UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

REGION 20

24 HOUR FITNESS USA, INC.	)	CASE NO. 20-CA-035419
	)	**JOINT POST-TRIAL BRIEF SUBMITTED BY CHARGING PARTY ALTON J. SANDERS AND INTERVENOR SERVICE EMPLOYEES INTERNATIONAL UNION**
and	)	
ALTON J. SANDERS, an individual.	)	

Before Administrative Law Judge William L. Schmidt

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INTRODUCTION

In *D.R. Horton,* Inc., 357 NLRB No. 184, 2012 WL 36274 (January 3, 2012), the Board held that an employer violates Section 8(a)(1) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §158(a)(1), by implementing a workplace policy that prohibits employees from exercising their Section 7 right to initiate or participate in class, collective, and other representative legal actions. Respondent 24 Hour Fitness, Inc. has imposed such a policy on its employees since 2005. Since then, it has continued to enforce that policy against more than 99% of its employees, including Charging Party Alton J. Sanders. 24 Hour Fitness has thereby violated Section 8(a)(1).

None of the defenses asserted by 24 Hour Fitness to the Acting General Counsel's Complaint have merit. First, 24 Hour Fitness challenges the validity and correctness of *D.R. Horton* itself. *See* Answer, Second Affirmative Defense; June 28, 2012 Hearing Transcript ("Tr.") at 21:6-22:15. As 24 Hour Fitness necessarily acknowledges, though, *D.R. Horton* is the law, which is why its attorneys conceded at the June 28, 2012 hearing that, by raising this defense, 24 Hour Fitness is simply trying to preserve its challenge to *D.R. Horton* for later litigation. *See* Tr. at 21:25-22:15.

Second, 24 Hour Fitness seeks to distinguish this case from *D.R. Horton*, based on the fact that in 2007 it began allowing new employees to "opt out" of its individualized arbitration policy (or, more accurately, to regain their otherwise-forfeited Section 7 right to engage in concerted legal activity), as long as those employees complete a multi-step opt-out procedure within 30 days of being hired. Jt. Stip. 11; Jt. Ex. 14. That distinction makes no difference.

Section 8(a)(1) is violated whenever an employer's policies, viewed objectively, have the likely effect of burdening or otherwise interfering with its employees' ability to exercise their Section 7 right to engage in concerted protected activity – including the right to engage in

concerted legal activity to improve workplace conditions, which is a "substantive . . . core right[]" under Section 7. *D.R. Horton*, 2012 WL 36274 at *7. By stripping employees of that right at the outset of employment and requiring them to jump through a series of procedural hoops within a short time frame to reclaim it, 24 Hour Fitness has interfered with the free exercise of Section 7 rights – even though some employees (here, a tiny fraction) were able to overcome those procedural hurdles. *See D.R. Horton*, 2012 WL 36274 at *5-*6 & n.6 and cases cited. The NLRA extends the protections of Section 7 to all covered employees as a matter of federal labor policy and statutory law. Employers cannot subvert those protections by stripping workers of their Section 7 rights at the outset of employment and forcing those employees to take affirmative steps to request Section 7 protection. That burden-shifting inherently interferes with, restrains, and coerces employees in their ability to exercise Section 7 rights.

24 Hour Fitness's violation of Section 8(a)(1) in this case is particularly egregious because, in a transparent effort to discourage employees from taking the steps necessary to regain their forfeited Section 7 rights, the company: 1) failed to give adequate notice to new employees of what rights they will be forfeiting by not opting out, misled them as to the benefits of not opting out, and failed to explain why their Section 7 rights are significant and legally protected; 2) made opting out an unnecessarily cumbersome and time-consuming procedure, without any justification for doing so; and 3) offered no assurances of anonymity or confidentiality to any employee who sought to initiate the opt-out procedure, despite the employees' reasonable fear of retaliation. These additional burdens upon the exercise of core Section 7 rights, which 24 Hour Fitness has never made *any* attempt to justify, explain why more than 99% of the 24 Hour Fitness employees hired after 2005 now find themselves permanently prohibited from exercising their Section 7 right to initiate or participate in any class, collective, or representative action or to

share any information about the pendency of any arbitration with any co-workers – in clear violation of Section 8(a)(1).

Third, 24 Hour Fitness challenges the remedy sought in the Acting General Counsel's complaint. *See* Answer, Third Affirmative Defense; Tr. at 7:17-11:11. That challenge, however, rests upon a mischaracterization of the relief requested. Neither the GC nor the Charging Party seek an order "requir[ing] Article III judges to undo determinations that they've already made with regard to the enforcement of arbitration agreements." *See* Tr. at 7:23-8:8, 8:22-9:2. Rather, the Complaint seeks far more limited relief: an order requiring 24 Hour Fitness to cease and desist from its unlawful policies and practices, to no longer prohibit its NLRA-covered employees from initiating or participating in class and collective workplace actions, and to provide notice to any court or arbitrator that still has jurisdiction over any claim against 24 Hour Fitness brought on a concerted action basis that the company no longer seeks to enforce those prohibitions. *See* Complaint at 5; *see* Tr. at 8:9-16, 10:25-11:7 (GC's confirmation that ALJ Schmidt correctly construed the relief requested in the GC's Complaint). This relief is well within the authority of the ALJ, and is an appropriate remedy for 24 Hour Fitness's longstanding, ongoing violations of Section 8(a)(1).

STATEMENT OF FACTS

In 2005, after respondent 24 Hour Fitness, Inc. was hit with a series of employment class and collective actions (including one that was allowed to proceed on a class action basis in arbitration (*In the Matter of James C. Allen et al. and Sport and Fitness Clubs of America, Inc. dba 24 Hour Fitness*, AAA No. 11 160 03041 04 (Sochynsky, Arb., April 13, 2005 Clause Construction Ruling)) and seven others that were consolidated into a single wage-and-hour lawsuit that ended up settling for $38 million (*Boyce v. Sport and Fitness Clubs of America*, Case

No. 03-CV-2140 BEN (S.D. Cal.)), 24 Hour Fitness instituted a new policy that prohibited any of its employees from pursuing any workplace claims on a concerted action basis (with limited exceptions not applicable here) in court, arbitration, or anywhere else. Jt. Stip. 2-4; Jt. Ex. 2(a). Those new policies applied to all then-current 24 Hour Fitness employees, whether or not those employees signed a document agreeing to be bound or even acknowledged receipt of the handbook setting forth the new policy. *See* Jt. Stip. 4 ("Any employee who did not sign would be informed that after their employment started the conditions and policies of the Team Member Handbook would nonetheless apply to them, including the Arbitration Policy.").

Every version of 24 Hour Fitness's Arbitration of Disputes Policy since at least the 1990's has required the company's employees to arbitrate workplace disputes. Beginning in 2005, those policies also began to include language prohibiting class, collective, and representative actions and further prohibiting employees from disclosing to their co-workers or others that an arbitration was pending (which effectively precluded consolidation or joinder of claims in arbitration as well).

24 Hour Fitness deliberately buried these prohibitions in the multi-paragraph Arbitration of Disputes Policy in its lengthy (48-page to 63-page) handbooks. It never mentioned them in the Acknowledgment of Receipt forms that it required new employees to sign upon receiving a copy of those handbooks. Nor did it refer to these unlawful prohibitions in any of its employment application forms. As a result, even after the company in 2007 began offering employees a time-limited, multi-step procedure for opting out of the Arbitration of Disputes Policy, few if any employees could have known that by failing to opt out, they would be forever bound to the Section 7 prohibitions set forth in that Arbitration policy – and even fewer could have known

what it meant to forfeit the statutory Section 7 right to pursue workplace claims on a class, collective, or representative action basis.[1/]

24 Hour Fitness's prohibition against concerted legal activities first appeared in the 2005 version of its Employee Handbook, in an Arbitration of Disputes Policy that stated (in non-highlighted language on the second page in the last sentence of the fifth paragraph):

> . . . However, there will be no right or authority for any dispute to be brought, heard or arbitrated *as a class action, private attorney general, or in a representative capacity* on behalf of any person.

Jt. Ex. 2(a) (emphasis added). Two paragraphs later, that policy also prohibited employees from disclosing the existence of a pending arbitration to any co-worker, stating (in the next to last sentence of the seventh paragraph):

> . . . Except as may be required by law, neither a party nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties.

Id.; *see also* Jt. Ex. 3(a) (43-page 2005 Handbook).

24 Hour Fitness slightly modified the class action prohibition in the next version of its Arbitration of Disputes Policy to ensure (through the use of more technical, even less

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[1/] In a typical "class action" governed by Federal Rule of Civil Procedure 23 and its state law counterparts, the action is filed by one or more workers on behalf of themselves and as the representatives of all other similarly situated workers; and if the class is certified as meeting the Rule 23 standards, all affected workers are included unless they affirmatively exclude themselves from the class. *See D.R. Horton*, 2012 WL 36274 at *4. In a "collective" action, sometimes described as an "opt-in" class action, one or more workers file an action on behalf of themselves and as the representatives of all others similarly situated, under a particular statute (such as the Fair Labor Standards Act, 29 U.S.C. §216(b), or the Age Discrimination in Employment Act, 29 U.S.C. §626(b)) that requires each participating worker to file a "Consent to Sue" to be included in the class. A "representative" action, such as under California's Labor Code Private Attorney General Act, Cal. Labor Code §2698 *et seq.* or other private attorney general statues, allows one or more individual workers to bring a representative lawsuit on behalf of all aggrieved persons, without having to satisfy the procedural requirements of class certification, under statutes that specifically allow representative actions to enforce public law rights. *See, e.g., Arias v. Superior Court*, 46 Cal.4th 969 (2009).

comprehensible language) that its prohibitory policy would encompass all possible forms of concerted legal actions. The next revised version of the company's 63-page Employee Handbook thus stated:

> . . . However, there will be no right or authority for any dispute to be brought, heard or arbitrated *as a class action (including without limitation opt out class actions or opt in collective class actions), or in a representative or private attorney general capacity on behalf of a class of persons or the general public*. . . .
>
> . . . Except as may be required by law, neither a party nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties.

Jt. Ex. 2(b), 3(b) (emphasis added).

Beginning at least in 2005, 24 Hour Fitness began requiring new employees to sign an Acknowledgment of Receipt form, to acknowledge that they had received the version of the company's Employee Handbook then in effect. (The company made clear, though, that employees who failed or refused to sign the receipt acknowledgment would still be bound by all handbook policies, including the Arbitration of Disputes Policy. Jt. Stip. 4.) The Receipt Acknowledgment form that 24 Hour Fitness used between 2005 and at least January 1, 2007 made no reference to any opt-out provisions (because no opt-out procedure existed). *See* Jt. Ex. 4. Indeed, 24 Hour Fitness concedes that no employee hired prior to January 1, 2007 was *ever* given any opportunity to opt out of 24 Hour Fitness's mandatory arbitration agreement or the class action prohibition it contained. Jt. Stip. 22; Tr. at 92:14-22.[2/]

[2/] 24 Hour Fitness has stipulated that approximately 18% of its current NLRA-covered workforce comprises employees hired prior to January 2007. Jt. Stip. 22. Each of those employees were thus forced to waive their Section 7 right to pursue class action remedies without being given any opportunity to regain that right through the later-adopted opt-out process.

Beginning on or about January 1, 2007, 24 Hour Fitness began presenting new employees with a different version of the Employee Handbook Receipt Acknowledgment. Jt. Stip. 5; Jt. Ex. 5. That 2007 Receipt Acknowledgment form for the first time included a description of the company's new multi-step opt-out process, stating:

> I have received the January 2005 handbook and I understand that in consideration for my employment it is my responsibility to read and comply with the policies contained in this handbook and any revisions made to it. In particular, I agree that if there is a dispute arising out of or related to my employment as described in the "Arbitration of Disputes" policy, I will submit it exclusively to binding and final arbitration according to its terms, unless I elect to opt out of the "Arbitration of Disputes" policy as set forth below.
>
> *I understand that I may opt out of the "Arbitration of Disputes" policy by signing the Arbitration of Disputes Opt-Out Form ("Opt-Out Form") and returning it through interoffice mail to the CAC/HR File Room no later than 30 calendar days after the date I received this handbook*, as determined by the Company's records. I understand that I can obtain the Opt-Out Form by calling the Employee Hotline at 1.866.288.3283. I understand that if I do not opt out, disputes arising out of or related to my employment will be resolved under the "Arbitration of Disputes" policy. I understand that my decision to opt out or not opt out will not be used as a basis for the Company taking any retaliatory action against me.

Jt. Ex. 5 (emphasis added).

24 Hour Fitness also began adding a reference to this new opt-out procedure in its Employment Application form. *See* Resp. Ex. 1. That language starts by touting arbitration as a mutually beneficial dispute resolution procedure, by stating: "I understand that as an expeditious and economical way to settle employment disputes without need to go through court, 24 Hour Fitness agrees to submit such disputes to final and binding arbitration" – thus falsely suggesting that 24 Hour Fitness is conferring a special benefit upon the employee, by agreeing to "settle" disputes through arbitration. *Id*. The form then informs the new applicants that they "may opt out of the arbitration procedure within a specified period of time, as the procedure provides," but

if the employee does not opt out, 24 Hour Fitness's agreement to this expeditious and economical procedure that avoids the "need to go to court" will be binding on both parties. *Id*.

Nothing in the Employment Application form explains that by failing to opt out of arbitration, the employees will be forever forfeiting any and all right to pursue class, collective, or representative rights in court *or* in arbitration or to be permitted to discuss with co-workers the pendency or results of any arbitration (which is also a protected right under Section 7). *Id*. Nor is there any evidence that 24 Hour Fitness ever explained to any employee the significance of those statutory rights or that they are protected by the NLRA and the Norris-LaGuardia Act. And, there was no way for prospective employees to know that by accepting employment and not opting out they would be forfeiting Section 7 rights, because 24 Hour Fitness did not provide employees with the Employee Handbook setting forth the class action prohibition and non-disclosure provisions until their first day on the job. *Compare* Resp. Ex. 1 (Charging Party's August 25, 2008 application) *with* GC Ex. 2 (Charging Party's October 6, 2008 New Team Member Handbook Receipt Acknowledgment).

New employees hired after 2007 would need to carefully read the lengthy Employee Handbook and in particular to focus upon the applicable sentences in the multi-paragraph Arbitration of Disputes Policy, to know anything at all about their Section 7 forfeiture. Even then, few employees would understand what it meant to forfeit the right to pursue disputes "as a class action (including without limitation opt out class actions or opt in collective class actions), or in a representative or private attorney general capacity on behalf of persons or the general public." Fewer still would realize that the NLRA and Norris-LaGuardia Acts guarantee employees a federal statutory right to pursue workplace claims in concert with their co-workers.

In or about September 2007, 24 Hour Fitness revised its Handbook and the New Team Member Handbook Receipt Acknowledgment. Jt. Stip. 6 & Jt. Ex. 6; *see also* Jt. Ex. 3(b), 3(c) (revised handbooks, apparently from 2007). No changes were made to the language of the Arbitration of Disputes Policy. The only change in the Receipt Acknowledgment was that it began referring to receipt of the new 2007 Handbook rather than the old 2005 Handbook. *See* Jt. Ex. 6. (This is apparently the version given to Charging Party Alton Sanders, who began working for 24 Hour Fitness in 2008. Tr. at 38:20-21, 87:8-11; *see* Resp. Ex. 1.)

24 Hour Fitness next revised its handbook in 2010. Now called the "Team Member Handbook," this lengthy document maintained the existing language of the Arbitration of Disputes Policy without change. Although other modifications were made to other policies, the 2010 version of the Arbitration of Disputes Policy continued to include the same prohibitions against Section 7 activity as before:

> . . . However, there will be no right or authority for any dispute to be brought, heard or arbitrated as a class action (including without limitation opt out class actions or opt in collective class actions), or in a representative or private attorney general capacity on behalf of a class of persons or the general public. . . .
>
> . . . Except as may be required by law, neither a party nor an arbitrator may disclose the existence, content, or results of any arbitration hereunder without the prior written consent of both parties.

Jt. Ex. 3(d).[3/]

At some point in 2009 or 2010, 24 Hour Fitness also began offering some employees an electronic version of its Arbitration of Disputes Policy. *See* Jt. Ex. 2(d). That electronic version

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[3/] There is another version of the Handbook, identified as Jt. Ex. 3(e) that appears not to have any arbitration provision at all, although the record suggests that workers given this handbook were given a stand-alone copy of the Arbitration of Disputes policy. *See* Jt. Stip. 9.

includes the same prohibitory language as in the hard copy version. The electronic version also adds three paragraphs at the end to describe the company's opt-out procedures, which state:

> I agree that if there is a dispute arising out of or related to my employment as described in the Arbitration of Disputes Policy, I will submit it exclusively to binding and final arbitration according to its terms, unless I elect to opt out of the Arbitration of Disputes Policy as set forth below.
>
> I understand that I may opt out of the Arbitration of Disputes Policy by signing the Arbitration of Disputes Opt-Out Form ("Opt-Out Form") and returning it through interoffice mail to the CAC/HR File Room no later than 30 calendar days after the date I click on the button below. I understand that I can obtain the Opt-Out Form by calling the Employee Hotline at 1.866.288.3283. I understand that if I do not opt out, disputes arising out of or related to my employment will be resolved under the Arbitration of Disputes Policy. I understand that my decision to opt out or not opt out will not be used as a basis for 24 Hour Fitness taking any retaliatory action against me.
>
> I UNDERSTAND THAT BY ENTERING MY INITIALS AND CLICKING THE "CLICK TO ACCEPT" BUTTON, I AM AGREEING TO THE ARBITRATION OF DISPUTES POLICY (WHICH INCLUDES MY ABILITY TO OPT-OUT OF THE POLICY WITHIN THE PERIOD OF TIME NOTED ABOVE). I ALSO AGREE THAT THIS ELECTRONIC COMMUNICATION SATISFIES ANY LEGAL REQUIREMENT THAT SUCH COMMUNICATION BE IN WRITING.

Jt. Ex. 2(d).[4/]

[4/] There is also a second version of this electronic document, which is undated and which includes the identical class action prohibition and disclosure ban and the same statement about all disputes being arbitrable, but omits the third (capitalized) paragraph quoted above and which modifies the procedures for obtaining and submitting an opt-out form. *See* Jt. Ex. 2(e). This second version requires employees to obtain their opt-out forms from the Team Support Center rather than from the Employee Hotline, and directs them to send their completed opt-out forms to the company's Legal Department rather than to the CAC/HR File Room:

> I understand that I may opt out of the Arbitration of Disputes Policy by signing the Arbitration of Disputes Opt-Out Form ("Opt-Out Form") and *returning it to the Legal Department* through interoffice mail or by fax to 925-543-3358 no later than 30 calendar days after the date I click on the button below. I understand that I can obtain the Opt-Out Form *by calling the Team Support Center at 1.888.356.5485, ext. 3339*. I understand that if I do not opt out, disputes arising out of or related to my employment will be resolved under the Arbitration of Disputes Policy. I understand that my decision to opt out or not opt out will not be used as a basis for 24 Hour Fitness taking any retaliatory action against me.

(continued...)

Finally, the record contains three versions of an electronic document entitled "Arbitration Policy Opt-Out Information": the first directs employees to send any opt-out form to the "Legal Department"; the second directs employees to send that form to the CAC/HR File Room; and the third directs employees to send that form to the MSC/HR File Room. Jt. Ex. 9, 10(a), 10(b). It is not clear which versions of those forms were used for which employees, or whether some employees received multiple versions with different directions. What is clear is that *none* of these forms – or any of the other forms used by 24 Hour Fitness – include any specific reference to the policies prohibiting concerted legal actions in the company's Arbitration of Disputes Policy. Nor do they make any promise that employees can opt out anonymously (which obviously they cannot) or that 24 Hour Fitness would keep confidential from managers or others the identity of those who chose to opt out of the company's favored arbitration policy. *See also* Jt. Ex. 14(a)-(f) (versions of the opt-out form in use since January 1, 2007).

Although 24 Hour Fitness's employees have been allowed for several years to review the company's policies on-line and to sign the Acknowledgment of Receipt form electronically, the company's Custodian of Records testified that she was "not aware of the specific functionality" of the electronic on-line version of the company's policies. Tr. at 45:8, 60:4-9. It seems clear from the screen shots submitted in response to the GC's subpoena, though, that a new employee sitting at a computer terminal in a busy 24 Hour Fitness Center can click through the electronic form checklists without reading, or even opening, any of the linked policies and without

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[4/] (...continued)
Id. (emphasis added). The record does not indicate which new hires received this version.

The record also includes a third electronic copy of the Arbitration of Disputes Policy, which includes the same prohibitions against class, collective, and representative actions and against disclosure of "existence, content, or results of any arbitration." Jt. Stip. 8 & Jt. Ex. 9. The record also does not indicate which employees received this version of the policy.

downloading any of those policies for future reference. *See* GC Ex. 3; Tr. at 63:15-64:8. The "Click to Sign" button on the upper left-hand side of the page is not grayed-out on the screen shot provided by 24 Hour Fitness. This means that new employees can sign the Acknowledgment without actually reviewing the complete text of any of the company's linked policies (and thus never learning what rights they were forfeiting). GC Ex. 3 at 29-32. Even if a new employee clicked on the link to 24 Hour Fitness's Arbitration of Disputes Policy, the screen shot shows that the employee will *not* see the language prohibiting class actions or prohibiting the disclosure of a pending arbitration unless that employee physically scrolls down to the second or third screen page of that policy. *Id*. at 34; *see also* Tr. at 68:13-69:7.

24 Hour Fitness thus intentionally made it as difficult as possible – and certainly far more difficult than necessary – for new employees to understand that unless they opt out, they will be waiving their Section 7 right to pursue workplace disputes on a concerted action basis. Moreover, because 24 Hour Fitness also makes it impossible for an employee to opt out of the class action prohibition without also opting out of arbitration (by failing to separate its Class Action Prohibition/Non-Disclosure Policies from its Arbitration of Disputes Policy), any employee who wants to arbitrate any future workplace disputes cannot take separate advantage of that procedure without at the same time forfeiting his or her Section 7 rights.

24 Hour Fitness can only identify 35 employees who timely and successfully completed this opt-out process in the five years since it first became available (although the company believes that up to 70 such individuals may have actually opted out). Jt. Stip. 24. The company currently employs 19,614 NLRA-covered employees, of whom 3,605 were hired before any opt out procedure existed. Jt. Stip. 22; Tr. at 92:14-22. The total number of new hires since January 1, 2007 (including those no longer employed by the company) is approximately 70,000

individuals. Jt. Stip. 24. Adding the 70,000 individuals hired since January 1, 2007 to the total number of new hires prior to 2007 (based on the 18% figure that represents the number of current workers hired before 2007) yields a total of 85,366 employees (70,000/.82) hired since 2005 – of which only 35 (0.4%) to 70 (0.8%) successfully opted out ***(meaning that between 99.2%-99.6% forfeited their Section 7 rights through inaction***).[5/]

24 Hour Fitness claims to have no idea how many additional employees tried to opt out but failed. The company's Custodian of Records acknowledged that 24 Hour Fitness cannot determine how many employees tried to contact the employee hotline to request an opt out form but were not able to opt out successfully, either because no one answered the telephone, because the interoffice mail was not properly delivered, because they sent the forms to the wrong address, or for some other reason. *See* Tr. at 70:15-71:19. There is evidence, however, that several employees complained about the telephones not being answered and about being given inaccurate information. *See* GC Ex. 4(a), 5(g), Tr. at 50:5-51:20, 52:8-54:2, 70:19-71:21. Because 24 Hour Fitness cannot find (or perhaps never kept) records showing how many employees tried to initiate the opt-out process by calling the employee hotline, there is no way to quantify the extent of the procedural breakdown. Tr. at 46:23-47:5.

[5/] Although most of these individuals no longer work for 24 Hour Fitness, they would still be potential class members in a lawsuit filed against the company for wrongful employment practices that occurred during their periods of employment, but for the fact that more than 99% of them are prohibited from participating in or initiating a class, collective, or representative action challenging those practices.

ARGUMENT

I. The Board's Decision in *D.R. Horton* Governs This Case

24 Hour Fitness first challenges the validity of *D.R. Horton, Inc.*, apparently contending that the Board lacked a proper "quorum" and that the case was incorrectly decided. Those arguments are easily refuted, but even if there were some basis for 24 Hour Fitness's position, its attorneys acknowledged at trial that the ALJ is bound by the Board's decision and that respondent is challenging the validity of *D.R. Horton* only to preserve its arguments for later legal proceedings. *See* Tr. at 21:25-22:16.

As to the quorum issue, it is not clear whether 24 Hour Fitness intends to argue that the Board issued its decision in *D.R. Horton* after Member Craig Becker's recess appointment expired, or that the recusal of Member Brian Hayes meant the Board lacked a quorum, or both. The responses to both arguments are straightforward. First, Member Becker's appointment did not expire until the close of the Congressional session after the session in which he was appointed. That is the date set by the Constitution, in the absence of a concurrent resolution of adjournment between the House and Senate. *See* U.S. Const. art. II, §2, para. 3 (recess appointments "expire at the End of their next Session."). Because there was no such concurrent resolution, the next Congressional "session" expired when the new one began, which was noon on January 3, 2012 (as provided by U.S. Const. amend XX, para. 2). *See* Henry B. Hogue, Congressional Research Service, *Recess Appointments: Frequently Asked Questions* 1-2 (Jan. 9, 2012); Deschler's Precedents of the House of Representatives, H. Doc. 94-661, vol. I §2, at 8 (1994). Although the *D.R. Horton* decision was not made public until several days after January 3, it was formally completed, signed, and issued on the morning of January 3, when Member Becker was still a member of the Board.

24 Hour Fitness's second challenge, based on the recusal of Member Hayes, is precluded by *New Process Steel L.P. v. NLRB*, 130 S.Ct. 2635 (2010), in which the Supreme Court stated that the Board is fully authorized to issue rulings and make decisions when it has three members (as it did on the morning of January 3, 2012), even if one is recused. *See* 130 S.Ct. at 2639-40 ("It is undisputed that . . . the last sentence [of 29 U.S.C. §153(b)] authorized two members of [a three-member Board] to act as a quorum of the group . . . if, for example, the third member had to recuse himself from a particular matter."); *see also id*. at 2641 (noting that "the Board has throughout its history allowed two members of a three-member group to issue decisions when one member of a group was disqualified from a case"). Were the rule otherwise, a dissenting member of a three-member Board could prevent the majority from ever acting, simply by recusing rather than dissenting in any case where there was disagreement.

Even if 24 Hour Fitness had a legitimate basis for challenging the Board's quorum, which it does not, that still should not affect the outcome of this case. The logic underlying the Board's *D.R. Horton* decision is unassailable. Consequently, the current Board would undoubtedly reach the same result, for the same reasons, even if it were considering these issues for the first time without the controlling authority of *D.R. Horton*. *See also Advanced Services, Inc.*, No. 26-CA-063184 (July 2, 2012) (ALJ decision following *D.R. Horton*).

The Board rested its analysis in *D.R. Horton* on three basic principles. First, the Board cited a long history of cases, dating back to 1942, holding that Section 7 protects the right of workers to pursue employment claims in court or in arbitration on a concerted action basis.[6/]

[6/] *See* 2012 WL 36274 at *2-4 (citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978); *Spandsco Oil & Royalty Co*., 42 NLRB 942, 948-49 (1942) (three employees' joint FLSA lawsuit); *Salt River Valley Water Users Ass'n*, 99 NLRB 849, 853-54 (1952), *enfd*. 206 F.2d 325 (9th Cir. 1953) (designating employee as co-workers' representative to seek FLSA back (continued...)

This has long been the law, even before class actions became commonplace. Indeed, the right of employees to pursue legal challenges to workplace policies on a concerted action basis is so critical to the NLRA's purposes that the Board in *D.R. Horton* repeatedly described it as a "core" right and a "substantive" statutory right.[7/]

Second, the Board cited an equally long history of decisions under Section 8(a)(1), holding that "[j]ust as the substantive right to engage in concerted activity aimed at improving wages, hours or working conditions through litigation or arbitration lies at the core of the rights protected by Section 7, the prohibition of individual agreements imposed on employees as a means of requiring that they waive their right to engage in protected, concerted activity lies at the core of the prohibitions contained in Section 8." *Id*. at *7. The Board had little difficulty concluding in *D.R. Horton* that an employer's class action prohibition on its face interferes with, coerces, and restrains employees in the exercise of protected Section 7 rights, and is thus

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[6/] (...continued)
wages); *NLRB v. City Disposal Systems* (1984) 465 U.S. 822 (pursuing collective grievances in arbitration)); *see also Brady v. National Football League*, 644 F.3d 661, 673 (8th Cir. 2011) (a "lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment is 'concerted activity' under §7 of the National Labor Relations Act."); *Mohave Elec. Co-op, Inc. v. NLRB*, 206 F.3d 1183, 1188 (D.C. Cir. 2000); *United Parcel Service v. NLRB*, 677 F.2d 421 (6th Cir. 1982), *enf'g* 252 NLRB 1015, 1018, 1022 n.26 (1980); *Trinity Trucking & Materials Corp. v. NLRB*, 567 F.2d 391 (7th Cir. 1977) (mem. disp.), *cert. denied*, 438 U.S. 914 (1978), *enf'g* 221 NLRB 364, 365 (1975); *Le Madri Restaurant*, 331 NLRB 269, 275 (2000); *Harco Trucking, LLC*, 344 NLRB 478 (2005).

[7/] 2012 WL 36274 at *7 ("the substantive right to engage in concerted activity aimed at improving wages, hours or working conditions through litigation or arbitration lies at the core of the rights protected by Section 7. . . ."); *id*. at *12 ("The right to engage in collective action – including collective legal action – is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest."); *id*. at *4 ("Such conduct is not peripheral but central to the Act's purposes."); *id*. at *14 ("Section 7 of the NLRA manifests a strong federal policy protecting employees' right to engage in protected concerted action, including collective pursuit of litigation or arbitration.").

unlawful under Section 8(a)(1) as well as under the parallel provisions of the Norris-LaGuardia Act. *Id*. at *7-*8 (citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004)).

Third, the Board explained why there was no conflict between the NLRA (as the Board construed it) and the implied policies of the Federal Arbitration Act of 1925 (as identified by the Supreme Court in *AT&T Mobility LLC v. Concepcion*, __ U.S. __, 131 S. Ct. 1740 (2010)). *See* 2012 WL 36274 at *10-*16 ("[Our] well established interpretation of the NLRA and . . . core principles of Federal labor policy, does not conflict with the letter or interfere with the policies underlying the FAA and, even if it did, that . . . finding represents an appropriate accommodation of the policies underlying the two statutes."). As the Board explained, the purpose of the FAA was to prevent courts from treating arbitration agreements less favorably than other private contracts," and "[t]o find that an arbitration agreement must yield to the NLRA is to treat it no worse than any other private contract that conflicts with Federal labor law." *Id*. Moreover, "the Supreme Court's jurisprudence under the FAA . . . makes clear that the agreement may not require a party to 'forgo the substantive rights afforded by the statute,'" and here, D.R. Horton's "categorical prohibition of joint, class, or collective federal state or employment law claims in any forum directly violates the substantive rights vested in employees by Section 7 of the NLRA." *Id*. at *12 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)).[8/]

Further, "nothing in the text of the FAA suggests that an arbitration agreement that is inconsistent with the NLRA is nevertheless enforceable." *Id*. at *14. To the contrary, Section 2 of the FAA, 9 U.S.C. §2, expressly provides that "arbitration agreements may be invalidated in whole or in part upon any "grounds as exist at law or in equity for the revocation of any

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[8/] As the Board noted, although there may be no substantive Section 7 right to *obtain* class certification (which depends on whether Rule 23 standards have been satisfied), there is a substantive Section 7 right to *seek* such certification. *Id*. at *12 & n.24.

contract'" – which includes the ground "that a term of the contract is against public policy." *Id*. (quoting 9 U.S.C. §2 and citing *Town of Newton v. Rumery*, 480 U.S. 386, 392 (1987); *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83–84 (1982)). "Finally, even if there were a direct conflict between the NLRA and the FAA, there are strong indications that the FAA would have to yield under the terms of the Norris-LaGuardia Act," which precludes enforcement of any "private agreement that seeks to prohibit a 'lawful means [of] aiding any person participating or interested in' a lawsuit arising out of a labor dispute (as broadly defined)." *Id*. at *16.[9/]

For these reasons, the Board concluded that an employer policy that prohibits class, collective, and representative actions (as in *D.R. Horton* and here) and that also prohibits joint and consolidated actions (explicitly in *D.R. Horton* and implicitly here, by prohibiting employees from sharing information about pending arbitrations, *see supra* at 5, 8), violates Section 8(a)(1) because it unlawfully interferes with the employees' right to engage in concerted legal activity protected by the Act.

[9/] Where a case involves rights and obligations under two federal statutes, the relevant inquiry is not one of "preemption," but of "implied repeal" – whether Congress intended to repeal part or all of a previously enacted statute as a result of its enactment of a subsequent, inconsistent statute. Findings of implied repeal, though, are highly disfavored and should never be presumed. *See, e.g.*, *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) (intention to repeal must be "clear and manifest"). Even when two federal statutes cover the same subject, "the rule is to give effect to both if possible." *Id*.; *D.R. Horton*, 2012 WL 36274 at *10 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (when two federal statutes "are capable of co-existence," both should be given effect "absent a clearly expressed congressional intention to the contrary."); *see also Direct Press Modern Litho*, 328 NLRB 860, 861 (1999); *Image Systems*, 285 NLRB 370, 371 (1987). In those rare cases in which two federal statutes are in "irreconcilable conflict," moreover, it is the *later*-enacted statute – in this case the 1932 Norris-LaGuardia Act and 1935 NLRA – that must be found to have impliedly repealed any inconsistent provisions in the *earlier* statute – the 1925 FAA. *See Posadas v. National City Bank*, 296 U.S. 497, 503 (1936). Thus, to the extent any actual conflict existed between the FAA and the NLRA – a conclusion the Board in *D.R. Horton* expressly rejected – the proper question to ask would be whether the two statutes could be reconciled; and, if not, the NLRA would have to be found to have impliedly repealed any inconsistent provisions in the earlier enacted FAA, not vice versa.

II. 24 Hour Fitness's Opt-Out Procedure Does Not Eliminate Its Section 8(a)(1) Violation

24 Hour Fitness next tries to distinguish *D.R. Horton* factually, contending that although D.R. Horton's employees were required to waive their Section 7 rights as a "condition of employment," 24 Hour Fitness's employees were given the option of not forfeiting that right. According to 24 Hour Fitness, its 30-day "opt out" procedure transformed its facially unlawful prohibition of concerted Section 7 activity into a lawful exercise of employee free choice (which it apparently contends more than 99% of its employees *voluntarily* accepted, without interference, restraint, or coercion). But 24 Hour Fitness's attempt to distinguish *D.R. Horton* cannot be reconciled with the Board's legal analysis. Although there was no occasion in *D.R. Horton* for the Board to address whether an opt-out provision could in some circumstances excuse an otherwise unlawful prohibition, *see* 2012 WL 36274 at *16 n.28 (reserving issue), decades of decisions under Section 8(a)(1), and the reasoning of *D.R. Horton* itself, require that 24 Hour Fitness's attempted distinction be rejected.

As a threshold matter, the right to engage in concerted legal activity to vindicate state and federal workplace protections is a core, substantive right under Section 7 and the Norris-LaGuardia Act. *D.R. Horton*, 2012 WL 36274 at *7; *see supra* at 16 n.7. An employer cannot impose forfeiture of such a right as the default condition of employment for new employees. To the contrary, any procedure that deprives employees of this right at the outset of employment and requires those employees to act affirmatively in order to reinstate that right is inherently coercive and violative of Section 8(a)(1) – just as if the Section 7 right at issue were the right to join or support a union. *See D.R. Horton*, 2012 WL 36274 at *5. Section 7 coverage is the statutorily-protected default, not an option that new employees must specifically request from their

employer upon pain of permanent forfeiture. For this threshold reason, 24 Hour Fitness's Section 7 forfeiture provisions conflict with the statutory scheme.

Moreover, Section 8(a)(1) prohibits interference, restraint or coercion, even when that interference does not rise to the level of a successful across-the-board ban. When the Board evaluates workplace agreements for compliance with Section 8(a)(1), it focuses on the practical impacts and effects of those agreements, not simply on the technical language drafted by the employer's sophisticated attorneys. Nowhere is that point better stated than in *D.R. Horton* itself, in which the Board cites a series of cases holding that employer pressure to enter into an agreement to waive Section 7 rights violates the NLRA even if not all employees succumb to that pressure. *See* 2012 36274 at *5-*7 (citing *National Licorice Co. v. NLRB*, 309 U.S. 350, 360 (1940) (affirming Board ruling that individual employment contract violates Section 8(a)(1) because it discouraged, without forbidding, discharged employee from presenting grievance to employer except on an individual basis); *J. I. Case Co. v. NLRB*, 321 U.S. 332, 337 (1944) ("Individual contracts no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act."); *NLRB v. J.H. Stone & Sons*, 125 F.2d 752, 756 (7th Cir. 1942) (individual employment contract language requiring employees first to attempt to resolve employment disputes individually with employer is a per se violation of the Act, even if "entered into without coercion" and even though some employees declined to sign those contracts, because it was a "restraint upon collective action"); *Jahn & Ollier Engraving Co.*, 24 NLRB 893, 900-01, 906-07 (1940), *enfd. in relevant part*, 123 F.2d 589, 593 (7th Cir. 1941) ("profit-sharing" contract offered to employees who had worked for employer for at least one year that purported to waive

employees' right to strike was unlawful interference under Section 8(a)(1), even though one employee had declined to sign it, apparently without consequence)).

As the Board wrote in *Jahn & Ollier Engraving Co*., 24 NLRB 893:

> 'Whether the words or actions of an employer constitute interference, restraint, or coercion, within the meaning of the Act, must be judged, not as an abstract proposition, but in the light of the economic realities of the employer-employee relationship. It need hardly be stressed that the dominant position of an employer, who exercises the power of economic life and death over his employees, gives to an employer's statements, whether or not ostensibly couched as argument or advice, an immediate and compelling effect that they would not possess if addressed to economic equals.'

24 NLRB at 906-07 (internal citation omitted) (cited in *D.R. Horton*, 2012 WL 36274 at *5 n.7). What matters under Section 8(a)(1), then, is whether the employer's policies, reasonably construed, have the likely practical effect of impinging upon protected Section 7 rights, whether or not they actually prevent every employee from engaging in the covered activity. *Id*. at *5 (citing *U-Haul Co. of Calif.,* 347 NLRB 375, 377-78 (2006); *Lutheran Heritage Village-Livonia*, 343 NLRB 646); *see also Lafayette Park Hotel*, 326 NLRB 824, 825 (1998) (proper inquiry is whether employer policy "would reasonably tend to chill employees in the exercise of their Section 7 rights"); *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 374 (D.C. Cir. 2007) (Section 8(a)(1) violated when employer's rules would "'reasonably tend to chill employees in the exercise of their statutory rights'").[10/]

[10/] The Board in *D.R. Horton* found that the same conclusion was also required by the Norris-LaGuardia Act, which similarly prohibits employers from inducing employees to waive their right to engage in concerted activity for their mutual aid and protection. *See* 2012 WL 36274 at *7, *16. In the Norris-LaGuardia Act, Congress recognized the inherent disparity in bargaining power between employers and individual workers. *See* 29 U.S.C. §102 ("under prevailing economic conditions . . . the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment."). To help workers overcome that gross economic disparity, Congress proclaimed as a core foundational element of federal labor policy

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The unlawful coerciveness of 24 Hour Fitness's opt-out procedure is underscored by the cases prohibiting employers from "interrogating" or "polling" workers about their desire to engage in collective activity. Here, 24 Hour Fitness prohibits its employees from exercising their Section 7 right to engage in collective legal activity unless they individually step forward and reveal their intention to engage in collective action (to an employer they reasonably believe is hostile to the exercise of that right), thus targeting themselves as potential troublemakers. This is a burden upon the exercise of protected rights that must be found inherently coercive.

[10/] (...continued)
that workers must be free "from . . . interference, restraint, or coercion . . . in . . . concerted activities for . . . mutual aid or protection," *id*., and it explicitly provided that "[a]ny undertaking or promise . . . in conflict with the public policy declared in section 102 of this title, is declared to be contrary to the public policy of the United States." 29 U.S.C. §103.

This statutory prohibition against enforcement of any agreement that conflicts with Section 2 of the Norris-LaGuardia Act, 29 U.S.C. §102, contains no exception for agreements with opt-out clauses. As the Board explained in *D.R. Horton*:

> Congress has aimed to prevent employers from imposing contracts on individual employees requiring that they agree to forego engaging in concerted activity since before passage of the NLRA. In fact, the provisions of the Norris-LaGuardia Act prohibit the enforcement of a broad array of "yellow dog"-like contracts, including agreements comparable to that at issue here.

2012 WL 36274 at *7. When Congress enacted the Norris-LaGuardia Act in 1932, it knew full well that individual workers lacked meaningful power to negotiate workplace agreements on an equal basis with their economically dominant employers. That is why it prohibited "any" such undertaking or promise, without limitation. While the Board in *D.R. Horton* appropriately applied these statutory principles in the context of the case before it, in which the individual arbitration agreement happened not to contain an opt-out clause, nothing in the Board's analysis – and certainly nothing in the language of the Norris-LaGuardia Act itself – requires proof that an agreement in violation of the Act's protections was involuntarily imposed as a condition of employment, rather than being imposed as the result of implicit pressure – or even mutual agreement. *See also Pratt Towers, Inc.*, 338 NLRB 61, 64 (2002) (even where employer had right to deny re-employment, conditioning reinstatement on signing agreement renouncing union was unlawful); *Metro Networks, Inc.*, 336 NLRB 63, 66 (2001) ("an employer may not coercively condition an individual's return to employment on . . . forbearance from future charges and concerted activity because 'future rights of employees as well as the rights of the public may not be traded away in this manner'").

In *Allegheny Ludlum Corp.*, 333 NLRB 734, 739 (2001), the Board held that a similar opt-out provision violated Section 8(a)(1) because it had the practical effect of being an unlawful coercive poll. The employer in *Allegheny Ludlum* had taped an anti-union video that included images of employees at their work stations. When the union complained, the employer distributed a notice to employees stating that if they did not want to participate in the video, they must inform the company. As here, the employer imposed a default burden on the employees' Section 7 right, subject to an opportunity to "opt out." The Board held that this opt-out approach inherently coercive because it forced employees "'to make an observable choice that demonstrates their support for or rejection of the union.'" *Id.* at 745. Consequently, the Board held that the "requirement that employees wishing to 'opt out' notify the Respondent or its agents, constituted an unlawful poll of employees in violation of Section 8(a)(1) of the Act." *Id.* at 746.

The Board has similarly held that an employer violates Sections 7 and 8(a)(1) by polling employees as to their voting choices in union representation elections. *See, e.g.*, *Chinese Daily News & Communications Workers of Am.*, 353 NLRB No. 66, 2008 WL 5382359, at *3 (2008) ("an employer's interrogation of an employee concerning how that employee intends to vote, or has voted, in a secret-ballot election violates the Act"); *Gladieux Food Serv., Inc*., 252 NLRB 744, 746 (1980) ("Ortiz' question to Molero asking her how she intended to vote in the forthcoming election constituted an unlawful coercive interrogation."). Indeed, the very purpose of secret ballot elections is to ensure that employees may exercise Section 7 rights without coercion. *Fessler & Bowman, Inc.,* 341 NLRB 932, 933 (2004) ("Board-conducted elections support such a [Section 7] right by providing a forum where employees may freely express their representation choices via secret ballot."); *see also Chinese Daily News*, 2008 WL 5382359, at

*3. 24 Hour Fitness's opt-out procedure, which requires employees to disclose to their employer whether they intend to exercise their Section 7 rights, is coercive on its face. In addition, for the reasons stated below, it is even more coercive as applied.

a. 24 Hour Fitness Did Not Offer Employees Hired Before February 2007 Any Right to Opt Out of the Section 7 Forfeiture

We begin with employees hired by 24 Hour Fitness between 2005 and early 2007. Each of those employees was, and continues to be, bound by the prohibitions in 24 Hour Fitness's Arbitration of Disputes policy. None of them ever had *any* opt-out rights. As 24 Hour Fitness concedes, before 2007 it did not allow any of its employees to opt out of its mandatory individualized arbitration program.[11/] Thus, to the extent 24 Hour Fitness seeks to enforce its agreement against employees who were never given any opt-out option, it has no conceivable Section 8(a)(1) defense.

b. 24 Hour Fitness Offered Only Limited Opt-Out Rights to Employees Hired After 2007

24 Hour Fitness began offering new employees a limited opportunity to "opt out" of its unlawful prohibition against concerted legal actions at some point in 2007. However, the default condition was forfeiture. Any employee who failed to successfully complete the opt-out procedures within 30 days of hiring – for any reason – was permanently prohibited from participating in any class, collective, or representative action or from discussing the pendency of any arbitration with any co-worker.

Even if 24 Hour Fitness had made the opt-out procedure simpler to accomplish, easier to understand, and less inherently coercive in practice, the very act of mandating forfeiture of

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[11/] *See supra* at 4-5. Even after that date, it apparently took several months for 24 Hour Fitness to roll out the new agreement in several locations.

protected rights subject to a condition subsequent would be enough to violate Section 8(a)(1), for the reasons stated above. But the facts show that 24 Hour Fitness's violation was much more egregious, because it imposed substantial additional burdens on its employees' exercise of Section 7 rights at every step of the process. While it is not *necessary* for the ALJ to make specific findings concerning these additional impediments, the practical effect of those hurdles provides further compelling reason why 24 Hour Fitness's 30-day opt-out policy does not provide an adequate defense. Quite simply, 24 Hour Fitness never offered its employees meaningful notice or a meaningful opt-out opportunity, and never took any steps to ensure that its employees' Section 7 rights would be fairly protected.[12/]

24 Hour Fitness intentionally stacked the deck against its employees' ability to regain their Section 7 rights. It did so through a combination of factors, including: 1) by misleadingly describing the arbitration agreement only as "an expeditious and economical way to settle employment disputes without need to go through courts," without explaining what rights were thereby waived or limited (including, in particular, the right to engage in the protected Section 7 activity); 2) by making forfeiture of Section 7 rights the employer-favored default, requiring

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[12/] Of course, no one is ever required to file, or join, a class action, even if they have the right to do so. Under the governing class action rules, moreover, all prospective class members have the right under Rule 23 to opt out of a class action once it has been certified. For these reasons, a worker who wishes not to participate in a class action – like a worker who chooses not to distribute literature, not to discuss his salary with other employees, not to join a union, etc. – can simply decide not to engage in those concerted activities. *See* Fed.R.Civ.Pro. 23(c)(2)(B)(v) and its state law counterparts. Workers may opt out under this Rule without giving any reason – whether they prefer to pursue their claims individually, or in a different forum, or not at all. This guaranteed right to opt out (and, for opt-in "collective actions" under the Fair Labor Standard Act and Age Discrimination in Employment Act, the corresponding right to decline to opt in, *see, e.g.,* 29 U.S.C. §216(b)), fully protects any employee who for any reason does not want to participate in a class action. This established opt-out right also applies at the most meaningful time and in the most meaningful way: post-dispute, after the class has been certified, when the issues have been explained fairly and objectively in a class action notice, under circumstances where the employee is not pressured into making an uninformed decision.

employees to take affirmatively steps to preserve their statutory rights; 3) by limiting the employees' opportunity to regain their Section 7 rights to a limited, 30-day one-time-only period immediately after hire, before most new employees would have any idea what they were waiving and when they had no particular reason to consider the possibility of future workplace disputes that could affect them and their co-workers on a classwide basis; and 4) by requiring employees to undertake a series of steps to effect a valid opt out, including calling a hotline, filling out a form, and then sending that form to the company's human resources department – each of which constitutes an independent disincentive to action.

24 Hour Fitness has never offered any justification for making forfeiture of Section 7 rights the "default" condition for new employees, for making it so difficult for new employees to understand the consequences of not opting out, or for making it so burdensome for new employees to opt out within the 30-day deadline. The company's Custodian of Records stated that 24 Hour Fitness originally required the opt-out form to be sent to a distant Human Relations office to minimize the fear of retaliation if that form had to be submitted to the employee's manager. Tr. at 65:25-67:8. But that does not explain why Section 7 protection was not the default upon inaction, rather than an option requiring completion of a multi-step procedure. The company's supposed concern about triggering a fear of retaliation also does not explain why 24 Hour Fitness forced new employees to make a telephone call to an employee hotline to obtain the opt-out form, rather than providing that form to all new hires in the same packet as their handbook along with every other form they received on their first day of work. It does not justify the company's decision to bury the class action prohibition and non-disclosure policies in dense, technical language in a multi-paragraph Arbitration of Disputes Policy set forth in lengthy employee handbooks. And it certainly does not explain why the company perpetuated its

unlawful policies long after it digitized its hiring process and allowed new hires to opt in and out of all other company policies with a simple click of a mouse without any manager knowing which options they chose. *See* Tr. at 64:4-67:8. None of these supposed justifications can withstand factual scrutiny – because the company's obvious goal was not to protect its workers, but to compel a forfeiture of their core Section 7 right to pursue collective legal activity.[13/]

Once 24 Hour Fitness began using an electronic application process in 2009, it could easily have permitted employees to state their preferences confidentially, without undertaking a multi-step process (although the process would still have been inherently coercive). *See* Tr. 63:5-64:11. As the employees clicked through the various forms, 24 Hour Fitness could have included an electronic check box allowing those employees to opt in or out of the arbitration procedure electronically. Tr. at 64:4-11. Instead, the company required each new employee wanting to opt out to specifically note how to comply with the opt-out procedure, to write down the telephone number needed to obtain a blank opt-out form, to call that number, to receive the form, to fill out that form by hand, and to mail it to either human resources or the company's legal department (depending on which version of the opt-out procedure was then in effect). Tr. at 65:17-68:2.

These procedures impose substantial additional burdens on 24 Hour Fitness's employees' ability to exercise their Section 7 rights. As the social science literature makes clear (and as 24

[13/] As the Board explained in *D.R. Horton*, even if an employer's policy does not on its face prohibit a particular category of protected Section 7 activity (as 24 Hour Fitness's prohibitions do here), it would still violate Section 8(a)(1) if: 1) a reasonable employee would construe it as having that effect; 2) the policy were promulgated in response to protected Section 7 activity (which, in this case, would include the prior class action lawsuits against 24 Hour Fitness that originally gave rise to its individualized arbitration policy, *see supra* at 3-4); or 3) the policy were applied in a manner that restricted the exercise of Section 7 rights (as 24 Hour Fitness plainly has done, both before 2007, Jt. Ex. 2(a), (3)(a), and in a series of state and federal lawsuits since 2007, *see* Jt. Stip. 12-20). *D.R. Horton*, 2012 WL 36274 at *5 (citing *Lutheran Heritage Village-Livonia*, 343 NLRB at 646-47).

Hour Fitness presumably knows based on its own experience with fitness club member "rebate" offers and its other marketing efforts), even when potentially valuable benefits are offered, participation levels are dramatically lower when the benefit cannot be obtained without engaging in some affirmative conduct to claim that benefit.[14/] Moreover, 24 Hour Fitness's stratagem not

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[14/] "The more difficult the opt-out process, the less likely consumers are to avail themselves of it." Sovern, *Opting In, Opting Out*, 74 Wash. L. Rev. 1033, 1087, 1090 (1999) (citation omitted) (requiring consumers who do not wish personal information to be sold "to write to the cable company in a separate letter" does "not provide an easy or convenient mechanism for opting out" and is one reason the opt-out procedure is "ineffective" and "unlikely to reflect consumer preferences accurately"). Social scientists describe a process referred to as "optimistic bias," which leads people to "systematically underestimate risk" and is one of the reasons why few employees starting a new job are likely to exercise an opt-out right concerning how to resolve future workplace disputes. *See, e.g.*, Christine M. Reilly, *Achieving Knowing and Voluntary Consent in Pre-Dispute Mandatory Arbitration Agreements at the Contracting Stage of Employment*, 90 Cal. L. Rev. 1203, 1229 (July 2002) (citations omitted.) The consequence of optimistic bias has been examined in the context of pre-dispute, employer-mandated arbitration agreements like 24 Hour Fitness's:

> Applicants at the contracting stage of employment are not immune from optimistic bias. Few applicants think prospectively about potential conflict before they are employed and few consider the possibility of the relationship going sour, let alone a situation arising that would necessitate taking a dispute to court. Even if applicants did consider this possibility, they would probably dismiss it. . . . The employee is unlikely to properly value the mandatory arbitration clause because he will tend to discount the probability that he will ever engage in a dispute with this employer. . . . Optimistic bias, therefore, significantly impedes an applicant's careful deliberation of a [pre-dispute mandatory arbitration agreement].

Id. (citations and internal quotation marks omitted); *see also* Deborah R. Hensler & Thomas D. Rowe, Jr. *Beyond "It Just Ain't Worth It": Alternative Strategies for Damage Class Action Reform* (Spring 2001) 64 Law & Contemps. Probs. 137, 146-47 (citation omitted); Sovern, *Opting In, Opting Out*, 74 Wash. L. Rev. at 1057, 1069 (although one poll found that "eighty-nine percent of the public is concerned about threats to personal privacy" and another poll found that "ninety-eight percent of respondents believe that their privacy is being substantially threatened by marketers and advertisers," "[c]ommentators estimate that the proportion of consumers who take advantage of opt-outs [to protect personal information] is twenty percent or less") (citing Karlene Lukovitz, *Cashing in on Renting Your List* (Oct. 1985) Folio ("Publishers interviewed by FOLIO uniformly reported that very few readers take advantage of the option to not have their names rented; CBS, for instance, gets such requests from under 2 percent of subscribers."); Laurie Peterson, *The Great Privacy Debate* (Sept. 23,

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only made it procedurally difficult for workers to protect their Section 7 rights, but it also made those rights far less meaningful (itself a violation of Section 8(a)(1) – because if 99+% of the workforce is already prohibited from participating in an employment class action, opting out has no practical value to a new employee).[15/]

In contrast to its opt-out procedure, 24 Hour Fitness imposed no such multi-step process in obtaining the employees' signatures on the Handbook Receipt Acknowledgment form itself, which was a form that it undoubtedly *wanted* its employees to sign. And 24 Hour Fitness reserves to itself the authority to make whatever unilateral changes it wants in that policy (or any other policy set forth in its Handbook) at any later date, without providing further opt-out opportunities. *See, e.g.*, Jt. Exs. 3(a), 4, 5, 6. The only reason 24 Hour Fitness saddles its employees with additional burdens on their exercise of Section 7 rights is to discourage them from exercising those rights.

[14/] (...continued)
1991) ADWEEK – W. Advertising News 24 ("Studies show that when given the choice, fewer than 10% of consumers will ask to receive no more catalogs.").

[15/] Under Federal Rule of Civil Procedure 23(a)(1), an employee seeking to represent a class of similarly situated workers must demonstrate that the potential class of aggrieved workers is sufficiently "numerous" that class treatment would be more efficient than individual litigation. 24 Hour Fitness's forfeiture provisions make it impossible for a new employee to satisfy this threshold numerosity requirement, because they prohibit *all* employees hired before 2007 from participating in class actions, and never let *any* employee hired after 2007 participate in a class action if that employee did not file a timely opt-out at the outset of employment. By prohibiting the vast majority of its employees from participating in concerted legal challenges, 24 Hour Fitness effectively deprives new hires of any meaningful right to engage in concerted legal activities, because that prohibition precludes those employees from satisfying the threshold "numerosity" requirement needed to proceed on a classwide basis. As a result, even assuming there were an entry-level employee sophisticated enough to understood the significance of the class action right (and to anticipate that some day a dispute might arise with 24 Hour Fitness that would also affect similarly situated co-workers), that unusual employee would likely also have realized that the opt out right offered by 24 Hour Fitness was, as a practical matter, meaningless.

Providing new rank-and-file employees with a limited, short-term opportunity to revive their right to engage in concerted activity, in the face of powerful economic and workplace pressure not to assert that right, cannot immunize an employer from Section 8(a)(1) liability. As long as it is reasonably foreseeable that an employee would feel pressured to accept the status quo and not take the affirmative steps required to opt out of its employer's individualized arbitration program, that is enough to constitute a violation of Section 8(a)(1), especially given the Board's "well-established policy against ready inference of waivers of Section 7 rights." *Daniel Constr. Co.*, 239 NLRB 1335, 1335 (1979).

In addition, it appears from the record that 24 Hour Fitness strips all new employees of their Section 7 rights immediately upon the first date of hire, and does not allow them to regain those rights unless and until the employee has successfully completed the multi-step opt-out process. Thus, even if the company's opt-out procedure were otherwise sufficient to avoid Section 8(a)(1) liability, the fact that 24 Hour Fitness deprives *every* employee of their Section 7 rights at the commencement of employment and does not let any of those employees regain the forfeited rights until at least several days have passed, independently constitutes a violation of Section 8(a)(1).[16/]

[16/] 24 Hour Fitness's attorneys disputed this construction of its procedures at trial, contending in their opening argument that the company's "contract" with new employees precludes it from enforcing the mandatory arbitration agreement and class action prohibition against any employee during the first 30 days of employment. Tr. at 23:14-20. That is not what the language of the relevant documents provides. Nor is it likely to be what a reasonable employee reading that language would understand. Nowhere in the application form, Acknowledgment of Receipt form, or Employee Handbook does 24 Hour Fitness state that the provisions of its mandatory arbitration agreement do not go into effect 30 days after the start of employment. Instead, those provisions are all drafted to state that *all* disputes must be arbitrated in accordance with 24 Hour Fitness's rules – not all disputes arising more than 30 days after the start of employment. If the policy meant what 24 Hour contends, surely there would be some indication in the thousands of pages of court documents in the many wage and hour,

(continued...)

Particularly in the employment context, where the pressure to conform to employer preferences is so great and the fear of retaliation or blackballing for not toeing the line is so powerful (as the Board itself recognized in *D.R. Horton*, 2012 WL 36274 at *3 n.5), employees will always feel pressured not to opt out of a default workplace policy, particularly where, as here, the employer touts that policy as mutually beneficial. *See supra* at 7; *see also* Sarah Rudolph Cole, *Incentives and Arbitration: The Case Against Enforcement of Executory Arbitration Agreements Between Employers and Employees*, 64 UMKC L. Rev. 449 (Spring 1996); Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 Wm. & Mary L. Rev. 1 (Oct. 2000). Employer retaliation is a real and serious problem, which has caused Congress and the state legislatures to enact many statutes to protect workers from its consequences.[17/] As the Board and many courts have repeatedly recognized, rank-and-file workers reasonably fear that they will be retaliated against or blackballed if they dare take steps that might be seen as "disloyal" or adversarial or that in any way challenge the employer's prerogatives in the workplace.[18/] To be sure, 24 Hour Fitness

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[16/] (...continued)
discrimination, and other employment-related claims against 24 Hour Fitness (*see* Jt. Stip. 12-20) that any such claims reaching back to an employee's first month of employment could be litigated in court, or pursued in court or arbitration on a concerted action basis. But 24 Hour Fitness has never identified a single case or a single court document carving out the first 30 days of employment from its facially sweeping policy.

[17/] *See, e.g.*, 42 U.S.C. §12203(a) (retaliation after complaints regarding disability discrimination); 29 U.S.C. §215(a)(3) (retaliation for complaints regarding federal wage claims); 29 U.S.C. §623(d) (retaliation for complaints regarding age discrimination); Cal. Labor Code §98.6 (retaliation after employee seeks to recover wages owed); Cal. Labor Code §1102.5 (retaliation after reporting illegal employer conduct); Cal. Labor Code §6310 (retaliation after complaining about workplace safety issues).

[18/] *See, e.g.*, *D.R. Horton,* 2012 WL 36274 at *3 n.5; *Gentry v. Superior Court*, 42 Cal.4th 443, 460 (2007) (collecting cases) ("federal courts have widely recognized that fear of retaliation for individual suits against an employer is a justification for class certification in the (continued...)

informs new hires in the Acknowledgment of Receipt form accompanying the Employee Handbook, that: "I understand that my decision to opt out or not opt out will not be used as a basis for the Company taking any retaliatory action against me." But the convoluted wording of that promise, which is far from an unconditional promise not to engage in retaliation, seems designed to plant the fear of retaliation in an employee's mind rather than to offer clear, unequivocal assurance that there will be no retaliation and that no supervisor or manager will know whether an employee has chosen to participate in the arbitration program or not. More importantly, 24 Hour Fitness *never* promises new employees that they can opt out of the Arbitration of Disputes policy anonymously or that the identity of employees who opt out will be kept confidential – a deliberate omission that only increase the reasonable fear of retaliation. *See*

[18/] (...continued)
arena of employment litigation . . . ."); *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) ("it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions"); Sung Hui Kim, *Ethics in Corporate Representation: The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, 74 Fordham L.Rev. 983, 1024-26 (Dec. 2005) (discussing reasons for employee silence about issues and problems at work, including fear of retaliation or punishment, and fear of being labeled or viewed negatively as a troublemaker or complainer); David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 Comp. Lab. L & Pol'y J. 59, 83 (Fall 2005) (citing studies showing that "being fired is widely perceived to be a consequence of exercising certain workplace rights."); Milliken, Morrison & Hewlin, *An Exploratory Study of Employee Silence: Issues that Employees Don't Communicate Upward and Why,* New York University School of Business (Nov. 4, 2003), http://w4.stern.nyu.edu/emplibrary/Milliken.Frances.pdf (discussing study on employee fear of retaliation or punishment, and employee fear of being labeled or viewed by employer negatively, as reasons for employee not acting on concerns or problems, including disagreement with company policies or decisions); Cynthia Estlund, *Free Speech and Due Process in the Workplace*, 71 Indiana L.J. 101, 120-23 (Winter 1995) (discussing fear of employer retaliation as key reason for workers not reporting wrongdoing); *The Litigation Stigma: Lawsuits Come Back to Haunt*, HR Focus, Vol. 70, No. 2 (February 1993); *see also* Janet M. Bowermaster, *Two (Federal) Wrongs Make a (State) Right: State Class-Action Procedures as an Alternative to the Opt-In Class-Action Provision of the ADEA*, 25 U. Mich. J.L. Reform 7, 29 n.145 (Fall 1991) (citations omitted) (FLSA lawsuits, where workers must take affirmative steps to join class, have reduced class sizes and tend to be brought by former employees rather than current employees, who fear retaliation).

Tr. at 72:12-73:5, 73:24-74:11 (testimony of 24 Hour Fitness's Custodian of Records). All of these factors combine to explain why such a predictably tiny percentage of 24 Hour Fitness employees – roughly one-half of one percent – have ever taken the steps required to regain the rights 24 Hour Fitness compels them to waive as a condition of employment. *See supra* at 12-13.

For all these reasons, 24 Hour Fitness's opt-out option is not sufficient to avoid the Board's holding in *D.R. Horton* that an employer's prohibition against concerted legal action violates Section 8(a)(1). Indeed, the fact that 24 Hour Fitness is involved in so much litigation throughout the country in which it is aggressively seeking to enforce this prohibition against employees who dispute its applicability, enforceability, or the conditions under which it was imposed, *see* Jt. Stip. 12-20, undercuts any suggestion that those employees knowingly and intentionally chose to forfeit their right to join with co-workers in challenging the company's unlawful workplace practices.

III. The Relief Requested by the General Counsel is Both Necessary and Proper

Finally, 24 Hour Fitness challenges the remedy sought in the Acting General Counsel's complaint. *See* Answer, Third Affirmative Defense; Tr. at 7:17-11:11 (Respondent's oral motion to dismiss allegations in Complaint ¶5 and Prayer for Relief). That challenge, however, rests upon a mischaracterization of the relief requested.

The GC's Complaint seeks, among other forms of relief, "an affirmative order requiring Respondent to notify all judicial and arbitral forums, in which it has taken the position that employees are prohibited from pursuing a collective or class action by virtue of the Arbitration Policy, that Respondent no longer opposes the seeking of collective or class action type relief."[19/]

[19/] This is the same relief that the GC is seeking in other post-*D.R. Horton* cases as well. *See, e.g., Convergys Corp*., Consol. Case Nos. 14-CA-075249, 14 CA-083936 (Complaint filed (continued...)

The Complaint does *not* seek an order requiring those courts themselves to do anything, either by reconsidering a prior ruling or issuing a further order. Instead, this relief is directed against 24 Hour Fitness only, and only requires 24 Hour Fitness to provide notice that it will no longer pursue enforcement of its unlawful policy. Certainly, courts have the power to prohibit the enforcement of contractual provisions that violate the NLRA, *see Kaiser Steel Corp.*, 455 U.S. at 83-84, and that violate the Norris-LaGuardia Act, 29 U.S.C. §103. But the GC and Charging Party are not seeking such relief here.

24 Hour Fitness, then, is simply wrong in asserting that the GC's complaint "seeks an order from the ALJ requiring the Respondent to go back to each of those courts [identified in Complaint ¶5] and [have those courts] effectively withdraw [their] enforcement of the arbitration agreement," and the complaint thereby seeks to "require Article III Judges to undo determinations that they've already made with regard to the enforcement of arbitration agreements." Tr. at 7:23-8:8; *see also id*. at 8:22-9:2. As ALJ Schmidt pointed out and the GC confirmed, the Complaint instead seeks the far more limited relief of having 24 Hour Fitness no longer insist on unlawfully prohibiting class and collective workplace actions, and provide notice to the courts with continuing jurisdiction over its pending cases that it no longer opposes having those disputes resolved on a class or collective action basis, if otherwise appropriate under the law. *Id*. at 8:9-16; *see also id*. at 10:25-11:7 (GC's confirmation that ALJ Schmidt correctly construed the relief requested in the GC's Complaint).

This is well within the scope of permissible relief under the NLRA. The Board has "broad discretionary" power to "fashion[] remedies to undo the effects of violations of the Act."

[19/] (...continued)
July 31, 2012).

N.L.R.B. v. Seven-Up Bottling Co. of Miami, 344 U.S. 344, 346-47 (1953). It may order all remedies "necessary 'to dissipate fully the coercive effects of the unfair labor practices found.'" *Federated Logistics & Operations*, 340 NLRB 255, 256 (2003). In order to fully remedy the coercive effects of the unlawful class action bar, 24 Hour Fitness must be ordered to take steps no longer to seek its enforcement.

Even if some courts might choose to reconsider their own prior rulings in light of this remedy, that does not make the remedy impermissibly "retroactive," as 24 Hour Fitness suggests. First, "retroactivity" is not impermissible. "The Board's usual practice is to apply new policies and standards retroactively 'to all pending cases in whatever stage.'" *SNE Enterprises, Inc. & United Steelworkers of Am.*, 344 NLRB 673, 673 (2005). Although there is a narrow exception to this rule in cases in which applying a rule retroactively would cause "manifest injustice," 24 Hour Fitness cannot make any showing that it is manifestly unjust to require it to notify courts that it no longer wishes to enforce an unlawful contract.

Second, neither *D.R. Horton* nor this action applying its reasoning created any new rule of law, and therefore they do not apply any new rule "retroactively." The holding of *D.R. Horton* was "consistent with the well-established interpretation of the NLRA," and was based on the Board's long-held view "that the NLRA protects employees' ability to join together to pursue workplace grievances, including through litigation." 2012 WL 36274 at *2. There is therefore no new rule and no question of retroactivity

Finally, 24 Hour Fitness appears incorrectly to believe that ordering an employer to undo the negative effects of its unlawful actions is impermissible retroactivity. That is not so. As the Board explained in a case in which it ordered an employer to bargain as of the date on which it began to violate the Act rather than just ordering the employer bargain prospectively:

> No element of retroactivity is present in imposing the bargaining obligation as of the time the employer began his subversion of the statute. No new law or rule is being enacted governing conduct or relations previously not subject to the law. Instead, the remedy we impose does no more than reach all the unlawful actions committed, whether early or late in the course of the misconduct. The only element of retroactivity is that the misconduct being remedied occurred prior to issuance of the complaint and our consideration of the case; but this is the situation in every civil or criminal case where a wrong is remedied, for the remedy can be applied only after the wrong has been committed.

Peaker Run Coal Co., 228 NLRB 93, 96 (1977) (quoting *Baker Machine & Gear, Inc*., 220 NLRB 194, 195 (1975)). The requested relief is both appropriate and necessary to undo the severe coercive effects of 24 Hour Fitness's unlawful actions, and should be awarded.

CONCLUSION

For these reasons, Charging Party Sanders and Intervenor SEIU request that the ALJ conclude that 24 Hour Fitness has violated Sections 7 and 8(a)(1) of the NLRA, and order the relief request in the GC's Complaint to remedy those violations.

Dated: September 4, 2012

Respectfully submitted,

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PROOF OF SERVICE

CASE: ***24 Hour Fitness USA, Inc.***

CASE NO: 20-CA-35419

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 177 Post Street, Suite 300, San Francisco, California 94108. On September 4, 2012, I served the following document(s):

JOINT POST-TRIAL BRIEF SUBMITTED BY CHARGING PARTY ALTON J. SANDERS AND INTERVENOR SERVICE EMPLOYEES INTERNATIONAL UNION

on the parties, through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

(A) By First Class Mail: I placed the envelope, sealed and with first-class postage fully prepaid, for collection and mailing following our ordinary business practices. I am readily familiar with the practice of Altshuler Berzon LLP for the collection and processing of correspondence for mailing with the United States Postal Service. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Mail Postal Service in San Francisco, California, for collection and mailing to the office of the addressee on the date shown herein.

(B) By Email: I caused such document(s) to be served via electronic mail on the parties in this action by transmitting true and correct copies to the following email address(es):

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I declare under penalty of perjury that the foregoing is true and correct. Executed this September 4, 2012, at San Francisco, California.

/s/ Jean Perley
Jean Perley