UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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| D.R. HORTON, INC. | ) | |
| | ) | |
| And | ) | Case No. 12-CA-25764 |
| | ) | |
| MICHAEL CADA, an individual | ) | |
| | ) | |

**BRIEF FOR *AMICUS CURIAE***
**NATIONAL RETAIL FEDERATION**
**IN SUPPORT OF D.R. HORTON, INC.**

July 20, 2011

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## INTEREST OF AMICUS CURIAE

As the world's largest retail trade association and the voice of retail worldwide, National Retail Federation's ("NRF") global membership includes retailers of all sizes, formats and channels of distribution as well as chain restaurants and industry partners from the United States and more than 45 countries abroad. In the U.S., NRF represents an industry that includes more than 3.6 million establishments and which directly and indirectly accounts for 42 million jobs – one in four U.S. jobs. The total U.S. GDP impact of retail is $2.5 trillion annually, and retail is a daily barometer of the health of the nation's economy.

The NRF has an interest in this action because it concerns issues of great significance to its membership and the retail industry as a whole, namely whether the National Labor Relations Board will honor an agreement between an employer and an employee in which the parties agree to submit all disputes to individual arbitration and waive any right to pursue claims on a class basis.

The NRF submits this brief in response to the NLRB's invitation to interested parties to do so. D.R. Horton, Inc., the Respondent herein, is not a member of the NRF.

## INTRODUCTION

On June 16, 2010, the National Labor Relations Board (the "Board" or "NLRB") invited the filing of amicus briefs addressing the following:

> Did the Respondent violate Section 8(a)(1) of the Act by maintaining and enforcing its Mutual Arbitration Agreement, under which employees are required, as a condition of employment, to agree to submit all employment disputes to individual arbitration, waiving all rights to a judicial forum, where the arbitration agreement further provides that arbitrators will have no authority to consolidate claims or to fashion a proceeding as a class or collective action?

The NRF is particularly well positioned to address these questions because many retailers have implemented arbitration programs in recent years as a means of resolving employment

disputes in a quicker, less expensive way than in protracted litigation in court. These arbitration programs provide alternative dispute resolution mechanisms which are fair, balanced and protective of employee rights. Arbitration is well-suited to resolving individual employment disputes and the process benefits both the employee and the employer.

As is set forth more fully below, the NRF asserts that the Act does not prohibit the waiver of the right to engage in class actions, either in court or in arbitration, and urges the Board to find that such agreements do not violate Section 8(a)(1) of the Act.

I. *Arbitration Agreements are Enforceable Under the Federal Arbitration Act.*

The Federal Arbitration Act, 9 U.S.C. Sec. 1 *et seq.,* was enacted in 1925 and reenacted and codified by Congress in 1947. Section 2 of the Act provides in pertinent part:

> A written provision in any ...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. (emphasis supplied).

As noted by the Supreme Court, the Federal Arbitration Act ("FAA") was enacted in response to widespread hostility to arbitration agreements. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011). The Court has noted that the FAA reflects a liberal federal policy favoring arbitration. *Moses H. Cone Memorial Hospital v. Mercury Construction Center*, 460 U.S. 1, 24 (1983); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991). In line with this policy, the Court has cautioned that questions of arbitrability must be addressed with "...a healthy regard for the federal policy favoring arbitration." *Gilmer*, 500 U.S. at 26.

Under the FAA, arbitration agreements may be invalidated by generally applicable contract defenses such as fraud, duress or unconscionability. *AT&T Mobility LLC*, 131 S. Ct. at 1746. Thus, contract law principles relating to adhesion contracts, contract formation, consideration and the like may be considered in determining whether a valid agreement exists.

Once it has been determined that a valid arbitration agreement exists, however, it is incumbent upon the courts to honor those agreements and to enforce the principal purpose of the FAA—to insure that private arbitration agreements are enforced according to their terms. *Id.* at 1745. *See also Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1773 (2010).

## II. *The Federal Policy in Favor of Arbitration is Equally Applicable to Statutory Claims in the Employment Context*

In recent years, the Supreme Court and other courts have made it clear that the federal policy favoring arbitration applies not only to disputes involving contractual terms. These courts have held that arbitration is equally well-suited, and thus favored, for the resolution of disputes involving statutory claims in the employment context. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626-28 (1985).

In *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), the Supreme Court addressed the specific issue of whether a claim under the Age Discrimination in Employment Act (ADEA) can be subjected to mandatory arbitration pursuant to an arbitration agreement found in an individual's securities registration application. In that case, Gilmer was hired by Interstate as a Manager of Financial Services. He registered as a securities representative with various stock exchanges. As required by the exchanges, his registration application stated that Gilmer was required to arbitrate any dispute, claim or controversy arising between him and his employer, including any dispute arising out of his employment or the termination of his employment.

Interstate terminated Gilmer's employment in 1987 when he was 62 years of age. He first filed a claim of age discrimination with the EEOC and thereafter brought suit in federal court, claiming that his termination was based upon his age in violation of the ADEA. In the district court, Interstate filed a motion to dismiss his complaint based upon the arbitration

agreement in Gilmer's registration application. The district court denied the motion; however, on appeal, the Fourth Circuit reversed, noting that there was "...nothing in the text, legislative history, or underlying purposes of the ADEA indicating a congressional intent to preclude enforcement of arbitration agreements." *Gilmer*, 500 U.S. at 24. The Supreme Court granted certiorari to resolve a split among the Circuits.

The Court first noted that it had in prior cases held that statutory claims may be subject to arbitration agreements, and that such agreements were enforceable under the FAA. It reviewed cases in which it had held that claims under statutes such as the Sherman Act, the Securities Exchange Act of 1934 and the Racketeer Influenced and Corrupt Organizations Act (RICO) were subject to enforceable arbitration agreements. *Id.* at 26. In those cases, the Court recognized that by "agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Mitsubishi Motors Corp.*, 473 U.S. at 628.

In spite of these holdings, Gilmer argued that compulsory arbitration of ADEA claims would be inconsistent with the purposes of the Act. The Court disagreed. It stated:

> [H]aving made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue. In this regard, we note that the burden is on Gilmer to show that Congress intended to preclude a waiver of a judicial forum for the ADEA claims. If such an intention exists, it will be discoverable in the text of the ADEA, its legislative history, or an "inherent conflict" between arbitration and the ADEA's underlying purposes. Throughout such inquiry, it should be kept in mind that "questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration. *Gilmer*, 520 U.S. at 26. (internal citations omitted).

The Court rejected additional claims made by Gilmer that arbitration of ADEA claims was inappropriate due to perceived deficiencies in the arbitral process (e.g., arbitrators are biased, discovery is limited, etc.). In doing so, the Court stated that "...in our recent arbitration

cases, we have already rejected most of these arguments as insufficient to preclude arbitration of statutory claims. Such generalized attacks 'res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants', and as such, they are 'far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes.'" *Id.* at 30. (citation omitted).

In a more recent case, the Supreme Court held that its earlier holding in *Gilmer* that ADEA statutory claims could be subject to mandatory arbitration applied equally as well in the collective bargaining context. *14 Penn Plaza LLC v. Pyett*, 129 S. Ct. 1456, 1465 (2009). Again relying on the strong federal policy favoring arbitration, the Court held in *Pyett* that a negotiated provision in a collective bargaining agreement requiring covered employees to arbitrate rather than litigate ADEA claims was fully enforceable as a matter of federal law, and that individuals covered by the labor agreement were barred from pursuing such claims in a judicial forum.

III. *Pursuant to the FAA's Mandate that Arbitration Agreements are to be Enforced According to Their Terms, Class Action Waivers are Enforceable.*

As noted, the Supreme Court has consistently held that the FAA requires that arbitration agreements are to be enforced according to their terms, and that federal policy favors arbitration. *Stolt-Nielsen S.A.*, 130 S. Ct. at 1773; *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2776 (2010). Against this backdrop, it is clear that class action waivers contained in arbitration agreements should be upheld.

The Supreme Court has recently weighed in on this very issue. *See AT&T Mobility v. Concepcion*, 130 S. Ct. 1740 (2011). There, the contract between the Concepcions and AT&T required arbitration of all disputes between the parties, but barred the use of classwide arbitration. The Concepcions filed suit in federal court after they were charged sales tax on the retail value of free phones provided by AT&T. Their suit was consolidated with a class action

alleging that AT&T had engaged in fraud and false advertising by charging sales tax on phones that were "free". AT&T moved to compel arbitration under its contract with the Concepcions, but the district court held that the unavailability of classwide arbitration rendered the contract unconscionable under California law and thus unenforceable under the FAA. On appeal, the Ninth Circuit affirmed.

The Supreme Court disagreed and reversed the Ninth Circuit. It again noted that the purpose of the FAA is to ensure that private arbitration agreements are enforced as written so as to facilitate streamlined proceedings. It found that requiring classwide arbitration where the parties have agreed to bilateral arbitration "interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." *AT&T Mobility LLC*, 131 S. Ct. at 1748. It again reinforced the principle that "(a)rbitration is a matter of contract, and the FAA requires courts to honor parties' expectations." *Id.* at 1752 (citing *Rent-A-Center West*, 130 S. Ct. at 2774). Accordingly, the Court found that the California law was preempted by the FAA because it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and held that the class action waiver was enforceable as written. 563 U.S. at ____.

Although the Supreme Court has not yet had occasion to address class action waivers in arbitration agreements in a case in which statutory rights are involved, lower courts have done so. These courts have consistently held that class action waivers in arbitration agreements are enforceable even where statutory rights are implicated.

For example, in *Adkins v. Labor Ready*, 303 F.3d 496 (4th Cir. 2002), plaintiff entered into an arbitration agreement with his employer that required him to arbitrate individually all employment-related disputes with his employer. Despite this agreement, plaintiff sued his employer in federal court in a putative class/collective action alleging unpaid overtime under the

Fair Labor Standards Act (FLSA) and applicable state law. After the district court granted the employer's motion to compel individual arbitration, the plaintiff appealed. Noting that the plaintiff pointed to "no suggestion in the text, legislative history, or purpose of the FLSA that Congress intended to confer a nonwaivable right" to a class action, the Fourth Circuit affirmed. *Id.* at 503. Notably, the Court went on to hold that the plaintiff's inability as a result of the arbitration agreement to bring a class action "cannot, by itself, suffice to defeat the strong congressional preference for an arbitral forum." *Id.*

A similar result was reached in *Carter v. Countrywide Credit Indus.*, 362 F.3d 294 (5th Cir. 2004). There, plaintiffs claimed that the arbitration agreements they had signed with their employer were unenforceable since the agreements did not provide for class-based arbitration, and plaintiffs attempted to bring a FLSA collective action. Both the district court and the Fifth Circuit rejected the plaintiffs' arguments and enforced the arbitration agreements as written. The Fifth Circuit reasoned that the opportunity to seek collective action certification is not a substantive right guaranteed by the FLSA. *Id.* at 298; *see also Horenstein v. Mortgage Mkt., Inc.,* 9 Fed. Appx at 619, 2001 WL 502010, at *1 (9th Cir. May 10, 2001) (although plaintiffs who sign arbitration agreements give up the procedural right to proceed as a class, they nonetheless "retain all substantive rights" under the statute in question) (citing *Johnson v. West Suburban Bank,* 225 F.3d 366, 373 (3rd Cir. 2000)).

It is noteworthy that the above cases involved statutory rights under the FLSA, a law which like the ADEA analyzed in *Gilmer,* specifically envisions class/collective actions as part of their remedial scheme. But the courts in the cases noted above still faithfully followed the Supreme Court's admonition that the FAA requires that arbitration agreements must be enforced

according to their terms (*AT&T Mobility LLC*, 130 S. Ct. at 1773) and honored the class action waivers found in those agreements.

Thus, unless there is something in the text, legislative history or purpose of a specific statute that Congress intended to confer a nonwaivable right to a class action, the FAA requires that class waivers in arbitration agreements be enforced. *Adkins*, 303 F.3d at 503. As the following portions of this brief will discuss, there is nothing in the text, legislative history or the purpose of the National Labor Relations Act to suggest that Congress intended for Section 7 of the NLRA to prevent the waiver of class actions in arbitration agreements.

## IV. *If Filing a Class Action is Protected Activity, Nothing in the Act Prohibits Waiver of Such a Right*

The Supreme Court has never held that the filing of a class action to protect statutory rights other than those contained in the NLRA is protected concerted activity under Section 7 of the Act. In *Eastex v. NLRB*, 437 U.S. 556, 565-66 (1978), the Court held only that employees' desire to distribute a newsletter in the plant during nonworking time was protected activity, ruling that the "mutual aid and protection" clause encompasses situations in which employees seek to improve their working conditions through administrative or judicial forums. Clearly, the *Eastex* case did not involve employees who sought to file a class action; the decision stands only for the proposition that employees may not be retaliated against for engaging in concerted activity for the purpose of mutual aid and protection. The NRF submits that the individual agreement to submit disputes to arbitration and waive the possibility of participation in class or collective actions simply does not involve protected concerted activity.

In the years since the *Eastex* decision, no federal court has held that the NLRA provides a fundamental right to file a class action at all, let alone a nonwaivable right[1]. Some courts have held, not surprisingly, that employees who file lawsuits seeking to correct conditions in the workplace are engaged in protected concerted activity and may not be retaliated against for their actions (*Mohave Elec. Co-op, Inc. v. NLRB,* 206 F.3d 1183 (D.C. Cir. 2000); *Leviton Mfg. Co. Inc. v. NLRB,* 486 F.2d 686 (1st Cir. 1973) but those decisions do not deal with class actions and do not find any fundamental unwaivable right to proceed as a class to be protected by the NLRA. The one court which has faced the issue directly has found that the employer's enforcement of its mandatory arbitration policy in the face of a purported FLSA collective action was proper and did not violate Section 7 or Section 8(a)(1) of the NLRA. *Webster v. Perales*, No. 3:07-CV-00919, 2008 WL 282305, at *4 (N.D. Tex. Feb. 1, 2008).

The Counsel for the Acting General Counsel's brief in support of its exceptions in this case asserts that the NLRB has "consistently" found the filing of a class action to be protected concerted activity. However, a careful examination of those decisions reveals that they, too, are based either on the concept of protection of individuals from retaliation or protection of a union's right to organize, not some fundamental unwaivable right to proceed as a class in matters unrelated to the Act. *See, for example, Trinity Trucking & Materials Corp.*, 221 NLRB 364 (1975), *enf. mem.* 567 F.2d 391 (7th Cir. 1977*), cert. den.* 438 U.S. 914 (1978) [employer could not discharge employees because they filed lawsuit seeking punitive damages]; *Novotel New*

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[1] Indeed, such a proposition would seemingly be put to rest by the Supreme Court's *Pyett* decision, *supra*, in which the Court held that employees could be bound by their union's agreement to arbitrate their statutory claims. The Court found no violation of the NLRA in the union's waiver of its members' rights to litigate their statutory claims. If the NLRA does not prohibit waiver of the right to go to court with substantive statutory claims, it cannot reasonably be construed to prohibit waiver of procedural issues like class certification.

*York*, 321 NLRB 624 (1996) [union funding of FLSA collective action lawsuit not a violation of NLRA].

The difference is more than semantics. The NRF does not suggest that employees may be retaliated against for engaging in concerted activity. Nor does the NRF suggest that arbitration agreements can prohibit employees from filing charges at the NLRB. Rather, the NRF suggests that, as required by the Supreme Court's decision in *Gilmer*, employees who have agreed to an arbitration provision which includes a class action waiver should be bound to their bargain. As then General Counsel Meisburg concluded in his GC Memorandum 10-06, issued on June 16, 2010, employees are free to agree that they will arbitrate their non-NLRA statutory employment claims and such agreements do not violate the Act:

> No merit was found in arguments that, while a *Gilmer* forum waiver alone may not raise Section 7 issues, an employer's demand that employees agree not to institute a class action to further his or her individual claims does implicate Section 7, because filing a class action is inherently concerted activity on behalf of others. It was concluded that an individual's pursuing class action litigation for purely personal reasons is not protected by Section 7 merely because of the incidental involvement of other employees as a result of normal class action procedures. Similarly, an individual employee's agreement not to utilize class action procedures in pursuit of purely personal individual claims does not involve a waiver of any Section 7 right....So expanding the concept of "concerted activity" would also have the effect of overturning cases such as *Carter v. Countrywide Credit Industries, Inc.*, 362 F. 3d 294, 298 (5th Cir. 2004), thereby disserving the Congressional objectives that have been recognized in *Gilmer* and its progeny. Memorandum GC-10-06, page 6.

General Counsel Meisburg's conclusion was the correct one and should be followed by the Board here. The Supreme Court's recent decisions in *Stolt-Nielsen, supra* and *AT&T Mobility LLC, supra,* show strong support for the principle that arbitration is a favored remedy and that the FAA trumps attempts to eviscerate arbitration agreements.[2] The Board need not

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[2] The Wagner Act, enacted in 1935, granted Section 7 rights to employees for the first time. As noted, the Federal Arbitration Act was initially passed in 1925 and then codified and reenacted in 1947. That same year, Congress passed the Taft-Hartley Act which, among other

ignore the Court's clear direction in a misguided attempt to protect Section 7 rights. Those rights are not harmed by arbitration agreements which contain class action waivers. Employees who have agreed to arbitrate their disputes with their employers have several avenues through which to vindicate their rights. First, of course, they can arbitrate the claim, which will gain resolution more quickly and less expensively than through court action. Indeed, many employment arbitration agreements provide that the employer bears the brunt of the administrative expenses of the arbitration and the employee has whatever rights exist under the statute being invoked for recoupment of attorneys' fees and costs. Secondly, employees always have the right to seek assistance of the appropriate government agency to remedy violations of the law regardless of their agreement to arbitrate their individual claims. For example, the EEOC, OSHA, DOL, OFCCP and comparable state and local agencies can and do investigate and prosecute violations of the employment statutes they enforce. There may be no better protection for employee rights since those agencies are concerned with public policy, not the aggrandizement of attorneys' fees often sought by class counsel. Thirdly, nothing in a class action waiver agreement has any negative effect on employees' freedom to speak with each other. The arbitration agreement limits only how and before whom claims can be brought, an agreement the Supreme Court has said must be honored. There is no basis, under the NLRA or public policy, for the NLRB to

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things, amended Section 7 by granting employees the right to refrain from exercising the rights afforded to them under this section. If Congress had intended to exempt Section 7 rights from the coverage of the FAA, or to give Section 7 rights priority over the application of the FAA, or to confer a nonwaivable right to class actions in the context of Section 7 rights, it easily could have done so at this time. The fact that Congress did not so act raises the presumption that it did not intend to grant Section 7 rights any greater status than other statutory rights. *Gilmer*, 500 U.S. at 29 ("Congress, however, did not explicitly preclude arbitration or other nonjudicial resolution of claims, even in its recent amendments to the ADEA.")

reject class action waivers out of hand and the NRF submits that it would be inappropriate for the Board to do so.

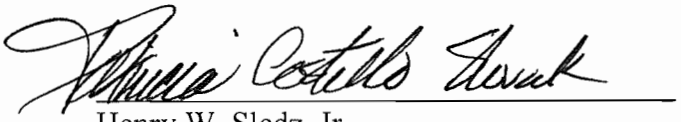
## CONCLUSION

For all of the reasons set forth here, the NRF urges the Board to conclude that the enforcement of a mutual arbitration agreement which contains a class action waiver does not violate the Act.

Respectfully submitted,

NATIONAL RETAIL FEDERATION

By its counsel:



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