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June 3, 2011

Hon. Lester Heltzer
Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, DC 20570-0001

VIA ELECTRONIC FILING

Re: D.R. Horton, Inc.
Case 12-CA-25764

Dear Mr. Heltzer:

The Board granted Respondent's motion to file a supplemental brief pursuant to *Reliant Energy aka Etiwanda, LLC*, 339 NLRB 66 (2003) on May 20, 2011. Counsel for the Acting General Counsel submits this letter in reply.

Respondent cites the Supreme Court's decision in *AT&T Mobility LCC v. Concepcion*, 563 U.S. ____, 2011 WL 1561956 (2011) in support of its position that its "Mutual Arbitration Agreement" does not violate the National Labor Relations Act (NLRA). However, *AT&T Mobility* involved a conflict between federal and state law in which federal law prevailed under established preemption principles. In contrast, the instant case involves the task of harmonizing two federal statutes, the NLRA and the Federal Arbitration Act (FAA). The Supreme Court has held that where two federal statutes "are capable of co-existence," the correct standard is that both should be given effect "absent a clearly expressed congressional intent to the contrary." *Morton v. Mancari*, 417 U.S. 535, 551 (1974).

Respondent misconstrues the FAA as nullifying the protection that the NLRA has traditionally afforded employees against overbroad employer restrictions that preclude the free exercise of the employees' right to engage in concerted activity for mutual aid and protection. The Acting General Counsel's position properly seeks to harmonize the

principles of the two federal statutes and to give effect to both to the extent possible. Respondent's arbitration agreement is overbroad because it fails to take into account that the rights to file and pursue unfair labor practice charges with the Board, and to concertedly file a class, collective or joint action lawsuit or arbitration claim, are protected under the NLRA. Fairly read, the agreement conditions employment on the employees' waiving of their Section 7 rights to file or pursue charges with the Board, and to join with other employees to file a class, collective or joint action lawsuit or arbitration claim without fear of being discharged or disciplined, in violation of Section 8(a)(1) and (4) of the NLRA.

Counsels for the Acting General Counsel respectfully urge the Board to reject the arguments in Respondent's supplemental brief.

Respectfully submitted,

/s/ John F. King

/s/ David Cohen

Counsels for the Acting General Counsel

cc:

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