.

The claim brought by the merchants in *American Express Co.*, is distinguishable in that it was for a violation of antitrust laws. Unlike *D.R. Horton* and the case at issue, the merchants were alleging not that they were precluded from pursuing their claim but rather the cost to do so individually would be prohibitive. Id. at 2309. However, the Supreme Court noted "antitrust laws do not guarantee an affordable procedural path to the vindication of every claim." *American Express Co.*, supra at 2309.

The Respondent does not set forth an argument explaining why it believes the holding in *American Express Co.* overrules *D.R. Horton*, other than to note that it "supports enforcement of Cellular Sale's arbitration agreement." (R Ltr. Br. 2.) I find nothing in *American Express Co.* or the FAA to support the Respondent's assertion. Consequently, I am bound by Board precedent unless and until it is reversed by the Supreme Court.

4. The Charging Party has engaged in concerted activity

The Respondent argues Charging Party's filing of the lawsuit in District Court is not protected activity under Section 7 of the Act because "there is absolutely no evidence that any employees are seeking to join, took part in, or authorized the filing of the lawsuit." (R Br. 13.)

Section 8(a)(1) of the Act provides that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." See *Brighton Retail, Inc.*, 354 NLRB 441, 441 (2009).

In *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), and in *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity. Individual action is concerted if it is engaged in with the object of initiating or inducing group action. *Whitaker Corp.*, 289 NLRB 933 (1988). The "mutual aid or protection" clause of the Act includes employees acting in concert to improve their working conditions through administrative and judicial forums.

In assessing whether an employer has violated Section 8(a)(1) by unilaterally implementing a policy (in this case it is a mandatory arbitration agreement), the Board applies the test established in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). First, it must be determined whether the rule explicitly restricts activities protected by Section 7. If the rule does, it is unlawful. However, if there is not an explicit restriction of Section 7 rights, "the finding of a violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the rule to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage*, supra at 647.

It is clear that under *Lutheran Heritage*, the arbitration agreement at issue explicitly restricts and has been applied to restrict the rights protected by Section 7. Further, under Board law, it is established that Bauer engaged in concerted protected activity as a result of the class action lawsuit he filed in District Court. The Board has held that filing a class action lawsuit to address wages, hours, and other terms and conditions of employment constitutes protected activity, unless done with malice or in bad faith. *Harco Trucking, LLC*, 344 NLRB 478 (2005); *Host International*, 290 NLRB 442,443 (1988); *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012). Consequently, the Respondent's action to force Bauer, and other employees covered under the Act, to waive their right to file a classwide action in any forum, arbitral or judicial interferes with and restrains them in the exercise of their Section rights. Therefore, I find that the Respondent's argument fails.

Accordingly, I find that the Respondent's action violated Section 8(a)(1) of the Act when it mandated that employees covered by the Act had to waive, as a condition of employment, their right to file joint, class, or collective claims in any arbitral or judicial forum.

B. Does The Respondent's Motion to Compel Arbitration Filed in District Court Violate Section 8(a)(1) of the Act?

The General Counsel advances the same arguments and cited authority to this charge as it does to the charge contesting the arbitration agreement. Likewise, the Respondent sets forth the same defenses. (GC Br. 6; R Br.; R Ltr. Br.)

In addition to the previously cited defenses, the Respondent argues that I should defer to an order issued by the District Court on July 3, 2013, granting the Respondent's motion to compel arbitration and dismissing Bauer's collective and class claims. (R Ltr. Br. Exh. C attached.) While the District Court's order is instructive, it lacks precedential authority. I am bound by Board precedent. See *Pathmark Stores, Inc.*, 342 NLRB 378 fn. 1 (2004). Consequently, this matter requires me to follow Board law as set forth in *D.R. Horton* which is contrary to the District Court's order.

Therefore, I find that the Respondent's action violated Section 8(a)(1) of the Act when it attempted to restrict Bauer's exercise of his Section 7 rights by filing a motion in District Court to compel arbitration and dismissal of Bauer's collective and class claims.

CONCLUSIONS OF LAW

1. The Respondent, Cellular Sales of Missouri, Inc., is an employer within the meaning of Section 2(6) and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory and binding arbitration policy which required employees to resolve employment-related disputes exclusively through individual arbitration proceedings and to relinquish any right they have to resolve such disputes through collective or class action.

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

4. The Respondent violated Section 8(a)(1) of the Act by filing a motion in District Court to compel arbitration and dismissal of Charging Party's collective and class claims.

REMEDY

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

As I have concluded that the arbitration policy contained within the Compensation Schedule is unlawful, the recommended Order requires that the Respondent revise or rescind it, and advise its employees in writing that said rule has been so revised or rescinded. Because the Respondent utilized the arbitration policy contained in the Compensation Schedule on a corporate wide basis, the Respondent shall post a notice at all locations where the arbitration policy contained in the Compensation Schedule was in effect. See, e.g., *U-Haul Co. of California*, supra at fn. 2 (2006); *D.R. Horton,* supra, slip op. at 17.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[9]

ORDER

The Respondent, Cellular Sales of Missouri, LLC, St. Louis, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and enforcing a mandatory and binding arbitration policy that waives the right to maintain class or collective actions in all forums, whether arbitral or judicial.

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

(c) Seeking court action to enforce a mandatory and binding arbitration policy that waives the right to maintain class or collective actions in all forums, whether arbitral or judicial;

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

or restricts employees' protected activity or that employees reasonably would believe bars or restricts their right to engage in protected activity and/or file charges with the National Labor Relations Board.

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

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

(a) Rescind or revise the arbitration agreement contained in the Compensation Schedule to make it clear to employees that the agreement does not constitute a waiver in all forums of their right to maintain employment-related class or collective actions, does not restrict employees' right to file charges with the National Labor Relations Board or engage in protected activity, and does not require employees to keep information regarding their Section 7 activity confidential.

(b) Notify the employees of the rescinded or revised agreement to include providing them a copy of the revised agreement or specific notification that the agreement has been rescinded.

(c) File a motion with the United States District Court for the Western District of Missouri in Case 12-05111-CV-SW-BP asking that the court vacate its order to compel arbitration and/or to limit the class and collective claims.

(d) Within 14 days after service by the Region, post at all facilities where the arbitration agreement contained in the Compensation Schedule applied copies of the attached notice marked "Appendix."[10] Copies of the notice, on forms provided by the Regional Director for Region 14 Subregion 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 1, 2012.

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

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

Dated, Washington, D.C. August 19, 2013

Christine E. Dibble (CED)
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

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

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

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

WE WILL rescind or revise the arbitration agreement contained in the Compensation Schedule to make it clear to employees that the agreement does not constitute a waiver of their right in all forums to maintain class or collective actions, does not restrict employees' right to file charges with the National Labor Relations Board or engage in other protected activity, and does not require employees to keep information regarding their Section 7 activity confidential.

WE WILL notify employees of the rescinded or revised agreement, including providing them with a copy of the revised agreement or specific notification that the agreement has been rescinded.

CELLULAR SALES OF MISSOURI, LLC
(Employer)

DATED: _____ **BY** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1222 Spruce Street, Suite 8.302
St. Louis, Missouri 63103-2829
Telephone: (314) 539-7770
Fax: (314) 539-7794
Hours of Operation: 8:30 a.m. to 5:00 p.m. CST

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (314) 539-7770.

EXHIBIT 4

JD(SF)–48–13
Concord, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES

FAA CONCORD H, INC. d/b/a
CONCORD HONDA

and

Cases 32–CA–066979
32–CA–070343
32–CA–072231

MACHINISTS AUTOMOTIVE TRADES
DISTRICT LODGE NO. 190,
AUTOMOTIVE MACHINISTS LODGE
NO. 1173

Judith H. Chang, Esq., for the General Counsel.
Joshua J. Cliffe and
Aurelio Perez, Esqs., for the Respondent.
David A. Rosenfeld and
Caren P. Sencer, Esqs., for the Charging Party.

DECISION

STATEMENT OF THE CASE

Eleanor Laws, Administrative Law Judge. This case was tried in Oakland, California on July 16, and 17, 2013. The Machinists Automotive Trades District Lodge No. 90, Automotive Machinists Lodge No. 1173 (the Union or Machinists) filed the charge in case 32–CA–066979 on October 18, 2011. The Union filed the charge in case 32–CA–070343 on December 7, 2011, and in case 32–CA–072231 on January 11, 2012. On March 22, 2012, the Acting General Counsel issued its first consolidated complaint. The Union filed the charge in case 32–CA–070343 on December 7, 2011. On February 26, 2013, the Acting General Counsel issued a second complaint (the complaint) consolidating case 32–CA–070343 with the previous cases.

The complaint alleges that the Concord Honda (Respondent or Concord) violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) when it implemented a bonus plan and changed the bargaining unit employees' work schedule without bargaining with the Union. The complaint further alleges that the Respondent, bypassing the Union, met with employees to discuss holding alternative work week elections and held such elections in violation of Sections 8(a)(1) and(5). Lastly, the complaint alleges the Respondent violated Section 8(a)(1) of the Act by: (1) requiring its employees, as a condition of employment, to sign agreements that compel the employees to submit to binding arbitration; (2) maintaining and enforcing the mandatory arbitration agreement since about July 2012; and (3) expressly taking a position that the

mandatory arbitration agreement prohibits employees from proceeding as a class and/or on a collective basis in an arbitration proceeding.

The parties entered into numerous stipulations of fact, which I approved. They are in the record as Joint Exhibit 1.[1]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel, Respondent, and Charging Party, I make the following[2]

FINDINGS OF FACT

I. JURISDICTION

Concord Honda, a corporation, sells and services automobiles at its dealership in Concord, California, where it annually derives gross revenues in excess of $500,000. The Respondent admits and I find that, at all material times, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. I also find that, at all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Concord Honda, owned by Sonic Automotive, sells and services new and used vehicles. At the time of the hearing, Concord employed roughly 25 vehicle service technicians. Chris Tastard, Concord's service manager, is the technicians' first-line supervisor. He maintains an open-door policy whereby any employees or group of employees may come to him with concerns about workplace problems. Tastard reports to Mike Cervantes, who has been the divisional fixed operations director for the Western Division of Sonic Automotive since 2011. Rax Patel is Concord's general manager.

On May 14, 2010, the Board certified the Machinists Automotive Trades District Lodge No. 190 as the designated exclusive bargaining representative of the following employees, hereinafter referred to as the Unit:

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[1] Abbreviations used in this decision are as follows: "Tr." for transcript; "Jt. Exh." for joint exhibit; "R Exh." for Respondent's exhibit; "GC Exh." for Acting General Counsel's exhibit; "GC Br." for the Acting General Counsel's brief; "R Br. for the Respondents' brief. Although I have included several citations to the record to highlight particular testimony or exhibits, I emphasize that my findings and conclusions are based not solely on the evidence specifically cited, but rather are based my review and consideration of the entire record.

[2] I note the Respondent attached an exhibit to its closing brief. The Exhibit was not properly entered into evidence. It consists of a memorandum from a previous General Counsel of the Board regarding the issue of whether employers can require employees to waive their right to class or collective actions. Because I am required to follow Board precedent, which does not include this memorandum, and because the memo was not introduced at the hearing, I do not consider it.

> All full-time and regular part-time technicians and lube technicians employed by Respondent and performing work at its Concord, California facility; excluding all confidential employees, guards, and supervisors as defined in the National Labor Relations Act.

Since June 2010, the Union and Respondent have been bargaining for an initial collective-bargaining agreement. To date, the Union and Respondent have not reached an overall agreement nor has either declared impasse. They have reached tentative agreements in some areas but have not come to agreement in others. Most relevant here, the parties disagree about the inclusion of a union security clause.[3] For the Union, Rick Rodgers, area director and business representative/organizer, and Mark Hollibush, area director/assistant directing business representative, have been the primary bargaining agents. Josh Cliffe, the Respondent's counsel, and Cervantes (as of 2011) have been the Respondent's primary bargaining representatives.

B. Alleged Unilateral Changes and Direct Dealing

1. June 2011 Bonus

Once or twice a month, Tastard holds morning meetings with the technicians. At a morning meeting in mid-June 2011, he told them about a bonus incentive. If Concord made its June budget, the technicians would receive an extra dollar for every hour of service sold. In addition, technicians would receive $100.00 if they maintained a positive attitude throughout June. (GC Exh. 3.) The June 2011 bonus is the only bonus Tastard has offered to the Unit employees. (Tr. 52, 355.)[4]

The Respondent did not give the Union advance notice of its intent to implement the bonus plan. During a June 29, 2011, bargaining session, Rodgers raised his frustration over the implementation of the bonus plan without bargaining. (GC Exh. 6; Tr. 190.) On July 11, Cliffe sent an email to Rodgers with an attachment detailing the "proposed" June bonus plan, and asked if there was any problem with paying it. (GC Exh. 7.) Rodgers was on vacation at the time and therefore did not immediately respond. The bonus for maintaining a positive attitude was paid to the technicians on July 15, 2011.[5] (GC Exh. 2.) On July 19, Rodgers responded to Cliffe's email, stating, "I have no issues with the two bonus plans as long as they are applied equally." (GC Exh. 7.) By that point, Rodgers knew that the bonus for maintaining a positive attitude had already been implemented. Concord did not meet its budget goal, so no employees got the extra dollar-per-hour bonus. (Tr. 373.)

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[3] Other areas of disagreement include jury duty, sick leave, and pensions.

[4] The transcript contains some errors. Page 394, line 12, "would" should be replaced by "could".

[5] Bryan's paycheck dated June 26 showed a bonus of $125.00. Other employees' paychecks showed bonus amounts for other months that could not be explained. These bonuses are not at issue in this case, however, and the parties have stipulated that the employees were paid the $100.00 bonus. The paychecks for the paydate July 15 uniformly denote a $100.00 bonus. (GC Exh. 2.) The Acting General Counsel argues that clearly some of the bonus at issue was paid in June. I disagree, but this makes no difference to the outcome.

2. Alternative Work Week Meetings and Elections

From at least July 2008 until November 13, 2011, the Unit employees at Concord have worked a 4-day-per-week, 10-hour-per day schedule (4/10 schedule).[6] This is also referred to as an "alternative work week" schedule. The "normal" work week is considered to be to a 5-day-per-week, 8-hour-per-day schedule (5/8 schedule). Under California state law, unless employees in a work unit have voted for an alternative work week schedule in a secret ballot election or agreed to it as part of a valid contract with the union, the employer must pay overtime for work beyond 8 hours in a day. Specifically, Cal. Labor Code, § 510(a) states, in relevant part:

> Eight hours of labor constitutes a day's work. Any work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek and the first eight hours worked on the seventh day of work in any one workweek shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee.

As noted, there are exceptions set forth in § 510(a):

> The requirements of this section do not apply to the payment of overtime compensation to an employee working pursuant to any of the following:
>
> > (1) An alternative workweek schedule adopted pursuant to Section511.
> >
> > (2) An alternative workweek schedule adopted pursuant to a collective bargaining agreement . . . .

Section 511, in turn, states in relevant part:

> (a) Upon the proposal of an employer, the employees of an employer may adopt a regularly scheduled alternative workweek that authorizes work by the affected employees for no longer than 10 hours per day within a 40-hour workweek without the payment to the affected employees of an overtime rate of compensation pursuant to this section. A proposal to adopt an alternative workweek schedule shall be deemed adopted only if it receives approval in a secret ballot election by at least two-thirds of affected employees in a readily identifiable work unit. The regularly scheduled alternative workweek proposed by an employer for adoption by employees may be a single work schedule that would become the standard schedule for workers in the work unit, or a menu of work schedule options, from which each employee in the unit would be entitled to choose.

There are specific adoption procedures that must be followed as set forth in California Industrial Welfare Commission (IWC) Order No. 4-2001, governing professional, technical, clerical, mechanical and similar occupations.

During early 2011, Rodgers received information leading him to suspect that Concord did not properly implement the 4/10 schedule. Specifically, he read a February 16, 2000, letter of

[6] The parties dispute whether the 4/10 schedule was lawfully implemented in accordance with California state law governing alternative work schedules.

compliance from Concord to the State of California Department of Industrial Relations. The letter stated that Concord held a secret ballot election of the work unit on February 14, 2000, and all three of the affected employees voted in favor of the 4/10 workweek. (GC Exh. 11). Rodgers learned there were more than 3 technicians employed during February 2000. Among those remaining, none recalled a secret ballot alternative workweek election.

At a bargaining session on March 9, 2011, Rodgers asked whether it was safe to assume there would not be an issue regarding Union security at the end of negotiations. In response, Cliffe said that was not a safe assumption, the Company took it seriously, and "it would be wrong to think that it would just go away at the end." Cervantes, who was there, described the Union's response to this as "very vocal, very heated."[7] (Tr. 434.)

On March 14, 2011, Union attorney David Rosenfeld sent a letter to Cliffe stating that none of the Unit employees recalled having an election to establish the alternative work week. He instructed Cliffe to provide to the Union any documentation to prove the 4/10 schedule had been implemented pursuant to an election. (Jt. Exh. 1at Exh. P.)

At the next bargaining session on May 11, the Union rescinded its tentative agreement on safety and submitted an information request pertaining to safety. (R. Exh. 4.)

As discussed in detail below, beginning in July 2011, counsel for the Union and Concord began exchanging correspondence regarding the arbitration demands of certain Unit employees. On July 8, 2011, Union attorney Karen Sencer sent a written demand for arbitration on behalf of some Unit employees alleging they were owed overtime money as a result of Concord's failure to implement the alternative workweek schedule properly. (Jt. Exh. 1 at Exh. Q.) That same day, Cliffe and Cervantes called Rodgers and said they were thinking of holding an alternative workweek election because they were concerned that employees wanted to go to a 5/8 schedule. Rodgers responded that, through contract negotiations, the parties had already reached a tentative agreement to maintain the 4/10 schedule.

On October 13, 2011, Cliffe informed Rodgers via email that a number of the Unit employees had demanded arbitration over issues related to the 4/10 schedule. He stated that this raised an issue as to whether the technicians still wanted to work the 4/10 schedule that had been authorized by vote on February 14, 2000. As a result, Concord was proposing an election. Cliffe attached documents pertaining to the election. One such document was an October 17 letter to the employees stating that the Company was proposing an election to determine if the Unit wanted to retain the 4/10 schedule. The letter further stated the employees would vote by secret ballot on November 2 and 3. Finally, the letter set forth the details of Concord's proposed 4/10 work schedule. (GC Exh. 12.)

During the bargaining session on October 14, Cliffe brought up the 4/10 work schedule election. Rodgers informed him they had already tentatively agreed to the 4/10 schedule in bargaining, he objected to an election, and he would consider it self-dealing. (GC Exh. 8.)

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[7] At some undetermined point in time, Rodgers said the Union would never agree to a contract without a Union security provision. The Respondent pinpoints this statement to March 9, but the testimony fails to establish the date. (Tr. 434; R. Br. 6.)

Cervantes and Cliffe told the Union representatives that Concord felt it was necessary to go forward with the elections. (Tr. 515.)

On October 17, and 18, 2011, Tastard, Patel and Larry Brock, Concord's director of associate development, met with Unit employees to discuss holding alternative work week elections. At the meeting, the employees received the October 17 alternative work week schedule proposal described above. The employees also signed a receipt for the proposal as well as an attendance record.

On November 2, and 3, 2011, the Respondent held secret ballot elections with Unit employees. The elections took place in Concord's break room. Tastard and Patel were present for the Respondent. The Union opted not to be present. The Respondent distributed a voter list for each employee to sign and date, indicating their participation in the election and attesting that they cast a vote of their choice.

To establish (or here retain) the 4/10 schedule, two-thirds of the technicians needed to vote for it. Because less than two-thirds of the technicians voted in favor of the 4/10 schedule, the Respondent was required to change to a 5/8 schedule within 60 days under California IWC Order 4 § 3(C)(5). As a result of the need to change the schedule, Cervantes determined there were not enough stalls for all of the Unit employees to continue as service technicians. Accordingly, management decided they would need to lay off the 2 technicians with the least skill and seniority.

On November 4, Cliffe informed Rodgers there were not enough votes to retain the 4/10 schedule and the technicians would be moved to a 5/8 schedule on November 7. Rodgers was also told of the plan to lay off 2 technicians. In response, Rodgers demanded that the schedule not change and said he would file unfair labor practices if Unit employees were laid off. Though precise accounts of how the employees learned about the impending schedule change and proposed layoffs vary, the information sparked concern and confusion among them.

Later on November 4, Cliffe told Rodgers that Concord wanted to delay implementing the schedule change until November 14 and hold another alternative workweek election. Cliffe proposed to transfer the two employees who were slated to be laid off into the parts room to work. Rodgers thought this was a temporary move pending the election. According to Cervantes, the transfer was not intended to be temporary. (Tr. 465– 466.)

On November 8, Rodgers wrote Cliffe to tell him he thought the alternative workweek issue must be resolved through collective bargaining rather than a new election, and offered some bargaining dates. He further instructed that if Concord management intended to circumvent collective bargaining and hold the election, they should do it soon. (R. Exh. 1.)

The parties met for another bargaining session on November 11. The Union wanted to come to a global settlement whereby it would withdraw pending claims against Concord if the parties could reach agreement on a final contract. The parties, however, could not agree on union security. The Respondent announced that it wanted to have another alternative work week election and Cervantes said he wanted to bargain over the second election. Rodgers expressed

his viewpoint that the election was unlawful and therefore he would not bargain over it or otherwise participate.[8]

On November 15, 2011, the Respondent again met with the Unit employees to discuss holding a second election. The Respondent once again invited the Union to participate in the meeting, but the Union opted not to participate. As with the earlier meeting, the employees were presented with an alternative work week proposal similar to the October 17 proposal, but dated November 11. Also in line with the earlier meeting, the employees signed a receipt for the proposal as well as an attendance record.

On November 21, 2011, the Respondent reverted back to a 4/10 schedule. The work schedule has not changed since that time. The second election took place on November 30 at the same place and in the same manner as the November 2 and 3 elections. Likewise, the Respondent distributed a voter list for employees to sign and date, indicating their participation in the election and attesting that they cast a vote of their choice. The Respondent invited the Union to participate in the elections, but the Union opted not to participate. The Unit employees voted unanimously in favor of the 4/10 schedule.

C. The Arbitration Agreement

At all material times, the Respondent has required Unit employees to sign, as a condition of their employment, agreements covering employment at will and binding arbitration. An agreement is set forth below in the analysis section for ease of reference.

On July 8, 2011, Sencer made an initial demand to invoke the alternative dispute resolution system and binding arbitration on behalf of Unit employees. Specifically, the Union alleged violations of the California Labor Code and Business and Professions Code regarding a dispute over, *inter alia*, the Respondent's alternative workweek schedule and allegedly unpaid overtime wages. (Jt. Exh. 1 at Exh. Q.) Cliffe responded on July 21, acknowledging the arbitration demand and requesting the names of the employees seeking arbitration. (Jt. Exh. 1 at Exh. R.) On July 25, Sencer informed Cliffe of the Union's intent to arbitrate claims on a classwide basis, and identified three class representatives: Lucio Amaya, Brian Brock, and Paul Bryan. (Jt. Exh. 1 at Exh. S.) On August 9, 2011, Cliffe replied, stating Concord's position that class arbitration was inappropriate under the Federal Arbitration Act because the arbitration agreements did not authorize class arbitration. He offered to arbitrate the threshold issue of class arbitrability. (Jt. Exh. 1 at Exh. T.) On September 13, Sencer informed Cliffe that the three class representatives would proceed with separate individual arbitrations. She requested a list of arbitrators for each individual grievant. (Jt. Exh. 1 at Exh. U.)

Having received no response to her September 13 letter, Sencer wrote Cliffe on October 13, stating that unless the Union received a list of arbitrators for each grievant before the end of the month, the Union would take steps either to compel arbitration or be excused from the arbitration agreement. On October 31, Cliffe sent Sencer an email stating that Concord would provide a list of arbitrators, and stated Concord's desire to consolidate the now 19 individual

[8] IWC 4-2001 § 3(C)(5) provides for a 12-month interval between elections. http://www.dir.ca.gov/IWC/IWCArticle4.pdf.

actions. Sencer responded on November 3, stating that the Union would only agree to consolidate the claims if Concord provided a list of all current and former employees, notified them of the arbitration, and permitted them to join their claims in the consolidated complaint. Receiving no response, Sencer proposed 6 arbitrators for the first 6 cases. Again receiving no response, Sencer prompted Cliffe in a December 5 email. Cliffe responded on December 7, stating he did not agree to any of the arbitrators she proposed. Instead, he proposed to have a different arbitrator hear and decide Concord's motion to consolidate. Sencer responded on December 13, questioning the authority for an arbitrator to hear a consolidation motion without the parties' consent. (Jt. Exh. 1 at Exh. V.)

Following a telephone conversation, Cliffe sent Rosenfeld and Sencer a letter on January 10, setting forth legal authority that, in his view, supported Concord's proposal of submitting its motion to consolidate to an arbitrator. (Jt. Exh. 1 at Exh. W.)

On April 20, 2012, Amaya, Brock, and Bryan, sought arbitration on behalf of themselves and similarly situated current and former employees, alleging that Concord violated the California Labor Code. (Jt. Exh. 1 at Exh. X.) On November, 13, 2012, Respondent filed a motion to dismiss the class allegations, which the arbitrator granted on February 6, 2013. The arbitration is currently proceeding on a consolidated basis with 19 plaintiffs. (Jt. Exh. 1 at Exhs. Y, Z.)

III. DECISION

A. Bonus Plan

The complaint, at paragraph 8(a), alleges that in about June 2011, Respondent unilaterally implemented a bonus plan in violation of Section 8(a)(1) and (5) of the Act.

When employees have duly elected a collective bargaining representative, an employer violates the Act when it bypasses the Union and takes unilateral action regarding a term and condition of employment. *NLRB v. Katz*, 369 U.S. 736 (1962). This is so even if the unilateral changes increase rather than decrease the employees' wages or benefits. *The Daily News of Los Angeles*, 304 NLRB 511 (1991). More to the point, the Board has held that implementing bonuses without bargaining with the Union violates Section 8(a)(1) and (5) of the Act. *Koenig Iron Works*, 282 NLRB 717 (1987), enfd. in relevant part, 681 F.2d 130 (2d Cir. 1988); *Johnson-Bateman*, 295 NLRB 180, 182 (1989) (Wage incentive program is mandatory subject of bargaining).

The Respondent, citing to Board caselaw, argues that Concord was excused from bargaining because the Acting General Counsel failed to meet its *prima facie* burden to present evidence of:

(1) an established past practice or condition of employment;
(2) a change to that past practice or condition of employment; and
(3) a change that has a material, substantial, and significant impact on the terms or conditions of employment of unit employees

(R. Br. 21.) This is an incorrect statement of the Acting General Counsel's initial burden of proof, and not surprisingly the cases to which the Respondent cites do not support it.

Specifically, it is upside down on the burden regarding past practice. Correctly stated, if the Acting General Counsel shows that the employer made material unilateral changes to mandatory subjects of bargaining, the burden shifts to the employer to prove the change was in some way privileged, such as being consistent with an established past practice. *NLRB v. Katz*, 369 U.S. 736 (1962); *Fresno Bee*, 339 NLRB 1214 (2003). Thus the past practice burden is by no means *prima facie* and it rests squarely with the employer.

As to whether the bonus was "material, substantial and significant," the Acting General Counsel bears the burden of proof. *North Star Steel Co.*, 347 NLRB 1364, 1367 (2006). The Board has found similar and lesser bonus payments to be mandatory subjects of bargaining. See *Gas Machinery Co.*, 221 NLRB 862, 863-865 (1975) ($25 bonus); *Southern States Distribution*, 264 NLRB 1, 2-3 (1982) ($25 Christmas bonus); *Rubatex Corp.*, 235 NLRB 833, 835 (1978) ($100 bonus); *Czas Publishing Co.*, 205 NLRB 958, 969–971 (1973), enfd. 495 F.2d 1367 (2nd Cir. 1974) ($50 Christmas bonus); *Aero-Motive Manufacturing Company*, 195 NLRB 790 (1972), enfd. 475 F.2d 27 (6th Cir. 1973). ($100 bonus); *General Telephone Company of Florida*, 149 NLRB 311, 313–314 (bonuses from $5 to $10). Accordingly, I find the bonus was material.

Because the Acting General Counsel has established a unilateral material change, to avoid liability the Respondent must show that it was privileged to act as it did. The Respondent's arguments in this regard are grounded in its incorrect impression that the Acting General Counsel must show no such privilege existed. As such, the Respondent argues that because there was no "well established status quo ante of announcing and bargaining employee bonuses with the Union" there could be no unilateral change. (R. Br. 22.) There could not be an established practice for bargaining over bonuses. First of all, the Union was recently certified and initial contract negotiations were ongoing. Moreover, as Tastard stated, "June 2011 is the only bonus." (Tr. 355.) The change was from an established practice of not offering bonuses to offering and implementing a bonus. The Respondent argues that the record contradicts Tastard's testimony because payments that also appeared to be bonuses appeared on various employees' paychecks at different times. None of the Respondents' witnesses, however, including Tastard and Cervantes, could explain the reason behind this.[9] No employee recalled having been incented to receive any other bonus. Absent record evidence of specific bonuses the Respondent offered and paid, the unexplained references to various amounts paid on certain employees' paychecks do not prove a well established past practice of bypassing the Union and unilaterally implementing bonus plans.

Because Concord implemented the June 2011 bonus plan without notifying or bargaining with the Union, I find it violated of Section 8(a)(1) and (5) of the Act.

B. The Alternative Workweek Meetings, Elections and Schedule Change

Because I find the issues in complaint paragraphs 8 and 9 are intertwined, I will analyze each as part of a larger whole.

[9] The Respondent attempts to attack Bryan's credibility based in part on his confused testimony regarding the bonus payments. It is clear, however, that none of the witnesses could decipher what the relevant portion of the paychecks represented, so this attempt is unconvincing.

Paragraph 9 alleges that on about October 17, and 18, 2011, and November 15, 2011, the Respondent bypassed the Union and dealt directly with Unit employees by meeting with them to discuss holding alternative work week elections and by holding said elections on November 2, 3, and 30, 2011. Paragraph 8(b) of the complaint alleges that, as a result of the November 2 and 3 elections, the Respondent unilaterally changed the bargaining unit employees' work schedule from four 10 hour days per week to five 8 hour days per week from November 14–18, 2011, in violation of Section 8(a)(1) and (5).

1. Unilateral Changes

In *Bottom Line Enterprises*, 302 NLRB 373 (1991), the Board held:

> [W]hen, as here, the parties are engaged in negotiations, an employer's obligation to refrain from unilateral changes extends beyond the mere duty to give notice and an opportunity to bargain; it encompasses a duty to refrain from implementation at all, unless and until an overall impasse has been reached on bargaining for the agreement as a whole. [Footnote omitted.]

There are two limited exceptions to this rule: (1) when a union employs delay tactics in bargaining, and (2) "when economic exigencies compel prompt action." *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 81 (1995). See also *Visiting Nurses Services of Western Massachusetts*, 325 NLRB 1125, 1130 (1998), enfd. 177 F.3d 52 (1st Cir. 1999) cert. denied 528 U.S. 1074 (2000).

The parties have stipulated that the meetings and elections occurred as alleged. The Respondent argues that the parties reached impasse on the issue of the alternative workweek elections. The burden to prove impasse rests with the Respondent. *Coastal Cargo Company, Inc.*, 348 NLRB 664, 668 (2006). As set forth in *Bottom Line*, absent an overall impasse (which the parties have stipulated did not exist) this argument fails unless the Respondent can prove of one of the *RBE Electronics* exceptions applies.[10]

Turning to the first exception, the Respondent asserts that the Union engaged in delay tactics.[11] The Respondent cites to *Jefferson Smurfit Corp.*, 311 NLRB 41, 60 (1993), as permitting piecemeal implementation when a union has engaged in conduct that prevents either agreement or impasse. The Board has held that an employer may make unilateral changes absent an overall impasse "when a union, in response to an employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining." See *M & M Contractors*, 262 NLRB 1472 (1982). To being with, I find the Respondent did not make "diligent and earnest" efforts to bargain over the alternative workweek meetings or elections. The Respondent's proposal to meet with the employees about the election was transmitted to the Union on October 13. The proposal was to meet with the employees a mere 4 days later and hold the election less than 3 weeks later. The Union opposed the elections, stating they had already reached tentative agreement over the alternative work week during negotiations. Nonetheless, on November 14, Cervantes and Cliffe told the Union representatives that Concord

[10] Even without the stipulation, the evidence is clear that the actions at issue herein took place when the parties were continuing to conduct negotiations.

[11] In its answer, the Respondent asserted that it was excused from bargaining to the extent the Union bargained in bad faith. During opening statements, the Respondent alleged the Union used stalling tactics. I find, therefore, that the Respondent has adequately asserted this affirmative defense.

felt it was necessary to go forward with the election. (Tr. 515.) In this context and with this timing, I do not find the Respondent's attempts to bargain about the election were genuine. Instead, I find the meetings and elections, when presented to the Union, were a *fait accompli*. See *Ciba Geigy Pharmaceuticals*, 264 NLRB 1013, 1017 (1982); *Pontiac Osteopathic Hospital*, 336 NLRB 1021, 1023 (2001). As such, the Union was under no obligation to bargain to impasse. *Dorsey Trailers, Inc.*, 327 NLRB 835, 858 (1999).

I further note that the Respondent did not offer to bargain over the effects of the election. Instead, it initially announced that 2 technicians would be laid off and later announced they would be transferred. There is no evidence that the Union was given an opportunity to bargain as to the timing of the schedule change following the first election or any proposed layoffs and/or transfers.

Assuming the Respondent made diligent and earnest attempts to bargain, I turn to the Respondent's argument that the Union engaged in delaying tactics. The Respondent begins this argument by discussing witness credibility, asserting that I should not believe Bryan's denial that the Union was engaged in delaying tactics. The Respondent, however, does not cite to any testimony or other evidence of Bryan's purported denial, and I could find none in the record. (R. Br. 26.) In any event, my decision as to whether the Union engaged in delaying tactics does not rely on Bryan's testimony.

The Respondent next asserts that Rodgers is not a reliable witness because of the implausible positions he has taken during bargaining. Straying from any real argument about delaying tactics, the Respondent essentially contends that the Union's objection to the alternative work week election made no sense in light of its assertion in a separate arbitration claim that the alternative work week had not been lawfully established. This is neither here nor there for my purposes. The Respondent has steadfastly asserted that it implemented its alternative work week schedule pursuant to prior valid election(s). At the time of the elections at issue before me, the parties had reached, through bargaining, a tentative agreement for an alternative work week schedule and the employees had been working that schedule for years. The election of course could change this, and as discussed below and in the statement of facts, it did for a time. For the Union not to agree to it does not strike me as a delaying tactic, regardless of the positions the parties may have taken in other forums. [12]

The Respondent makes further arguments about the unreliability of Rodgers' testimony regarding whether there is such thing as a confirmation election. These arguments do not, without more, meet the Respondent's burden to prove that the Union engaged in delaying tactics. Next, the Respondent argues that Rodgers really should have supported the second election and his claimed ignorance that he had no idea how to bargain over a confirmation election "provides no defense for his refusal to bargain over the second election." (R. Br. 31.) This again has

[12] It is clear the parties had concerns about the impact of this litigation on the wage-and-hour claim asserted through arbitration and vice versa. It is also clear these concerns resulted in legal maneuvering and posturing all around. I don't share these concerns, however, lacking jurisdiction over the claims not before me and having no investment whatsoever in the outcome of the arbitration.

The Respondent faults Rodgers for failing to explain what he meant by the "status quo" during his testimony at the hearing. Rodgers was subject to cross-examination, however, so the Respondent could have elicited this information.

nothing to do with delaying tactics and is seemingly misplaced. It also ignores Rodgers' assertion that he believed the election was illegal. In any event, this argument is only potentially persuasive if there was overall impasse or an exception under *RBE Electronics*. Otherwise, Rodgers need not defend his refusal to bargain over the elections.[13] Regardless of the Union's reasons, any contention that its refusal to bargain on this topic falls within an exception under *RBE Electronics* must fail because it would result in the exception swallowing the rule.

In its brief, the Respondent mentions the Union's revocation of the tentative agreement on safety and subsequent requests for information as part of its statement of facts, but does not present argument that these were delaying tactics. Because the Acting General Counsel addressed these actions and the Respondent's brief mentions them, I will address them here. When determining if a union is engaging in delay tactics, the Board will look at overall conduct. See, e.g., *Register-Guard*, 339 NLRB 353, 354–355 (2003). Delaying tactics have been found where the union's "entire course and conduct, prior to the start of collective bargaining and during the instant negotiations evidenced 'a legal strategy to obstruct negotiations,' one grounded in the tactics of avoidance and delay . . ." *Serramonte Oldsmobile*, 318 NLRB 80, 100-101 (1995), enf. granted in part, denied in part on other grounds 86 F.3d 227 (D.C. Cir. 1996). Specifically, in *Serramonte*, the union avoided bargaining altogether for over 3 months, disingenuously pretended the employer had failed to give timely notice of its intent to open negotiations, and did not ask unit employees what they wanted out of bargaining. See also *M&M Contractors*, 262 NLRB 1472 (1982) (union's refusal for 7 months to respond to a date to meet for bargaining was delaying tactic).

No similar pattern of delaying tactics is present here. On the contrary, the Union maintained that the work schedule should be resolved through bargaining and it proposed bargaining dates. It is true that rescission of proposals tentatively agreed to may be considered elements of bad faith. See, e.g, *NLRB v. Industrial Wire Prod. Corp.*, 455 F.2d 673, 79 LRRM 2593 (9th Cir. 1972), enforcing 177 NLRB 328, 74 LRRM 1128 (1969); But see *Loggins Meat Co.*, 206 NLRB 303 (1973) (lawful for employer to withdraw two proposals after acceptance by union). The rescission of the safety proposal and the requests for information occurred well before the unilateral changes to the work schedules, and the parties continued to bargain in the interim.[14] There is no evidence the Union avoided or caused any overall delay with regard to its bargaining obligations. As such, I find the Respondent has failed to meet its burden to prove the Union engaged in delaying tactics under *RBE Electronics*.

[13] The same rationale holds true for the Respondent's next assertion, *i.e.* that Rodgers cannot defend himself by virtue of his asserted fears of tainting the vote. Ditto for the Respondent's arguments regarding Rodgers' testimony about the number of employees potentially facing layoff and whether he talked to employees about whether they were upset about the first election.

[14] The Respondent points out that the specific safety incidents the Union pointed to in support of its decision to rescind the proposal occurred after the rescission. Rodgers supported the decision to rescind the proposal on "ongoing safety concerns." I note concerns about dumping of water, invalid safety forms, and improper write-ups for safety violations in the Union's bargaining notes. (GC Exhs. 6, 8.) Even if this single instance of regressive bargaining in May, however, was a bargaining tactic, it is not sufficient to establish the overall delay required to excuse the Respondent's unilateral actions in October and November.

Next, the Respondent argues its actions of holding the elections and changing the employees' work schedules were taken to comply with legal obligations and therefore did not violate the Act. The Respondent, however, has consistently maintained that it implemented the alternative work week schedule pursuant to a valid election, as is shown by the certificate it filed with the State of California.[15] In essence, the Respondent faults the Union for not helping to fix its legal problems while simultaneously alleging no problems exist. It wants to have its proverbial cake by arguing it has complied with the election requirements to establish an alternative work week (and by extension has complied with wage-and-hour law), and eat it too by holding new seemingly redundant elections and attempting to blame the Union for not agreeing to them. If the Respondent's contention that it lawfully established the alternative work week schedule is found to be correct in arbitration, there will be no liability for unpaid overtime compensation. If it is not, any relief to the employees will be determined by arbitration.[16] The Respondent's argument that the Act should not be construed to discourage or prohibit an employer's attempt to comply with other laws is, as applied here, an ill-conceived attempt to foist responsibility for its own conduct on the Union, the Acting General Counsel, and in turn, the Board. I reject the Respondent's attempts to deflect the potential fallout from a lawsuit in another forum based on actions it maybe took or maybe didn't take in the past—actions the Union has no obligation to mitigate in this forum.

Finally, the Respondent argues that the second *RBE Electronics* exception, economic exigency, applies. The economic exigency exception requires "a heavy burden" to show "circumstances which require implementation at the time the action is taken or an economic business emergency that requires prompt action." 320 NLRB at 81 (footnotes and internal citations omitted). Unless there is a dire financial emergency, events such as losing significant accounts or contracts (*Farina Corp.*, 310 NLRB 318, 321 (1993)), operating at a competitive disadvantage (*Triple A Fire Protection*, 315 NLRB 409, 414, 418 (1994)), or a supply shortage (*Hankins Lumber Co.*, 316 NLRB 837, 838 (1995)), will not excuse unilateral action. To successfully prove an economic exigency defense, the employer must show that "the exigency was caused by external events, was beyond the employer's control, or was not reasonably foreseeable." *RBE Electronics,* supra. at 82.

I find the Respondent has not met its burden to prove economic exigency because the circumstances placing them in the position to seek the new elections were in Concord's control and were reasonably foreseeable. It was Concord's responsibility to comply with the legal requirements for establishing an alternative workweek schedule. Any failure to do so was not the result of an external event beyond its control. In fact it could not conceivably be in anyone else's control. Potential liabilities associated with a failure to hold elections properly and to file a legitimate record of the elections with the state are plainly reasonably foreseeable. Rodgers'

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[15] I have reviewed the cases the Respondent cited to in its brief in support of its legal obligations defense. None of the cases involves a situation like the one present here, where the employer asserts it has already complied with the law.

The Respondent asserts that any reliance on *Pratt Industries*, 358 NLRB No. 52 (2012), is misplaced. My decision on this issue does not rely on that case but instead rests squarely on precedent from the Supreme Court and Board decisions rendered at times when the validity of the Board Members' appointments is not disputed.

[16] As previously stated, I do not pass judgment on the validity of the earlier election, only the Respondent's position on its validity in relation to the issues before me.

discovery of the 2000 certificate of compliance and the ensuing arbitration likewise cannot be seen as an unforeseeable external event beyond the Respondent's control. If a corporate officer files an erroneous tax return, whether intentionally or inadvertently, it is reasonably foreseeable the company may face liability. If someone discovers the error and reports it to the Internal Revenue Service, this does not change the fact that the corporate officer's actions are the reason for the exigency, regardless of the discoverer's motive. Similarly, here it cannot rationally be argued that anyone other than the Respondent created the situation giving rise to the claimed exigency.

In addition, the Respondent presented no evidence that it faced a dire economic emergency, and in fact presented no evidence of its financial situation whatsoever. See *Bottom Line,* 302 NLRB at 374 (No evidence of circumstances requiring economic action at time it was taken). Though the Respondent argues the liability it potentially faces if it loses the wage-and-hour and arbitration could amount to hundreds of thousands of dollars, it presented no evidence of what this potential liability would be measured against. Moreover, if the Respondent is correct in its position that it lawfully established the alternative work week schedule, then there will be no liability. Arbitrator Hodge, while presiding over the arbitration, shared his frustration over feeling as if parties tried to use him as a pawn for other objectives and expressed his resolve not to take the bait. (GC Ehx. 15, p. 8.) Like Arbitrator Hodge, in making my ruling here, I decline to speculate about what might happen in another lawsuit in another forum.

The Respondent points to *Seaport Printing & Ad Specialties, Inc.*, 351 NLRB 1269, 1270, enfd. 589 F.3d 812 (5th Cir. 2009), for support. In that case, a hurricane and mandatory evacuation followed by significant destruction to the employer's facility resulted in layoffs. I need not spend time contrasting the difference between the level of the employer's control in *Seaport Printing* versus here. The same holds true for *Brooks-Scanlon, Inc.*, 246 NLRB 476 (1979), where a timber shortage caused lumber milling to cease. The Respondent also cites to *Raskin Meat Packing Co.*, 246 NLRB 78, 82-42 (1979). *Raskin* involved a meat packing plant that was forced to close when its line of credit, which had been keeping the plant in business, was discontinued. In addition, the Department of Agriculture filed a complaint against the bank for purchasing livestock without being properly bonded. The Department of Agriculture complaint against the plant was clearly brought about by actions within the plant's control. The discontinuation of the line of credit, which the bank had extended to the plant for many years, was not within the plant's control, however. It came about only because, due to the plant's dire economic situation, it was unable to secure a bond. Here, the Respondent presented no evidence of a such a dire economic situation or an event beyond its control leading to its demise. Likewise, in the other cases the Respondent cites, the employer came forward with specific evidence of a complete lack of funds or a loss of a significant portion of its business. As noted above, no such evidence was presented here.

Accordingly, I find the Respondent's economic exigency argument fails.

2. Direct Dealing

I will next turn to whether the meetings the Respondent held to discuss holding the elections constituted direct dealing.

The Board's criteria for finding an employer has engaged in unlawful direct dealing with represented employees is articulated in *Southern California Gas Co.*, 316 NLRB 979 (1995), as follows:

> (1) the employer was communicating directly with union-represented employees;
> (2) the discussion was for the purpose of establishing or changing wages, hours, and terms and conditions of employment or undercutting the Union's role in bargaining; and
> (3) such communication was made to the exclusion of the Union.

I find the Respondent communicated directly with union-represented employees for the purposes of establishing or changing hours in satisfaction of the first two criteria. In addition, the discussion about the upcoming election also clearly undermined the Union's role in collective bargaining.[17] See *Ryan Iron Works, Inc. v. NLRB*, 257 F.3d 1, 7 (1st Cir. 2001) (employer solicitation permits it to "gain intelligence on employees' views and to gauge the level of support for a particular position, undermining the chosen representative's exclusive right to perform these functions.").

The more difficult question is whether the communications were made to the exclusion of the Union. It is undisputed that the Union was invited to attend the meetings and opted not to come. This does not end the inquiry, however. As noted, I have found the elections were presented to the Union as a *fait accompli*. The meetings were held while the employees were on the clock, attendance was taken, and the employees had to sign a sheet stating they had received the Respondent's proposal. Under these circumstances, it is clear employee attendance was expected and monitored. Attending the meetings would have put the Union in the position of telling all of its Unit employees that though it had bargained for and reached a tentative agreement about the work schedule, the employer was holding an election for them to vote on it anyway.

As the Board stated early on in *Union Mfg. Co.*, 27 NLRB 1300, 1306 (1940):

> Employees' designation of a collective bargaining representative and the Board's certification thereof would be futile and meaningless, could an employer, shortly thereafter, at any designated stage of the bargaining procedure, demand proof that the exclusive representative was acting in accordance with the desires of the employees. By such demand the employer would refuse to grant the exclusive representative of his employees that recognition to which under the Act it is entitled.

Though *Union Mfg.* was a refusal to bargain case, the point is applicable to a direct dealing case, as shown in *Darlington Veneer Co.*, 113 NLRB 1101 (1955). There, Board affirmed the intermediate report, which concluded that employer ratification of contract proposals was not only a refusal to bargain, but was also direct dealing:

[17] Whether or not the meetings had the purpose of undermining the Union, they clearly had the effect. Regardless, the Union met the first part of the second prong of the *Southern California Gas Co.* test as the meetings were to discuss an election to establish (or re-establish) and/or change the work schedule.

> To compel the Union to submit the contract for ratification as proposed by Respondent would also violate the well-established principle that where the employees have designated a representative as provided in the Act, the employer may not deal directly with the employees. . . . It follows, therefore, that the employer may not insist on a contractual right, in effect, to bypass the exclusive representative as the Company seeks to do in this case.

Id. at 1107. The October 17 meetings were held to introduce the Respondent's plan to bypass the Union and demand proof from the employees that the Union was acting in accordance with their desires. While the Union was permitted to be present for the meeting, it is unclear what meaningful role it could play.

As to the November 15 meeting, the Union contended that holding the second election without waiting 12 months violated California law, as articulated above. Again, it is unclear what meaningful role the Union could play at the meeting other than to watch while the Respondent discussed its plans to hold another election the Union deemed illegal about a work schedule that had already been agreed upon through bargaining. By holding meetings to announce its intent to conduct elections with the employees, the Respondent denied the Union the recognition to which it was entitled under the Act, and I therefore find the communications were effectively made to the Union's exclusion. *Darlington,* supra; see also *Aggregate Industries*, 359 NLRB No. 156 (2013).

Based on the foregoing, I find the Respondent's meetings with Unit members about the elections constituted direct dealing in violation of Section 8(a)(1) and (5).

C. Arbitration

Complaint paragraphs 10–12 allege that since around July 2011, the Respondent has required employees to sign mandatory arbitration agreements (MAAs) as a condition of employment, and has enforced the MAAs to preclude class or collective litigation in violation of Section 8(a)(1).

A representative MAA states:

> I also acknowledge that the Company utilizes a system of alternative dispute resolution which involves binding arbitration to resolve all disputes which may arise out of the employment context. Because of the mutual benefits (such as reduced expense and increased efficiency) which private binding arbitration can provide both the Company and myself, I and the Company both agree that any claim, dispute, and/or controversy that either party may have against one another (including, but not limited to, any claims of discrimination and harassment, whether they be based on the California Fair Employment and Housing Act, Tills VII of the Civil Rights Act of 1964, as amended, as well as all other applicable local, state or federal laws or regulations) which would otherwise require or allow resort to any court or other governmental dispute resolution forum between myself and the Company (or its owners, directors, officers, managers, employees, agents, and parties affiliated with its employee benefit and health plans) arising from, related to, or having any relationship or connection whatsoever with my

seeking employment with, employment by, or other association with the Company, whether based on tort, contract, statutory, or equitable law, or otherwise, (with the sole exception of claims arising under the National Labor Relations Act which are brought before the National Labor Relations Board, claims for medical and disability benefits under the California Workers' Compensation Act, and Employment Development Department claims) shall be submitted to and determined exclusively by binding arbitration. I understand and agree that after I exhaust administrative remedies through the Department of Fair Employment and Housing and/or the Equal Employment Opportunity Commission, I must pursue any such claims through this binding arbitration procedure. I acknowledge that the Company's business (repairing automobiles and selling automobiles and parts coming from outside the State) and the nature of my employment in that business affect interstate commerce. I agree that the arbitration and this Agreement shall be controlled by the Federal Arbitration Act, in conformity with the procedures of the California Arbitration Act (Cal. Code Civ. Proc. sec 1280 et seq., including section 1283.05 and all of the Act's other mandatory and permissive rights to discovery). However in addition to requirements imposed by law, any arbitrator herein shall be a retired California Superior Court Judge and shall be subject to disqualification on the same grounds as would apply to a judge of such court. To the extent applicable in civil actions in California courts, the following shall apply and be observed: all rules of pleading (including the right of demurrer), all rules of evidence, all rights to resolution of the dispute by means of motions for summary judgment, judgment on the pleadings, and judgment under Code of Civil Procedure Section 631.8. The arbitrator shall be vested with authority to determine any and all issues pertaining to the dispute/claims raised, any such determination shall be based solely upon the law governing the claims and defenses pleaded, and the arbitrator may not invoke any basis (including, but not limited to, motions of "just cause") for his/her determinations other then such controlling law. The arbitrator shall have the immunity of a judicial officer from civil liability when acting in the capacity of an arbitrator, which immunity supplements any other existing immunity. Likewise, all communications during or in connection with the arbitration proceedings are privileged in accordance with Cal. Civil Code Section 47(b). As reasonably required to allow full use and benefit of this agreement's modifications to the Act's procedures, the arbitrator shall extend the times set by the Act for the giving of notices and setting of hearings. Awards shall include the arbitrator's written reasoned opinion. If CCP § 1284.2 conflicts with other substantive statutory provision or controlling case law, the allocation of costs and arbitrator fees shall be governed by said statutory provisions or controlling case law instead of CCP § 1284.2. (Jt. Exh. 1, L–O.)

Section 8(a)(1) of the Act provides that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." The Board has consistently held that collective legal action involving wages, hours, and/or working conditions is protected concerted activity under Section 7. See, e.g., *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948-949 (1942); *United Parcel Service*, 252 NLRB 1015, 1018, 1022 n. 26 (1980), enfd. 677 F.2d 421 (6th Cir. 1982).

The parties do not dispute that the MAA is a condition of employment, and it is therefore treated in the same manner as other unilaterally implemented workplace rules. When evaluating whether a rule, including a mandatory arbitration policy, violates Section 8(a)(1), the Board applies the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). See *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed.Appx. 527 (D.C. Cir. 2007); *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012). Under *Lutheran Heritage*, the first inquiry is whether the rule explicitly restricts activities protected by Section 7. If it does, the rule is unlawful. If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage* at 647.

The MAA does not expressly restrict Section 7 activity, and neither the Acting General Counsel nor the Union asserts that it was promulgated in response to union activity. The first disputed question therefore is whether employees would reasonably construe the MAA's language to prohibit Section 7 activity. For the following reasons I find that they would.

The MAA is written with singular language, referring repeatedly to actions between "myself" and the Company. The second sentence, which incidentally contains 213 words, refers to the benefits that "private binding arbitration can provide both the Company and myself." It further states that "I and the Company both agree that any claim, dispute, and/or controversy that either party may have against one another" will be decided through binding arbitration. This singular language, with no reference to the ability to pursue claims about working conditions jointly (other than through the Board's procedures) would lead an employee to read the MAA as applicable to individual employment disputes. Moreover, the MAA states, "all communications during or in connection with the arbitration proceedings are privileged in accordance with Cal. Civil Code Section 47(b)." By stating that any communication made in connection with arbitrations proceeding is privileged, the MAA would reasonably be construed as prohibiting employees from discussing with each other information about employment disputes subject to arbitration.

The Respondent asserts that, by incorporating the state's procedural rules, *i.e.*, the California Code of Civil Procedure (CCP), which permit joinder of claims, the MAA is distinguishable from the agreement the Board found unlawful in *D.R. Horton*. The MAA does not incorporate the entire CCP, however. Instead, certain provisions are referenced and incorporated by description and/or section number. The MAA does incorporate the procedures of the California Arbitration Act and cites to them as "Cal. Code Civ. Proc. sec 1280 et seq., including section 1283.05 and all of the Act's other mandatory and permissive rights to discovery." Unlike section 1283.05 and the provisions related to discovery rights, the MAA does not expressly reference Section 1281.3, which addresses consolidation of arbitration claims as follows:

> A party to an arbitration agreement may petition the court to consolidate separate arbitration proceedings, and the court may order consolidation of separate arbitration proceedings when:

(1) Separate arbitration agreements or proceedings exist between the same parties; or one party is a party to a separate arbitration agreement or proceeding with a third party; and

(2) The disputes arise from the same transactions or series of related transactions; and

(3) There is common issue or issues of law or fact creating the possibility of conflicting rulings by more than one arbitrator or panel of arbitrators.

Compounding its failure to specifically reference CPP § 1281.3, the MAA does not mention the word "joinder" nor does it incorporate CPP § 378 which permits joinder of plaintiffs in civil court actions. By contrast, other CPP provisions applicable to civil court actions, such the rules of pleading and rules of evidence, are specifically mentioned and incorporated. The MAA's lack of any direct reference to joinder or consolidation as well as the absence of any specific citation to procedures that permit such render it silent on the matter for the average employee/technician. Accordingly, I find employees would reasonably construe the MAA as permitting individual arbitration actions only.

The Acting General Counsel asserts that the MAA has also been applied to restrict employees from exercising Section 7 activity. Though I need not decide this in light of my findings above, I will address the argument in the event a reviewing authority disagrees that employees would reasonably construe the MAA as permitting individual claims only.

In *D.R. Horton*, slip op. at 1, the Board explained that an employer violates Section 8(a)(1) of the Act by imposing, as a condition of employment, a mandatory arbitration agreement that precludes employees from "filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial." Citing to *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948-949 (1942), *Salt River Valley Water Users Ass'n*, 99 NLRB 849, 853-854 (1952), enfd. 206 F.2d 325 (9th Cir. 1953), and a string of other cases, the Board noted that concerted legal action addressing wages, hours, and working conditions has consistently fallen within Section 7's protections. *D.R. Horton* at n.4. The Board stopped short of requiring employers to permit both classwide arbitration and classwide suits in a court or administrative forum, finding that "[s]o long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of classwide arbitration." Id. at 16.

It is clear that by seeking to consolidate the 19 separate individual arbitration actions, the Respondent has not been utilizing the MAA to prohibit collective arbitrations. Indeed, the Charging Party has opposed consolidation, insisting on either class action arbitration or separate individual arbitrations. I find, therefore, that the MAA has not been applied to restrict collective action. Whether that ends the inquiry, however, depends on the scope of the Board's decision in *D.R. Horton*. More specifically, I must determine whether *D.R. Horton* requires an employer to permit both class *and* collective claims in one forum or another.

The Board in *D.R. Horton* was not forced with resolving this precise issue because the arbitration agreement it considered completely barred all class and collective claims. The Board, however, clearly held that filing a class action is protected activity. It relied on *Meyers Industries*, 281 NLRB 882, 887, for the proposition that the actions of a single employee are

protected if he or she "seek[s] to initiate or to induce or to prepare for group action." *D.R. Horton,* slip op. at 4. The Board concluded that "an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7." Id. The Board further noted that "if the Act makes it unlawful for employers to require employees to waive their right to engage in one form of activity, it is no defense that employees remain able to engage in other concerted activities." Id. at 6. The Board, therefore, clearly found both class and collective claims are protected Section 7 activities. The Respondent argues that collective actions align better with employees' Section 7 rights not to engage in concerted activities because employees who do not wish to participate need not opt out. This argument fails because, regardless of its merits, the Board has held that class action claims are protected by Section 7. Id.

The Respondent sets forth multiple arguments contending that *D.R. Horton* was wrongly decided. Because *D.R. Horton* is Board precedent that has not been overturned by the Supreme Court, I must follow it. Any arguments regarding its legal integrity are properly addressed to the Board. Though the Respondent cites to Supreme Court cases that were decided after *D.R. Horton*, nothing in those decisions overrules the Board's decision. Relying on *CompuCredit Corp. v. Greenwood*, 132 S.Ct. 665, 672 n.4 (2012) and *American Exp. Co. v. Italian Colors Restaurant*, 133 S.Ct. 2034 (2013), the Respondent argues that the Board ignored the requirement of a "congressional command" to override the FAA. The Board has found, however, that Section 7 of the Act substantively guarantees employees the right to engage in collective action, including collective legal action, for mutual aid and protection concerning wages, hours, and working conditions. As such, I find this argument fails.

Finally, I will address the Respondent's argument that *D.R. Horton* is void because the Board lacked a quorum when it issued the decision. This argument derives from the D.C. Circuit's decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), which the Board has rejected and so must I. See, e.g., *Bloomingdale's Inc.*, 359 NLRB No. 113 (2013); *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. at n.1 (2013). Though the Fourth Circuit recently agreed with *Noel Canning* when it decided *NLRB v. Enterprise Leasing Co. Southeast, LLC*, Nos. 12–1514, 12–2000, 12–2065, 2013 WL 3722388 (4th Cir. 2013), the Board has noted that at least three courts of appeals have reached a different conclusion on similar facts. *Bloomingdales,* supra, (citing *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), cert. denied 544 U.S. 942 (2005); *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *U.S. v. Allocco*, 305 F.2d 704 (2d Cir. 1962)). Consistent with Board precedent, the Respondent's defense based on *Noel Canning* and a lack of quorum fails.[18]

The Union asserts that the FAA, which derives its authority from the commerce clause, does not apply here because the manner in which the parties resolve the instant dispute does not impact interstate commerce. This argument is based on the Supreme Court's decision in *National Federation of Independent Businesses v. Sebelius*, 567 U.S. ___,(2012), 132 S.Ct. 2566 (2012), which held that the Affordable Care Act's individual mandate is not subject to regulation

[18] The Respondent's argument that the Board lacked authority to act on the charges filed in this case based on a lack of quorum also fails for the reasons set forth in *Bloomingdales, Inc.*

under the Commerce Clause. This is because, the Court reasoned, the Commerce Clause cannot be used to require individuals to engage in commerce.

The path from the Court's rationale upholding the individual mandate in the Affordable Care Act to the Respondent's argument that the choice of forum to resolve a dispute alleging violation of state law does not impact interstate commerce is relatively obscure. In determining whether employment contracts with arbitration clauses are subject to the FAA, the Supreme Court has focused on whether the work the employees at issue perform involves interstate commerce. In *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 200–201 (1956), the Court found the FAA did not apply to an employment contract where there was "no showing that petitioner while performing his duties under the employment contract was working 'in' commerce, was producing goods for commerce, or was engaging in activity that affected commerce . . ." [19] In making this determination, the work activity is looked at in the aggregate. *Citizen's Bank v. Alafabco, Inc.*, 539 U.S. 52, 56–57 (2003). Thus the proper inquiry here is whether the technicians' work activity affects commerce, not whether their choice of dispute resolution forum affects commerce. The Union fails to point out how *National Federation* has changed this inquiry, and there is no Board precedent on point to serve as guidance. It appears the only court to consider the issue so far has continued to focus on the scope of the employer's business and/or the employees' duties to determine the FAA's applicability to an employment contract.[20] *McElveen v. Mike Reichenbach Ford Lincoln, Inc.*, No. 4:12–874–RBH–KDW, 2012 WL 3964973 (D.S.C. 2012). As I cannot find authority to support the Union's assertion that I should consider the choice of forum for the employment dispute resolution rather than the technicians' employment itself, its argument fails.

CONCLUSIONS OF LAW

(1) The Respondent is an employer within the meaning of Section 2(6) and (7) of the Act.

(2) The Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally implementing the July 2011 bonus, meeting with employees about alternative workweek elections, holding alternative workweek elections, and unilaterally changing employees' work schedules.

(3) The Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory arbitration agreement which required employees to resolve employment-related disputes exclusively through arbitration proceedings and by enforcing that agreement to preclude resolution of such disputes through class action.

[19] Though not discernible from the decision, the petitioner's brief to the Supreme Court states that he worked as a plant superintendent. 1995 WL 72431.

[20] There appears to be uncertainty among the courts as to whether the employees' duties or the employer's operations should be the primary consideration. Analysis of this is not required to address the Union's argument or render my decision.

REMEDY

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

As I have concluded that the Mandatory Arbitration Agreements are unlawful, the recommended order requires that the Respondent revise or rescind them, and advise its employees in writing that they have been so revised or rescinded.

At the hearing, the Acting General Counsel requested that I order the Respondent to "move the arbitrator to rescind the order granting Respondent's motion to dismiss class action allegations and to consolidate the cases pursuant to the unlawful policies contained in the unlawful mandatory arbitration agreements." (Tr. 9.) The law does not require the employer to permit class action arbitrations. Instead, *D.R. Horton* states that a forum for class or collective claims must be available. It is therefore beyond my authority to require the Respondent to permit classwide arbitration. Instead, the employees must be permitted to proceed with class action claims regarding wages, hours and/or working conditions in some forum, whether arbitral or judicial.

The Acting General Counsel also requested "an Order requiring Respondent to reimburse the unit employees and/or the Union for any litigation expenses directly related to its opposition to the Respondent's unlawful motion to prohibit class arbitration." (Tr. 9.) The Respondent argues that, until *D.R. Horton* was decided, the Board's position on the issue was unclear. I agree, and therefore find that no litigation expenses are appropriate prior to January 3, 2012, the date *D.R. Horton* was issued. Neither the Acting General Counsel nor the Union submitted any argument or legal authority to support a request for reimbursement of litigation expenses. Presumably, the request is premised on the Acting General Counsel's belief that the Respondent's objective in opposing class action arbitration was unlawful. Given the absence of any supporting argument, and in light of the fact that the Respondent did not preclude collective action among the employee-plaintiffs, I decline to grant this remedy.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[21]

ORDER

The Respondent, FAA Concord Honda Inc., d/b/a Concord Honda, Concord, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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

(a) unilaterally implementing an employee bonus or changes in the work week schedule in the absence of an overall agreement or a lawful impasse in collective-bargaining negotiations;

(b) bypassing the Union and dealing directly with its employees with regard to their terms and conditions of employment;

(c) maintaining Mandatory Arbitration Agreements that employees would construe as prohibiting class or collective actions;

(d) enforcing the Mandatory Arbitration Agreements to prohibit class actions;

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

(a) Rescind or revise the MAAs to make it clear to employees that the agreement does not constitute a waiver in all forums of their right to maintain employment-related class or collective actions.

(b) Notify the employees of the rescinded or revised agreements to include providing them copies of the revised agreements or specific notification that the agreements have been rescinded.

(c) Within 14 days after service by the Region, post at its facility in Concord, California, copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 18, 2011.

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

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

Dated, Washington, D.C. October 23, 2013

Eleanor Laws
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT fail and refuse to bargain collectively and in good faith with Automotive Machinists Lodge No. 1173, International Association of Machinists and Aerospace Workers (the Union) as the designated exclusive collective bargaining representative of the employees in the following unit:

All full-time and regular part-time technicians and lube technicians employed by FAA Concord H, Inc. d/b/a Concord Honda (the Employer) and performing work at its Concord, California facility; excluding all confidential employees, guards, and supervisors as defined in the National Labor Relations Act.

WE WILL NOT implement the June 2011 Bonus or the change in your weekly work schedule from a four day/ ten hour schedule to a five day/ eight hour schedule in the absence of an overall agreement or a lawful impasse in collective-bargaining negotiations.

WE WILL NOT bypass the Union and deal directly with you with regard to the holding of alternative work week elections or any other changes to your terms and conditions of employment.

WE WILL NOT solicit employees to sign and then maintain and enforce any provision of our mandatory arbitration agreements that we have interpreted in a way that interferes with your Section 7 rights to engage in collective legal activity by precluding you from participating in class actions relating to your wages, hours, or other terms and conditions of employment brought in any arbitral or judicial forum.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the June 2011 Bonus and the November 14-18, 2011 change to the work week schedule which we unilaterally implemented without bargaining with the Union and/or without an overall agreement or a lawful impasse in negotiations.

WE WILL rescind the mandatory arbitration agreements or revise them to make clear to employees that they may bring collective and class claims in an arbitral or judicial forum under the terms of the agreements.

WE WILL no longer object to our employees bringing or participating in class actions under the terms of the agreements.

FAA Concord Honda, Inc.,
d/b/a Concord hONDA

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Oakland Federal Bldg., 1301 Clay Street, Room 300-N, Oakland, CA 94612-5211
(510) 637-3300, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (510) 637-3253.

EXHIBIT 5

JD–78–13
Oklahoma City, OK

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CHESAPEAKE ENERGY CORPORATION
and it's wholly owned subsidiary CHESAPEAKE
OPERATING, INC.

And

Case 14-CA-100530

BRUCE ESCOVEDO, AN INDIVIDUAL

William F. LeMaster, Esq., of Overland Park, KS,
for the Acting General Counsel.
Mark Hammons, Esq. of Oklahoma City, OK,
for the Charging Party.
Michael F. Lauderdale, Esq., of Oklahoma City, OK,
for the Respondent-Employer.

DECISION

Statement of the Case

Bruce D. Rosenstein, Administrative Law Judge. The parties herein waived a hearing and submitted the case directly to me by way of a Joint Motion and Stipulation of Facts dated September 11, 2013. The complaint herein, which was issued on July 30, 2013, and was based upon an unfair labor practice charge and amended charge filed on March 18 and June 17, 2013 by Bruce Escovedo (Charging Party or Escovedo), alleges that Chesapeake Energy Corporation and its wholly owned subsidiary Chesapeake Operating, Inc. (Chesapeake Energy, Chesapeake Operating, or collectively Respondents) have since July 2011, and at all material times, promulgated and maintained individual agreements with their current and former employees binding them to Respondents' Dispute Resolution Policy (DRP) that precludes class or collective actions to be arbitrated pursuant to the DRP. The DRP further requires employees and former employees to submit all employment related disputes and claims to "binding arbitration", and further requires that all claims or disputes "in any way related to or arising out of (an employee's) employment", including "claims under … the National Labor Relations Act…" are subject to binding arbitration. The Acting General Counsel alleges that these requirements violate Section 8(a)(1) of the National Labor Relations Act (the Act).

The Joint Stipulation provides as follows:

1. The charge in this proceeding was filed by the Charging Party on March 18, 2013, and a copy was served by regular mail on Respondent Chesapeake Operating on that same date. (A copy of the charge and affidavit of service respectively are attached, hereto as Exhibits A and B).

2.. The amended charge in this proceeding was filed by the Charging Party on June 17, 2013, after request by the Board to conform to the Region's determination after conduct of the investigation, and a copy was served by regular mail on Respondents on that same date. (A copy of the amended charge and affidavit of service respectively are attached as Exhibits C and D).

3. On July 30, 2013, the Regional Director for Region 14 of the Board issued a Complaint and Notice of Hearing alleging that Respondents violated the National Labor Relations Act. (Copy attached hereto as Exhibit E).

4. On August 12, 2013, Respondents filed their initial Answer; on September 9, 2013, Respondents filed an Amended Answer to the Complaint denying that it had committed any violation of the Act and setting forth their defenses. (A copy of the Amended Answer is attached hereto as Exhibit F).

5. Respondent Chesapeake Energy has been a corporation with an office and place of business in Oklahoma City, Oklahoma, herein called Respondent Chesapeake Energy's facility and through its subsidiaries and related companies, is a producer of natural gas, natural gas liquids and oil. During the 12-month period ending June 30, 2013, Respondent Chesapeake Energy purchased and received at its Oklahoma City, Oklahoma facility goods valued in excess of $50,000 directly from points outside the State of Oklahoma. Respondent Chesapeake Energy is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

6. Respondent Chesapeake Operating has been a corporation with an office and place of business in Oklahoma City, Oklahoma, and has been engaged in the business of oil and gas exploration, production and distribution. During the 12-month period ending June 30, 2013, Respondent Chesapeake Operating purchased and received at its Oklahoma City, Oklahoma facility goods valued in excess of $50,000 directly from points outside the State of Oklahoma. Respondent Chesapeake Operating is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

7. At all material times, Sabreena Coleman held the position of Chesapeake Operating Sr. Director — Human Resources Compliance. Coleman has been a supervisor of Respondent Chesapeake Operating within the meaning of Section 2(11) of the Act and an agent of Respondents within the meaning of Section 2(13) of the Act. Respondents acknowledge that the sending of the Dispute Resolution Policy at issue in this matter to the Charging Party was authorized by its human resources department.

8. Since in or about July 2011, and at all material times, Respondents have required their employees to sign Respondents' Arbitration Agreement and Dispute Resolution

Policy (DRP). Attached hereto as Exhibit G is the DRP that Respondents sent to Charging Party for execution, which is the DRP that Respondents require all their employees to sign with the exception that the list of entities on page four of the DRP has varied depending upon the entities affiliated with Respondents.

9. The Charging Party was not employed by Respondent Chesapeake Energy. The Charging Party was employed by Respondent Chesapeake Operating, in the position of Reservoir Engineering Manager, and was a supervisor within the meaning of Section 2(11) of the Act.

10. Respondents assert that the DRP attached hereto as Exhibit G was electronically signed by the Charging Party on or about July 19, 2011, and further contend that his electronic signature on the document is binding,

11. On February 14, 2013, while addressing a pending Equal Employment Opportunity Commission charge filed against Respondent Chesapeake Operating, the Charging Party's attorney communicated to Respondent Chesapeake Operating that the Charging Party does not recall signing the arbitration agreement attached as Exhibit G.

STATEMENT OF ISSUES PRESENTED

Whether Respondents violated Sections 8(a)(1) of the Act by requiring employees to sign the DRP attached as Exhibit G that (1) requires mandatory arbitration precluding access to the Board and (2) precludes class or collective actions.

The Dispute Resolution Policy, at issue herein, states as follows:

Employee Id: 065374
Name: Bruce Escovedo
Company: Chesapeake Operating, Inc.
ARBITRATION AGREEMENT AND DISPUTE RESOLUTION POLICY

1. At-Will Employment: It is hereby agreed by Bruce Escovedo ("Employee") and Chesapeake Energy Corporation, and all its wholly-owned or related entities and affiliates (see attached list of entities, collectively referred to as the "Company"), that Employee's employment is "at will" in nature, meaning that it can be terminated by the Company or the Employee at any time, with or without cause, and with or without notice unless the Employee and the Company have entered into a separate written employment agreement specifying a set term of employment which is signed by both parties.

2. Mandatory Dispute Resolution Policy: Employee acknowledges that the Company has a mandatory Dispute Resolution Policy ("DRP") which requires binding arbitration to resolve all disputes between the Employee and the Company including any such disputes which may arise out of or relate to employment (see also paragraph 5 below). Employee acknowledges that the DRP is to be broadly interpreted to apply to any dispute which Employee and the Company may have between each other, to include disputes over whether claims are covered by the DRP. Employee also acknowledges that the DRP provides mutual benefits for Employee and the Company, to include faster and more economical resolution of employment related disputes.

3. Federal Arbitration Act: Employee acknowledges that employment with the Company involves interstate commerce, and that the Federal Arbitration Act ("FAA"), 9 U.S.C. AA § 1, et seq., shall apply to the DRP.

4. Jury Trial: Employee understands and acknowledges that by accepting and/or continuing employment with the Company, and thereby agreeing to the terms of the DRP, that both Employee and the Company give up the right to trial by jury in a court of law for all employment related disputes.

5. Claims Covered by DRP: A) Employee acknowledges that any claim or dispute between the Employee and the Company including any claim or dispute in any way related to or arising out of his/her employment with the Company is subject to binding arbitration under the DRP, to specifically include discrimination, harassment or retaliation claims, whether under federal or state law; by way of example only, claims under Title VII of the Civil Rights Act of 1964, as amended, the Civil Rights Act of 1866, the Equal Pay Act, the Civil Rights Act of 1991, the Rehabilitation Act of 1973, the Employee Retirement Income Security Act, the Uniform Services Employment Reemployment Rights Act, the Older Worker Benefit Protection Act of 1990, the Worker Adjustment and Retraining Act of 1988, the Fair Labor Standards Act, the Occupational Health and Safety Act, the National Labor Relations Act, the Family and Medical Leave Act, the Americans with Disabilities Act, as amended, the Pregnancy Discrimination Act of 1978, the Age Discrimination in Employment Act, and other state or federal common and statutory law. B) Employee acknowledges that any claims Employee may have relating to or arising out of the employment relationship, to include application for employment, actual employment, termination of employment or events occurring after termination, shall be subject to binding arbitration under the DRP. C) Employee acknowledges that any claim or dispute Employee may have against the Company includes claims or disputes with the Company's owners, directors, officers, managers, other employees, agents, representatives and affiliated parties and entities, including affiliated parties relating to the administration of the Company's employee benefit and health plans are subject to binding arbitration under the DRP.

6. Claims Not Covered by DRP: A) Employee understands that claims for worker's compensation benefits and unemployment compensation benefits are not covered by the DRP. B) Employee also understands that any claim the Company may have against Employee for injunctive or equitable relief is excluded from the DRP, to include claims or actions to enforce on-competition/non-solicitation agreements, to protect Company trade secrets, proprietary information or confidential information, to protect other Company property, and to protect the Company's business reputation.

7. Arbitrator: Employee understands that an independent arbitrator shall be selected jointly by the Employee and the Company who shall administer the arbitration. If, however, the Employee and the Company cannot agree on an arbitrator, then the claim shall be filed with the American Arbitration Association ("AAA") as set forth in Section 8. In this case, the independent arbitrator shall be selected pursuant to the AAA rules.

8. Applicable Rules to AAA Claims: All arbitration which is filed with the American Arbitration Association shall be administered by the Dallas, Texas AAA office and shall be before a single arbitrator in accordance with the American Arbitration Association's National Rules for the Resolution of Employment Disputes and shall be undertaken pursuant to the Federal Arbitration Act.

9. No Class or Collective Actions Permitted: Employee agrees that he/she shall have no right or authority for any dispute to be brought, heard or arbitrated as a class or collective action, or in a representative or a private attorney general capacity on behalf of a class of persons or the general public. No class, collective or representative actions

are thus allowed to be arbitrated pursuant to the DRP and Employee agrees that he/she must pursue any claims that they may have solely on an individual basis through arbitration.

10. Fees and Expenses: The Company will pay any administrative fees and all expenses and fees of the arbitrator.

11. Notice. The Employee shall provide notice to the Company of any claim to the address set forth below:

Chesapeake Energy Corporation
Post Office Box 18128
Oklahoma City, OK 73154-0128
Attn: Lisa M. Phelps

Such notice shall include a reasonable description of the Employee's claims against the Company and the relief requested. As noted above, if the Employee and the Company cannot agree on an arbitrator, then the Employee shall file his/her claim with the AAA.

12. Right to Representation: Employee has the right to be represented by an attorney during arbitration proceedings, but is not obligated to do so, and Employee acknowledges that any expenses related to legal representation shall be Employee's own responsibility.

13. Discovery Procedures: Employee understands civil procedure, discovery and evidence rules that apply in federal court shall apply in any arbitration proceeding, subject to modifications deemed appropriate by the arbitrator in accordance with the substantive law. Employee acknowledges that disputes about discovery shall be decided by the arbitrator.

14. Damages and Relief: Employee understands that the arbitrator shall have the same authority, but no more, as would a judge or jury in a court of law to grant monetary damages or such other relief as may be in conformity under the applicable law. As noted in Section 6, this agreement to arbitrate, however, shall not preclude the Company from obtaining injunctive or other equitable relief from a court of competent jurisdiction.

15. Arbitrator's Award: The arbitrator shall upon request by either Employee or the Company provide them with a written and reasoned opinion for any final award the arbitrator shall make. Employee acknowledges that any final award by an arbitrator shall be subject to the appeal procedures set forth in the Federal Arbitration Act. The decision of the arbitrator will be enforceable in any court of competent jurisdiction. The arbitrator shall have the discretion and authority to award costs and attorney fees to the prevailing party or, alternatively, may order each party to bear its/his/her own costs and attorney fees in connection with the arbitration to the extent permitted by applicable law.

16. Location: Unless otherwise agreed by the Employee and the Company, arbitration will take place in Oklahoma City, Oklahoma unless the Employee is employed in a state other than Oklahoma. In that case, the arbitration shall take place in the capital of the state where the Employee is employed.

17. Employment Status: Employee acknowledges the DRP does not alter his/her "at will" employment status unless the Employee and the Company have entered into a separate written employment agreement specifying a set term which is signed by both parties.

18. Change, Modification or Discontinuation of DRP: Employee understands and acknowledges that the terms of the DRP in effect at the time a request for arbitration is made will be binding on Employee and the Company. Employee also acknowledges that the Company reserves the right to change, modify or discontinue this DRP at any time, for any reason upon prior written notice of at least ten (10) business days to the

Company's current employees. Such written notice shall be effective whether provided to Employee personally, by mailing to a last known residential address, by email transmission to personal or Company email account, or by posting in the place of employment. However, no amendment or termination shall apply to a dispute or claim for which a proceeding has been initiated.

19. Severability: Employee acknowledges that should any term or provision, or portion thereof, of this arbitration agreement and DRP be declared void or unenforceable, it shall be severed, and the remainder of this arbitration agreement and DRP shall be enforceable.

20. Other Agreements regarding Arbitration: Employee acknowledges that any provision in an agreement relating to arbitration with the Company is null and void and of no further legal effect. However, the remaining terms of any such agreement (including an individual employment agreement) continue to be in full force and effect. Employee further acknowledges that any agreement contrary to the terms of this agreement and DRP (excluding changes described in section 18) must be entered into in writing by the President of the Company, and that no supervisor or other representative of the Company has the authority to enter into any agreement contrary to the terms stated herein, to include for employment for any specified period of time. Employee also specifically acknowledges that any oral representations or statements made at any time do not alter the terms stated herein.

21. Entire Agreement: Except as noted below, Employee acknowledges that this is the entire agreement between him/her and the Company regarding the terms and length of employment, and for resolution of employment-related disputes, and that it supersedes any prior agreement between Employee and the Company regarding these issues unless the Employee and the Company have entered into a separate written employment agreement signed by the Employee and the Company. In this case, the terms and provisions of any such employment agreement will control in case of any conflict between these two agreements and except as noted in paragraph 20 above, the arbitration clause in any such employment agreement is void and of no further legal effect. Employee also understands that there will be certain other contractual agreements that will be entered into with the Company at the beginning of or during employment including a Confidentiality Agreement. These agreements remain in full force and effect.

LIST OF ENTITIES
Chesapeake Appalachia, L.L.C.
Chesapeake Energy Marketing, Inc.
Chesapeake Midstream Management, L.L.C.
Chesapeake Operating, Inc.
Compass Manufacturing, L.L.C.
Great Plains Oilfield Rental, L.L.C.
Hawg Hauling & Disposal, L.L.C.
Hodges Trucking Company, L.L.C.
Keystone Rock & Excavating, L.L.C.
MidCon Compression, L.L.C.
Nomac Drilling, L.L.C.
Performance Technologies, L.L.C.

I, Bruce Escovedo, attest that I have read, understand and agree to be legally bound to all of the above

terms.
Employee ID: 065374
7/19/2011 4:36:28 PM
Version Arbitration 2.00
Personnel File Date: 7/16/2012

Discussion

This is another case raising issues related to *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), in which the Board found that the respondent violated Section 8(a)(1) of the Act by requiring its employees, as a condition of employment, to sign an "agreement" that any and all future employment claims against the company would be determined on an individual basis by final and binding arbitration. The Board held that the mandatory arbitration "agreement" was unlawful for two reasons: (1) it did not contain an exception for unfair labor practice allegations, and thus would reasonably lead employees to believe that they could not file unfair labor practice charges with the Board, and (2) it required employees to waive their substantive right under the Act to pursue concerted (i.e. class or collective) legal action in any forum, arbitral or judicial.[1]

The issue in the subject case is whether Respondents likewise violated Section 8(a)(1) of the Act by the provisions in the DRP that prohibit employees from bringing any dispute as a class or collective action and requiring them to pursue any claims they have solely on an individual basis through arbitration. In addition, the case raises the issue of requiring employees to submit all employment related disputes and claims to "binding arbitration" including claims under the Act by precluding unfair labor practice charges to be filed with the Board.

Legal Principles

The Acting General Counsel and the Charging Party, relying on the Board's decisions in *D.R. Horton,* supra, *Supply Technologies, LLC,* 359 NLRB No. 38 (2012), and *U-Haul Co. of California,* 347 NLRB 375, 377-378 (2006), enf. 255 Fed. Appx, 527 (D.C. Cir. 2007), argue that the Respondents violated Section 8(a)(1) of the Act because the mandatory DRP prohibits employees' rights to engage in collective action and directly interferes with employees' access to the Board and its processes.

The Respondents opine that the Board can no longer rely upon its decision in *D.R. Horton,* supra, and asserts that Circuit Court of Appeals decisions have held that the Board was improperly constituted at the time it issued the *Horton* opinion invalidating class and collective action waivers in mandatory arbitration agreements. See *NLRB v New Vista Nursing and Rehabilitation,* 719 F.3d 203, 221 (3rd. Cir. 2013); *NLRB v. Enterprise Leasing Co. Southwest, LLC,* 2013 WL 3722388 (4th Cir. 2013). Additionally, Respondents principally rely on the United States Supreme Court's *American Express*

[1] Recent administrative law judge decisions are currently pending before the Board involving substantially similar issues to the subject case. See, *24 Hour Fitness, USA, Inc.,* JD (SF)-51-12 (Nov. 6, 2012), *Mastec Services,* JD (NY)-25-13 (June 3, 2013), Bloomingdale's, *Inc.,* JD (SF)-29-13 (June 25, 2013), *Applebee's Neighborhood Grill and Bar,* JD (NY)-49-13 (Sept. 30, 2013), and *FAA Concord H, Inc. d/b/a Concord Honda,* JD (SF)-48-13 (Oct 23, 2013).

Co. v. Italian Colors Restaurants decision, 133 S. Ct. 2304 (June 20, 2013), that implicitly rejected the analysis used by the Board in the *D.R. Horton* decision.

Affirmative Defenses

Respondents argue that (1) the Charging Party does not have standing because he was not employed by Chesapeake Energy and because he was a Section 2(11) supervisor under the Act; (2) the Charging Party is not entitled to relief in this matter because he was an admitted 2(11) supervisor at the time the subject unfair labor practice charge was filed; (3) the charge filed against Chesapeake Energy is barred because the Board rather than the Charging Party solicited its filing; (4) the underlying charge was untimely because the Charging Party signed the DRP on July 19, 2011, and the original charge was filed on March 18, 2013; (5) the Board can no longer rely upon the *D. R. Horton* decision based on various Circuit Court of Appeals and Supreme Court decisions; and (6) the issuance of the subject complaint is in doubt as the Acting General Counsel, Lafe E. Solomon, was not validly appointed under the Federal Vacancies Reform Act.

Concerning Items (1) and (2) above, Section 10018.2 of the Board's Unfair Labor Practice (ULP) case handling manual provides that any person or organization may file an unfair labor practice charge that serves to trigger an investigation by the Office of the General Counsel. Section 2 (1) of the Act defines the term "person" to include one or more individuals. Thus, in accordance with Section 102.9 of the Board's Rules and Regulations, Section 2(11) supervisors are permitted to file charges under the Act.[2] However, in agreement with the Respondents, the Charging Party in the subject case is not entitled to individual relief in this matter because at the time that Escovedo filed the underlying charge he was an admitted supervisor.[3] With respect to Item (3), Section 10264.1 of the ULP manual authorizes the Regional Office investigating the unfair labor practice charge to seek an amended charge to cover all complaint allegations, and Section 10062.5 of the ULP manual provides that where the investigation of a charge reveals evidence of unfair labor practices not specified in a charge, and the charge does not support complaint allegations covering the apparent unfair labor practices found, the Charging Party should be apprised of the potential deficiency and given the opportunity to file an amended charge. See, *Petersen Construction Corp.*, 128 NLRB 969, 972 (1960). In regard to Item (4), I find that each independent requirement that employees execute the DRP six months prior to the filing of the subject charge on March 18, 2013, constitutes an independent unfair labor practice. *Seton Co.*, 332 NLRB 979 (2000) (employer gave similar warnings that were not actionable because of the time bar, but its prior actions did affect the viability of a claim based on similar conduct; each instance was viewed as a separate and independent event for purposes of Section 10(b)). Item

[2] The *Countrywide Financial Corp.* case cited by the Respondent in its brief relies on the February 13, 2013 decision of a Board administrative law judge (JD (SF)-09-13). Such a decision, absent review by the Board, is not binding precedent regarding the subject case. Therefore, I reject the Respondent's position that the subject complaint should be dismissed against Chesapeake Energy. It is further noted per the parties' "Stipulation" that Respondent Energy's DRP applies equally to the employees of Respondent Chesapeake Operating.

[3] The cases cited by the Acting General Counsel in its brief for the opposite proposition are distinguishable from the facts in the subject case.

(5) will be discussed later in this decision. With respect to Item (6), that affirmative defense is rejected as the Board has previously addressed the issue of whether the Acting General Counsel was validly appointed under the Federal Vacancies Reform Act and dismissed such challenges. See, *Bloomingdale's, Inc.*, 359 NLRB No. 113 (2013) and *Sub-Acute Rehabilitation Center at Kearny, LLC d/b/a Bedgrove Post Acute Center,* 359 NLRB NO. 77 (2013).

Analysis

The Respondents (Item 5) strongly argue that the Supreme Court decision in *American Express Co.*, supra, contravenes the Board's holding in *D.R. Horton,* supra, that a policy or agreement that precludes employees from filing employment-related collective or class claims against their employer, as in this case, restricts employees' Section 7 right to engage in concerted action for mutual aid or protection, and therefore violates Section 8(a)(1) of the Act. The *American Express case* involved the question of whether a contractual arbitration provision waiving the right to arbitrate on a class basis is enforceable under the Federal Arbitration Act (FAA), even when a plaintiff can demonstrate that the cost of prevailing on the claim in individual arbitration would likely exceed any potential recovery. In recent years, the Supreme Court has decided several cases upholding the enforceability of arbitration agreements. In *AT&T Mobility LLC v. Concepcion,* 131 S. CT. 1740 (2011), the Supreme Court held that the FAA preempted a state law precluding enforcement of a class arbitration waiver. Likewise, in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 558 U.S. 662 (2010), the Supreme Court held that a party may not be compelled to submit to class arbitration absent an agreement to do so. Additionally, the Supreme Court in *Rent-A-Center, West, Inc. v. Jackson,* 130 S. CT. 2772 (2010), held that the FAA reflects the overarching principle that arbitration is a matter of contract and in *Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 221 (1985), stated it applied even for claims alleging a violation of a federal statute unless the FAA's mandate has been overridden by a contrary congressional command.

The Supreme Court noted in the *American Express* decision that no contrary congressional command required us to reject the waiver of class arbitration here and the Sherman and Clayton Acts make no mention of class actions. In fact, they were enacted decades before the advent of Federal Rule of Civil Procedure 23, which was "designed to allow an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." As it concerns the subject case, the principles expressed by the Supreme Court equally apply to the Board since the Act does not mention class actions, and was enacted long before the advent of Rule 23.

For all of the above reasons, and principally relying on the decision of the Supreme Court in *American Express* discussed above, I find in agreement with the Respondents that the Board's position that class and collective action waivers in arbitration agreements violate Section 8(a)(1) of the Act cannot be sustained. Accordingly, I recommend that paragraph 4(a) of the complaint be dismissed.

With respect to paragraph 4(b) of the complaint that alleges the DRP directly interferes with employees' access to the Board and its processes, I find that Section 8(a)(1) of the Act has been violated. In this regard, I note that the identical issue presented in this case was not addressed in the Supreme Court's *American Express*

decision. However, the Supreme Court discussed the "effective vindication" exception noted in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 637 (1985), that would prevent a prospective waiver of a party's right to pursue statutory rights. *U-Haul Co. of California,* supra.

Conclusions of Law

1. Respondents are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. By maintaining and distributing, since at least September 2012, its Dispute Resolution Policy that prohibits employees from their right to file unfair labor practice charges with the Board, the Respondents have engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
3. The Respondents have not otherwise violated Section 8(a)(1) of the Act by maintaining and enforcing against employees the Dispute Resolution Policy since September 2012.

Remedy

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

Specifically, the Respondents shall be required to rescind or revise the Dispute Resolution Policy with respect to the exclusion of unfair labor practice allegations under the Act and the right of employees to file charges with the Board. In addition, the Respondents shall be required to notify employees that this has been done and to post a notice regarding the violation. Finally, because the Dispute Resolution Policy containing the overbroad language is used on a corporate wide basis, the Respondents shall be required to take these actions at all of its facilities where the Dispute Resolution Policy is in effect. See *D. R. Horton, Inc.* 357 NLRB No. 184, slip op. at 13; and *U-Haul of California, 347 NLRB at 375 fn. 2.*

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The Respondents, Chesapeake Energy Corporation and its wholly owned subsidiary Chesapeake Operating, Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining and distributing its current Dispute Resolution Policy that

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

prohibits employees from their right to file unfair labor practice charges with the Board.

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

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

(a) Rescind or revise the Dispute Resolution Policy with respect to the exclusion of unfair labor practice allegations under the Act and the right of employees to file charges with the Board.

(b) Notify employees of the revisions or rescissions by providing them with a copy of the revised Dispute Resolution Policy, or by specifically notifying them that the Dispute Resolution Policy has been rescinded for the reasons set forth in this decision and order.

(c) Within 14 days after service by the Region, post at its facilities in Oklahoma City, Oklahoma, Ohio copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representatives, shall be posted immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by e-mail, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with their employees by such means. *Picini Flooring,* 356 NLRB No. 9 (2010). Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since September 2012.

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

[5] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. November 8, 2013

Bruce D. Rosenstein
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post, mail, and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT maintain or distribute our Dispute Resolution Policy that prohibits employees from their right to file unfair labor practices with the Board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the National Labor Relations Act.

WE WILL NOT require our wholly-owned subsidiaries or related entities and affiliates, as listed in our Arbitration Agreement and Dispute Resolution Policy, to prohibit or restrict employees from filing charges with the National Labor Relations Board.

WE WILL rescind or revise the Dispute Resolution Policy with respect to the exclusion of unfair labor practice allegations under the Act and the right of employees to file charges with the Board.

WE WILL notify our employees of the revisions or rescissions by providing them with a copy of the revised Dispute Resolution Policy, or by specifically notifying them that the Dispute Resolution Policy has been rescinded for the reasons set forth in this decision and order.

Chesapeake Energy Corporation and its wholly owned subsidiary Chesapeake Operating, Inc.
(Employer)

Dated _____ By _____
(Representative) (Title)