UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

D.R. HORTON, INC.	)	
and	)	**Case 12-CA-25764**
MICHAEL CUDA, an Individual	)	

RESPONDENT'S ANSWERING BRIEF TO BRIEFS OF *AMICI CURIAE* SPIRO MOSS LLP, PUBLIC JUSTICE, P.C., NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, *ET AL.*, CHANGE TO WIN, AND AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

D.R. Horton, Inc. ("Respondent" or "Company"), files this answering brief responding to the briefs of *amici curiae* Spiro Moss LLP ("Spiro Moss"),[1] Public Justice, P.C., National Employment Lawyers Association, *et al.* ("Public Justice"), Change to Win, and the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO") (collectively "*Amici*") who submitted their briefs pursuant to the Board's invitation to address the following issue:

> 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?

[1] References to the *amicus* briefs filed by Spiro Moss, Public Justice, Change to Win, and AFL-CIO, will hereinafter be noted as "SM Br.", "PJ Br.", "CTW Br." and "AFL. Br.", respectively, followed by the appropriate corresponding page number.

ALJ Cates refused to find that the Company violated Section 8(a)(1) of the Act by maintaining and enforcing its Mutual Arbitration Agreement that is the subject of the Board's inquiry. The Company reasserts fully the facts and authorities it has previously presented in its earlier submissions in this case.

I. The *Amici* Mischaracterize the Scope of the Mutual Arbitration Agreement

The arguments of Spiro Moss, Public Justice, Change to Win, and AFL-CIO are similar to aspects of both the General Counsel's argument and the SEIU's (*amici*) previous argument insofar as they entirely mischaracterize the scope of the Mutual Arbitration Agreement. Their arguments are broadly based on the flawed premise that the Mutual Arbitration Agreement expressly prohibits protected activity. This is simply not the case.

It cannot be disputed that the Company's Mutual Arbitration Agreement does not violate Section 7 of the Act insofar as it requires employees to arbitrate workplace-related claims rather than litigating such claims in a judicial forum. However, because the agreement provides that arbitrators have no authority to consolidate claims or to fashion an arbitration proceeding as a class or collective action, the *Amici* assert that the Mutual Arbitration Agreement infringes upon employees' Section 7 rights.

The *Amici* argue that the Mutual Arbitration Agreement "prevent[s]," "prohibits," "strips," and/or forces employees to "forego" their right to engage in protected concerted activity. (SM Br. 6; PJ Br. 2; CTW Br. 1 & 3; AFL Br. 4). Spiro Moss argues that the agreement would "prevent employees from engaging in concerted activity to improve their wages and/or working conditions" and therefore "such an arbitration agreement or clause is unlawful, it is void and unenforceable by any court" because it would interfere with the "broad rights conferred by Section 7" and Section 8(a)(1) of the Act. (SM Br. 6). Similarly, Public Justice argues that "D.R. Horton's Mutual Arbitration Agreement "strips its workers of their well-established rights under

section 7 of the NLRA to bring joint, collective, and class legal actions for their mutual aid and protection." (PJ Br. 2) Change to Win argues that D.R. Horton violated the Act by "implementing a workplace policy that prohibits employees from pursuing any employment action in any forum on a class, collective, or joint action basis" (CTW Br. 1 & 3) and AFL-CIO argues that the Mutual Arbitration Agreement "cause[s] the employees to forego...substantive rights" provided under section 7 (AFL Br. 4). These overstatements lack merit.

Nowhere in the Mutual Arbitration Agreement does it prohibit employees, expressly or otherwise, from joining together or otherwise conferring with each other to bring workplace claims against the Company in arbitration.[2] For example, employees are completely unhampered by the agreement from deciding amongst themselves to each bring individual claims against the Company for the same alleged workplace wrongs that affect each of them. Indeed, as we have pointed out before, the facts of this case establish that employees appear to have done precisely that by hiring the same attorney to bring alleged Fair Labor Standard Act claims for unpaid overtime on behalf of a number of similarly situated individuals. The Company could not and did not object to such collaboration.

The Company firmly reasserts that all the agreement restricts, and all that the Company opposed in arbitration, is the procedural device of a class or collective action to resolve those claims. That restriction is expressed, not as a limitation on the right of employees to confer and decide to bring claims *en masse* against the Company, but rather as a limitation on the power of the arbitrator to entertain and rule on a class or collective basis. This is a far cry from "prevent[ing]," "prohibit[ing]," "strip[ping]," and/or forc[ing] employees to "forego" their right

[2] As one ALJ stated, "Section 7 does not provide a right to select any particular forum to concertedly engage in activities for mutual aid or protection. What the Act does provide is for employees to be free from discrimination because they engage in certain concerted activity, such as filing a lawsuit." *O'Charley's Inc.*, 2001 WL 1155416 (N.L.R.B. Div. Judges 2001) citing *Trinity Trucking & Materials Corp.*, 221 N.L.R.B. 364, 364-365 (1975).

to engage in protected concerted activity. (SM Br. 6; PJ Br. 2; CTW Br. 1 & 3; AFL Br. 4).

The distinction between prohibiting class or collective actions as a procedural device and prohibiting collaboration or cooperation in fact is crucial to this case and a proper analysis of applicable legal precedents. Although the Board has certainly held on many occasions that bringing a class or collective action against an employer by employees is protected concerted activity under Section 7, and that employees cannot be discharged or otherwise retaliated against for bringing such a suit, this is not the same as guaranteeing that employees can always move forward in any forum and assert collective, class or joint claims or that the employer is legally prohibited from objecting to the suit either because joinder of claims does not satisfy legal prerequisites or because the suit is barred by an independent agreement between the employer and its employees which precludes collective, class or joinder of claims. In this way, the right to maintain a class or collective action or to join claims is not a core Section 7 substantive right as is repeatedly argued by Public Justice (PJ Br. 2, 3, 8, 9, 10, 11), Change to Win (CTW Br. 11 &12), and AFL-CIO (AFL Br. 4 & 5). The right at issue, rather, is only the right to attempt such an action without adverse impact on the employee's employment. Again, no such adverse impact has occurred here, as Respondent's briefs point out.

II. Any Argument Regarding the Inherent Conflict Between the FAA and the NLRA Favors the Respondent

The arguments set forth by the General Counsel and the *Amici* improperly conflict with the Federal Arbitration Act ("FAA"). The plain text of Section 2 of the FAA clearly states that any contract agreeing to arbitration[3] "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Respondent

[3] Although Change to Win attempts to downplay the "weight" of the FAA by mentioning that the statute includes certain exclusions for arbitration contracts in other industries, Respondent notes that those exclusions clearly do not apply to the facts of this case. *See* (CTW Br. 17).

cited the Supreme Court's recent decision in *AT&T Mobility LLC v. Conception*, 131 S.Ct. 1740 (2011) to highlight the Court's interpretation of the FAA's impact on a conflicting law's attempt to invalidate an otherwise lawfully executed arbitration agreement because it did not allow for the arbitration of class or collective claims. Citing the "national policy favoring arbitration" and the "liberal federal policy favoring arbitration," the Court, consistent with its earlier rulings, states that arbitration is "a matter of contract" and the "FAA requires courts to honor parties' expectations" only as expressed in those contracts, and that any interference with those interpretations would be unlawful. *Id.* at 1749-1753.

Change to Win (along with other *amici*) attempts to distinguish *AT&T Mobility LLC v. Conception* from the current facts simply because it "was a consumer case, not an employment case." (CTW Br. 8). However, the Court in *AT&T Mobility LLC v. Conception* addressed the issues surrounding the interpretation of arbitration agreements pursuant to the FAA in general, non-specific terms and not limited to consumer cases. In fact, the Court stated in the most general sense:

> The overarching purpose of the FAA, evident in the text of §§2, 3, and 4, is to ensure the enforcement of arbitration and agreements according to their terms so as to facilitate streamlined proceedings. ***Requiring the availability of classwide arbitration interferes with the fundamental attributes of the arbitration and thus creates a scheme inconsistent with the FAA.***

Id. at 1748 (emphasis added).

This portion of the Court's decision clearly speaks <u>directly</u> to the issues at the heart of the instant matter and nothing therein signals that the Court intended its decision to be narrowly applied

only to the facts of the *AT&T Mobility LLC v. Conception* case or that arbitration agreements in the employment context should be excluded from its holding.[4]

Therefore, Respondent fully reasserts that the General Counsel and *Amici*'s arguments and the urged result, i.e., that Respondent be required by the Board to rescind its Mutual Arbitration Agreement and void all such contractual agreements duly and lawfully entered into between Respondent and its employees, would be in direct conflict with the FAA. To that end, the Board need only rely on the binding precedent of the Supreme Court to settle this conflict, and not the theoretical statutory interpretation principles cited by Change to Win. The Supreme Court held in *Hoffman Plastic Compounds, Inc. v. NLRB*, 553 U.S. 137 (2002), that since its decision in *Southern S.S. Co. v. NLRB*, 316 U.S. 31 (1942), the Court has "never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA." The *Hoffman Plastic* decision goes on to state that the Court has "precluded the Board from enforcing orders found in conflict with the Bankruptcy Code....rejected claims that federal antitrust policy should defer to the NLRA....precluded the Board from selecting remedies pursuant to its own interpretation of the Interstate Commerce Act[5]....[and] prohibited [the Board] from [fashioning a remedy] effectively rewarding a violation of the immigration laws." *Id.* at 144 *citing NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 532-534 (1984); *Connell Constr. Co. v. Plumbers*, 421 U.S. 616, 626 (1975); *Carpenters v. NLRB*, 357 U.S. 93, 108-110 (1958); *Sur-Tan, Inc. v. NLRB*, 467 U.S. 883, 903 (1984). *See also Southern*

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[4] Moreover, Public Justice's citation of a lone case from the Southern District of New York, *Chen-Oster v. Goldman Sachs & Co.*, ---F. Supp. 2d --, 2011 WL 1795297 (July 7, 2011), for the proposition that the *AT&T Mobility LLC v. Conception* decision would have "no bearing on whether an arbitration agreement is void under the federal common law where it deprives employees of a substantive federal statutory right" carries little weight because the case was limited to the facts of that case and then-controlling law in the Second Circuit, which the court noted could be impacted by *AT&T Mobility LLC v. Conception* and subsequent decisions within the Second Circuit.

[5] It is worth noting that the NLRA's later enactment (1935) than the Interstate Commerce Act (1887) did not create "implied repeal" of those portions of the Interstate Commerce Act that were in conflict with the NLRA as would be urged by Change to Win (CTW Br. 10).

S.S. Co. v. NLRB, 316 31 (1942) (court rejected Board's order reinstating employees who engaged in a strike onboard a ship when the activity amounted to mutiny in violation of federal statutes). Through these decisions the Supreme Court has clearly signaled its disapproval of Board remedies that impinge on other federal policies not dealing with the NLRA. There is nothing to suggest that the arguments of the General Counsel and *Amici* would be received more favorably by the Court. No conflict should exist.

III. Spiro Moss' Arguments on Void Contracts and Preemption Do Not Apply

Spiro Moss goes to great lengths in its brief to characterize the Mutual Arbitration Agreement as an inherently void instrument according to "federal common law" and opines that that the NLRB's jurisdiction would not be jeopardized if a court refused to enforce the Mutual Arbitration Agreement. (SM Br. 10-17). However, their argument effectively places the ability to effectuate a remedy with the federal courts and outside the remedial authority of the Board. Therefore, Spiro Moss' arguments go beyond the scope of the Board's invitation for briefs. Accordingly, Respondent will not address these issues but reserves any right to address them in the future should it become necessary.

IV. Conclusion

For the reasons set forth herein and in the Company's other briefs on file in this case, the General Counsel's exceptions to the ALJ's decision should be found without merit.

Respectfully submitted,

/s/

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CERTIFICATE OF SERVICE

I certify that the foregoing Respondent's Answering Brief in Response to Brief of *amici* Spiro Moss LLP, Public Justice, P.C., National Employment Lawyers Association *et. al.*, Change to Win, and American Federation of Labor and Congress of Industrial Organizations was served on August 24, 2011 by electronic mail on the following:

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