

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 30

WATERSTONE MORTGAGE CORPORATION

and

Case 30-CA-073190

PAMELA E. HERRINGTON, AN INDIVIDUAL

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BRIEF TO THE NATIONAL LABOR RELATIONS BOARD**

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I. INTRODUCTION

This case is before the National Labor Relations Board¹ upon a stipulated factual record which includes the Acting General Counsel's Amended Complaint. (Jt. Ex. H.) The Amended Complaint alleges that Waterstone Mortgage Corporation ("Respondent") violated Section 8(a)(1) of the National Labor Relations Act ("Act" or "NLRA"), as amended, 29 U.S.C. § 151 et. seq., by, as of April 7, 2011, maintaining and enforcing, as a condition of employment, an individual arbitration provision ("individual arbitration provision") in its employee handbooks that require employees to forego the resolution of employment-related disputes by collective or class action.

The Amended Complaint further alleges that Respondent violated Section 8(a)(1) of the Act by, as of July 23, 2012, maintaining and enforcing, as a condition of employment, a revised arbitration policy that would supplant the previous individual arbitration provision by requiring employees to choose to adhere to one of two options, Option A or Option B (collectively "Options"). The Options, when taken together, prospectively limit employees' rights to engage in protected concerted activity by permitting employees to opt-out of pursuing prospective employment-related class action litigation in both the arbitral and judicial fora.

The instant case is governed by the Board's recent decision in *D.R. Horton, Inc.*, 357 NLRB No. 184 (Jan. 3, 2012).² In *D.R. Horton*, the Board held that a policy or agreement that is imposed as a condition of employment and that precludes employees from pursuing

¹ The National Labor Relations Board will be herein referred to as the "Board." All references to the Stipulated Record are noted by "Stip. R. at ___", followed by the paragraph number(s). All references to the Joint Exhibits are noted as "Jt. Ex. ___," followed by the exhibit number(s).

² All citations to *D.R. Horton* herein rely on the slip opinion released by the Board on its website.

employment-related collective claims in any court or arbitral forum unlawfully restricts employees' Section 7 right to engage in protected concerted activity. Such policies therefore violate Section 8(a)(1) of the Act.

As in *D.R. Horton*, Respondent's individual arbitration provision violates Section 8(a)(1) of the Act because it prohibits employment-related collective dispute resolution in any forum. It is undisputed that, on about April 7, 2011, Respondent required, as a condition of employment, that all employees, including the Charging Party, Pamela Herrington ("Charging Party"), enter into employment agreements containing a mandatory individual arbitration provision. In addition to prohibiting employees from filing legal claims in the judicial forum entirely, the individual arbitration provision prohibited joint, collective or class action in the arbitral forum. This is a clear limitation on employees' rights to engage in Section 7 activity in violation of Section 8(a)(1) of the Act, as the Board held in *D.R. Horton*.

On November 28, 2011, the Charging Party filed a class action lawsuit in the United States District Court for the Western District of Wisconsin. Respondent thereafter moved to dismiss or alternatively to compel arbitration. The Honorable District Court Judge Barbara B. Crabb agreed with the Charging Party that the arbitration agreement, under *D.R. Horton*, violates the Act by requiring the Charging Party to give up her right under the Act to bring claims collectively. Judge Crabb then severed the language prohibiting collective action from the individual arbitration provision and granted Respondent's motion to stay the civil case while pending arbitration. The Judge ordered, "[The Charging Party's] claims must be resolved through arbitration, but she must be allowed to join other employees to her case." (Jt. Ex. N at 18.)

However, when the Charging Party later filed her class action arbitration demand, Respondent argued the Charging Party “should only be allowed to join others to this arbitration exclusively by way of permissive joinder. . . .” (Jt. Ex. P at 3-4). The Arbitrator disagreed, and consistent with Judge Crabb’s Order, held that the Charging Party’s action could proceed on a class basis. (*Id.* at 8-9.) Despite the Arbitrator’s finding, Judge Crabb’s Order, and the Board’s decision in *D.R. Horton*, Respondent filed an application for review of the Arbitrator’s decision in District Court, seeking to enforce the unlawful individual arbitration provision. In so doing, Respondent continues to attempt to circumvent the Act and prohibit the Charging Party and her similarly situated co-workers from engaging in statutorily protected activity of class action. (*See, e.g.,* 357 NLRB No. 184, slip op. at 3 (“Thus, employees who join together to bring employment-related claims on a classwide or collective basis in court or before an arbitrator are exercising rights protected by Section 7 of the NLRA.”))

More recently, Respondent has resorted to a different manner of circumventing the Act by giving employees the unlawful option to prospectively limit their rights to engage in protected concerted activity. On July 23, 2012, Respondent issued a letter to its employees, requiring them to, by July 31, 2012, choose one of two options, Option A and Option B, to supplant the individual arbitration provision in their employment agreements. (Jt. Ex. R.) Option A requires arbitration in the individual filer’s home state, permitting only joinder and intervention of claims and prohibiting class action arbitration entirely. (Jt. Ex. S.) Option B permits joint, collective, and class claims in the judicial forum only in Wisconsin. (Jt. Ex. S.) Taken together, these Options effectively prohibit employees from exercising their Section 7 rights by permitting employees to opt-out of pursuing prospective class action litigation in both the arbitral and judicial fora. (*See, e.g.,* 357 NLRB No. 184, slip op. at 4 n.7.)

Respondent wrongly asserts it is complying with the Board's statement in *D.R. Horton* that "employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in *all* forums, arbitral and judicial. So long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of classwide arbitration." 357 NLRB No. 184, slip op. at 12-13 (emphasis in original). Despite the Board's clear instruction, Respondent is *not* permitting employees to pursue individual claims in arbitration while contemporaneously leaving open the judicial forum for class actions. Rather, by requiring employees to choose either Option A or Option B, Respondent is effectively asking, and indeed permitting, employees to opt-out of pursuing any future employment-related class action litigation in any forum, which is a blatant violation of both the Board's holding in *D.R. Horton* and Section 8(a)(1) of the Act.

To be sure, Respondent's letter to employees introducing the Options is deceptive. Respondent describes the "main difference" between the two options as either one in which the employee could pursue claims in his or her home state against Respondent (Option A), or one in which the employee could pursue claims against Respondent in Wisconsin courts (Option B), and stating that either option would permit employees to "join" together with others. (Jt. Ex. R.) Through such phrasing, Respondent is at least implicitly coercing its employees to choose Option A, emphasizing it would permit them to file in their home state while failing to explain to employees that Option A would prohibit them from filing class arbitration or participating in class actions filed by those employees who chose Option B. Moreover, by mandating that employees choose an option by July 31, 2012, Respondent imposes a prospective waiver in circumstances where employees are unlikely to have notice of employment issues that may

require legal action or of other employees' efforts to act concertedly to redress issues of common concern.

Finally, Respondent's contention that Option A is lawful under *D.R. Horton* when it permits joinder and intervention but prohibits class action is incorrect. As the Board in *D.R. Horton* pointed out, unlike joinder, where each employee must bring his or her own claim which may then be joined to other similar pending claims, class actions allow named plaintiff-employees to protect the *unnamed* class members. 357 NLRB No. 184, slip op at 3 n.5 (emphasis added). Indeed, "[e]mployees surely understand what several federal courts have recognized: that named plaintiffs run a greater risk of suffering unlawful retaliation than unnamed class members." *Id.* Just as prohibiting individual employees from coming to management on behalf of unnamed employees with concerted concerns of a protected nature would violate the Act, giving an employee the option to submit only to arbitration while prohibiting class action is an unlawful infringement on Section 7 activity -- activity which is at the core of what Congress intended to protect. *Id.*, slip op. at 3. Accordingly, both of Respondent's arbitration policies -- that of the individual arbitration provision and the Options -- violate Section 8(a)(1) of the Act.

II. FACTS

A. **Jurisdictional Matters and Procedural History**

As this is an entirely stipulated record, the facts are undisputed. Respondent is a Wisconsin corporation with a principal office and place of business in Pewaukee, Wisconsin, and with various other office locations throughout the United States, and is engaged in the business of residential mortgage lending. (Stip. R. at ¶ 11(a).) During the calendar year ending December 31, 2011, Respondent, in conducting its operations, derived gross revenues in excess of \$500,000 (Stip. R. at ¶ 11(b)), and performed services valued in excess of \$50,000 in States other than the

State of Wisconsin. (Stip. R. at ¶ 11(c).) As such, Respondent has been an employer within the meaning of Section 2(2), (6), and (7) of the Act. (Stip. R. at ¶ 12.) Additionally, Eric J. Egenhoefer has been a supervisor and agent of Respondent within the meaning of Section 2(11) and (13) of the Act. (Stip. R. at ¶ 13(b).)

On January 26, 2012,³ the Charging Party filed an unfair labor practice charge against Respondent, alleging it maintained and enforced a mandatory arbitration program that prohibited employees from exercising their Section 7 rights, in violation of Section 8(a)(1) of the Act. (Stip. R. at ¶ 1; Jt. Ex. A.) On April 26, the Regional Director issued a Complaint and Notice of Hearing alleging Respondent violated the Act. (Stip. R. at ¶ 2; Jt. Ex. B.) Respondent filed its Answer to Complaint on May 10. (Stip. R. at ¶ 3; Jt. Ex. C.) On June 7, the Regional Director issued an Order Rescheduling Hearing. (Stip. R. at ¶ 4; Jt. Ex. D.) On July 25, the Regional Director issued another Order Rescheduling Hearing. (Stip. R. at ¶ 5; Jt. Ex. E.)

On August 1, the Charging Party filed a First Amended Charge, alleging that Respondent further violated Section 8(a)(1) of the Act by maintaining and enforcing a supplemental arbitration policy, or rather, the Options, proscribing employees from engaging in protected concerted activity. (Stip. R. at ¶6; Jt. Ex. F.) On August 6, the Regional Director issued an Order Rescheduling Hearing. (Stip. R. at ¶ 7; Jt. Ex. G.) On August 10, the Regional Director issued an Amended Complaint against Respondent, alleging further violations of the Act. (Stip. R. at ¶ 8; Jt. Ex. H.) Respondent filed its Answer to the Amended Complaint on August 24 (Stip. R. at ¶ 9; Jt. Ex. I), and on that same date, the Regional Director issued an Order Postponing Hearing Indefinitely (Stip. R. at ¶ 10; Jt. Ex. J).

³ All dates herein are 2012 unless otherwise noted.

On August 28, the parties filed with the Board a Joint Motion and Stipulation of Facts, including Exhibits A through Y, requesting to waive a hearing and decision by the Administrative Law Judge and submitting this case directly to the Board, pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations. On November 21, the Board issued its Order Approving Stipulation, Granting Motion, and Transferring Proceeding to the Board.

B. Respondent's Individual Arbitration Provision

Since about April 7, 2011, Respondent has promulgated, maintained, and enforced employment agreements with its current and former employees. (Stip. R. at ¶ 14(a).) Contained in the employment agreement is a provision regarding individual arbitration, or rather, the individual arbitration provision. (*Id.*) There, it states:

. . . Arbitration/Governing Law/Consent to Jurisdiction . . . In the event the parties cannot resolve a dispute by the ADR provisions contained herein, any dispute between the parties concerning the wages, hours, working conditions, terms, rights, responsibilities or obligations between them or arising out of their employment relationship shall be resolved through binding arbitration in accordance with the rules of the American Arbitration Association applicable to employment claims. Such arbitration may not be joined with or join or include any claims by any persons not party to this Agreement . . .

(*Id.*; Jt. Ex. K at page 6, ¶ 13.) Between April 7, 2011, and about July 23, Respondent required employees, including the Charging Party, to enter into employment agreements containing the individual arbitration provision as a condition of employment. (Stip. R. at ¶¶ 14(b); 14(c).) Respondent admits that the individual arbitration provision requires that any dispute arising under the employment agreements, including employment-related matters, must be brought only in an arbitral forum and is precluded from any joint, collective, or class action through the judicial or arbitral forum. (Stip. R. at ¶ 14(d).)

Although the individual arbitration provision has been replaced by Respondent's Options, explained below, as of about July 23, Respondent has expressly reserved its right to enforce the

individual arbitration provision for any and all disputes which arise under the employment agreements. (Stip. R. at ¶ 14(e).) Indeed, with respect to the Charging Party’s Class Action Complaint against Respondent filed on November 28, 2011, in the United States District Court for the Western District of Wisconsin in case 3:11-cv-00779-bbc (Stip. R. at ¶ 15(a)), Respondent has attempted to enforce the individual arbitration provision by filing a Motion to Dismiss or, In the Alternative, Motion to Compel Arbitration and Motion for Costs (Stip. R. at ¶ 15(b)). In significant part, Respondent argued:

. . . 3. However, the terms of the [Employment] Agreement make unmistakably clear that “any dispute between the parties concerning the wages, hours, working conditions, terms, rights, responsibilities or obligations between them or arising out of their employment relationship shall be resolved through binding arbitration.” . . . The [Employment] Agreement specifically precludes collective actions and class actions in arbitration by stating, “Such arbitration may not be joined with or join or include any claims by any persons not party to this Agreement.”

(*Id.*; Jt. Ex. M at page 2, ¶ 3.)

On March 16, 2011, the Honorable District Court Judge Barbara B. Crabb (“Judge Crabb”) issued an Opinion and Order in the Charging Party’s Class Action against Respondent, finding the individual arbitration provision to be invalid under the Act and *D.R. Horton*, and severed the individual arbitration provision from the rest of the employment agreement, granted Respondent’s motion to stay the case pending arbitration, and ordered that: “. . . Plaintiff Pamela Herrington’s claims must be resolved through arbitration, but she must be allowed to join other employees in her case . . .” (Stip. R. at ¶ 15(c); Jt. Ex. N at page 18.)

Judge Crabb’s finding, however, did not deter Respondent from continuing to attempt to enforce the invalidated and unlawful individual arbitration provision. To be sure, on July 11, in the subsequent class action arbitration brought by the Charging Party against Respondent (Stip. R. at ¶ 15(d); Jt. Ex. O), the Arbitrator, pointing to Judge Crabb’s March 16 Opinion and Order,

rejected Respondent's argument that the arbitration could not proceed as a class and stayed the arbitration so that the parties could seek review. (Stip. R. at ¶ 15(e); Jt. Ex. P at page 9.) On August 10, Respondent filed with Judge Crabb in District Court an Application for Review of Arbitrator's Partial Final Award on Clause Construction. (Stip. R. at ¶ 15(f); Jt. Ex. Q.) As of the time of filing of this case's Stipulation of Facts on August 28, Judge Crabb had issued a briefing schedule regarding Respondent's application for review. (Stip. R. at ¶ 15(g).)

C. Respondent's Options

Since about July 23, Respondent has promulgated, maintained, and enforced with its then-current employees a replacement to its individual arbitration provision contained in its employment agreement, or rather, an Amendment to the Employee Agreement ("Amendment"). (Stip. R. at ¶ 16(a).) Respondent's Amendment offered the employees the choice of either Option A or Option B to supplant the individual arbitration provision. (*Id.*; Jt. Ex. R, S.) Respondent introduced the Options to employees by attaching them to a letter dated July 23 ("Letter"). (Jt. Ex. R.) Respondent's Letter introduces the Options and states that the individual arbitration provision will be replaced by either Option A or Option B, whichever of the two is chosen by the employee. (*Id.*) Respondent's Letter further states, in pertinent part:

. . . The main difference between the two options, which you should carefully review, is that Option A will allow you to pursue any claims against Waterstone in arbitration in your home state, while Option B will allow you to pursue any claims against Waterstone in the courts of Wisconsin (or in any other forum directed by those courts). Under either Option A or Option B, you will be permitted to join together with other Waterstone employees in pursuit of any claims against Waterstone.

(*Id.*)

Respondent's Option A restricts employees' choice of forum to the arbitral forum administered by JAMS Arbitration and Mediation Services, as opposed to the individual arbitration provision, which was administered by AAA rules. (*Compare* Jt. Exs. K, S.) Option A

further permits the arbitration to be filed in any state but requires that the employment agreement be interpreted, enforced, and governed by and in accordance with the laws of the State of Wisconsin. (Jt. Ex. S.) Option A additionally restricts the manner in which employees can join or be joined by other employees in arbitration to, exclusively, the procedures set forth in Federal Rules of Civil Procedure (FRCP) 20 and 24, which are Joinder and Intervention, respectively. (*Id.*) Option A forbids the use of FRCP 23, Class Actions, but does expressly state that employees are not limited or precluded from filing a complaint or charge with a State, Federal, or Court [sic] agency. (*Id.*)

Option B, on the other hand, limits the filing of an employment-related claim to either: “(1) the United States District Court for the Western District of Wisconsin; (2) only if subject matter jurisdiction is lacking, in a Wisconsin State Court located in Waukesha County; or (3) any other forum to the extent it is directed by the foregoing court(s).” (*Id.*) Thus, Option B proscribes the arbitral forum but does not dictate the manner in which employees engage in collective and class action in the judicial forum. (*Id.*) Option B, like Option A, expressly states that employees may file complaints or charges with a State, Federal, or Court [sic] agency. (*Id.*)

Since July 23, and by no later than July 31, Respondent has required employees to enter into either Option A or Option B as a replacement to the individual arbitration provision as a condition of employment. (Stip. R. at ¶ 16(b).) Furthermore, Respondent’s intention in introducing the Options to its current and future employees was to eliminate the individual arbitration provision altogether, with no alternative agreements that would differ in substance to the Options. (Stip. R. at ¶¶ 16(c), 16(d).) Since July 23, Respondent has entered into an employment agreement containing Option A with at least one of its current and/or former employees. (Stip. R. at ¶ 16(e).)

On August 1, the Charging Party, in her class arbitration against Respondent, filed Claimant's Motion for a Protective Order, Temporary Restraining Order, and Preliminary Injunction Related to Waterstone Soliciting Waivers from Class Members of their Right to Participate in this Action. (Stip. R. at ¶ 16(f); Jt. Ex. T.) Respondent filed its opposition to the Charging Party's motion on August 10. (Stip. R. at ¶ 16(f); Jt. Ex. U.) As of the filing of this Stipulation of Facts, the Arbitrator had not yet ruled on the Charging Party's August 1 Motion.

III. ARGUMENT & ANALYSIS

A. **Respondent's Individual Arbitration Provision Violates Section 8(a)(1) of the Act Because It Is an Unlawful Rule under *D.R. Horton***

As the Board held in *Lafayette Park Hotel*, an employer violates Section 8(a)(1) by maintaining work rules that tend to chill employee Section 7 activities. 326 NLRB 824, 825 (1998). In *Lutheran Heritage Village-Livonia*, the Board found that rules explicitly restricting Section 7 activities violate Section 8(a)(1), 343 NLRB 646 (2004); even the mere maintenance of the rule will violate the Act without regard for whether the employer ever applied the rule for that purpose. *Guardsmark v. NLRB*, 475 F.3d 369, 375-76 (D.C. Cir. 2007). Where a workplace rule does not explicitly restrict Section 7 activity, however, the General Counsel must establish, by a preponderance of the evidence, that: (1) employees would reasonably construe the rule to prohibit Section 7 activity; (2) the employer adopted the rule in response to union activity; or (3) the employer applied a rule to restrict employee Section 7 activity. *Lutheran Heritage Village*, 343 NLRB at 647.

The Board more recently applied the principles of *Lafayette Park Hotel* and *Lutheran Heritage Village* in *D.R. Horton* to find that "employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in *all* forums, arbitral and judicial." 357 NLRB No. 184, slip op. at 1 (emphasis in original). In *D.R. Horton*, the

employer required each new and current employee to execute a Mutual Arbitration Agreement (“MAA”) as a condition of employment. *Id.*, slip op. at 1. The MAA required employees to agree, as a condition of employment, that they would not pursue class or collective litigation in arbitration or court. *Id.* The Board reasoned that the MAA clearly and expressly barred employees “from exercising substantive rights that have long been held protected by Section 7 of the Act,” and “implicate[d] prohibitions that predate the NLRA,” on which modern federal labor policy is based. *Id.*, slip op. at 4, 6.

The *D.R. Horton* Board also affirmed that “employees who join together to bring employment-related claims on a classwide or collective basis in court or before an arbitrator are exercising rights protected by Section 7 of the NLRA.” *Id.*, slip op. at 3. Section 8(a)(1) of the Act makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in” Section 7. 29 U.S.C. § 158(a)(1). The Board made clear that “the applicable test is that set forth in *Lutheran Heritage Village*, and under that test, a policy such as [r]espondent’s violates Section 8(a)(1) because it expressly restricts Section 7 activity or, alternatively, because employees would reasonably read it as restricting such activity.” 357 NLRB No. 184, slip op. at 7, citing *Lutheran Heritage Village*, 343 NLRB 646. In sum, the Board definitively held in *D.R. Horton* that an employer violates Section 8(a)(1) “by requiring employees to waive their right to collectively pursue employment-related claims in all forums, arbitral and judicial.”⁴ *Id.*, slip op. at 13.

⁴ The Board declined to address whether an employer can lawfully require employees to waive their right to pursue class or collective action in court at all, so long as the employees retain the right to pursue such class claims in arbitration. *Id.*, slip op. at 13, n.28.

Here, since April 7, 2011,⁵ Respondent has promulgated, maintained, and enforced employment agreements with its current and former employees. (Stip. R. at ¶ 14(a); Jt. Ex. K.) Contained in paragraph 13 of Respondent’s employment agreements with its employees is the individual arbitration provision, which states:

...Arbitration/Governing Law/Consent to Jurisdiction . . . In the event the parties cannot resolve a dispute by the ADR provisions contained herein, any dispute between the parties concerning the wages, hours, working conditions, terms, rights, responsibilities or obligations between them or arising out of their employment relationship shall be resolved through binding arbitration in accordance with the rules of the American Arbitration Association applicable to employment claims. Such arbitration may not be joined with or join or include any claims by any persons not party to this Agreement. . .

(Stip. R. at ¶ 14(a); Jt. Ex. K at page 6, ¶ 13.) The individual arbitration provision does not explicitly state that employees may not pursue class or collective litigation of claims in a judicial forum. However, its provision that “any dispute between the parties concerning the wages, hours, working conditions, terms, rights, responsibilities or obligations between them or arising out of their employment relationship shall be resolved through binding arbitration in accordance with the American Arbitration Association applicable to employment claims” clearly contemplates that any employment relationship claims may only be resolved through arbitration. To be sure, Respondent stipulated that the individual arbitration provision neither permits nor contemplates a

⁵ Respondent has asserted that Section 10(b), or, alternatively, the doctrine of laches, bars Counsel for the Acting General Counsel from seeking a remedy as to the individual arbitration provision that has existed since April 7, 2011 until about July 23. To the contrary, as set forth more fully *infra*, Section 10(b) does not preclude the pursuit of a complaint allegation based on the maintenance of an unlawful rule within the Section 10(b) period, even if the rule originally was promulgated outside the Section 10(b) period. *Control Services*, 305 NLRB 435, 435 n.2, 442 (1991), *enf’d mem.* 961 F.2d 1569 (3d Cir. 1992). Here, although the unlawful individual arbitration policy has been in effect since at least April 7, 2011, it has remained in effect until at least July 23, and Respondent continues to attempt to enforce it for any employment-related disputes arising under the individual arbitration policy. As Respondent’s litigation conduct within the Section 10(b) period amply demonstrates, Respondent’s current and former employees hired prior to July 23, may at any point experience enforcement of the individual arbitration provision. Thus, Section 10(b) is no bar.

judicial forum for class and collective claims, that any dispute arising under the employment agreement which contains the individual arbitration provision must be brought in an arbitral forum, and that the individual arbitration provision precludes any joint, collective, or class action through the arbitral forum. (Stip. R. at ¶ 14(d).) The individual arbitration provision thus expressly restricts Section 7 activity under *Lutheran Heritage Village*. Like the agreement in *D.R. Horton*, Respondent's individual arbitration provision plainly limits Section 7 activity and, as a term or condition of employment (*see* Stip. R. at ¶ 14(b)), violates Section 8(a)(1).

Any claim by Respondent that the Charging Party voluntarily executed her employment agreement containing the individual arbitration provision should not be considered. (*See, e.g.,* Jt. Ex. X at 1 (“This matter arises from Respondent’s attempt to enforce an arbitration provision contained in an employment agreement . . . voluntarily executed by [the Charging Party] during the course of her employment.”)) The parties in this matter have stipulated that “[s]ince about April 7, 2011 and about July 23, 2012, Respondent *required* employees to enter into employment agreements containing the individual arbitration provision . . . *as a condition of employment.*” (Stip. R. at ¶ 14(b) (emphasis added).)

Moreover, under the *Lutheran Heritage Village* test, even if the individual arbitration provision did not on its face constitute a violation of the Act, it has been applied to restrict the exercise of Section 7 activity.⁶ The stipulated record clearly demonstrates that Respondent has repeatedly used the individual arbitration provision to attempt to compel individual arbitration when employees have attempted to bring employment-related class actions against Respondent. (*See* Stip. R. at ¶¶ 14(e), 15(b), 15(e), 15(f); Jt. Exs. M, P, Q.) Respondent further stipulated that

⁶ If the challenged rule does not expressly restrict Section 7 activity, the rule will nevertheless violate the Act if it “has been applied to restrict the exercise of Section 7 rights.” *Lutheran Heritage Village*, 343 NLRB at 647.

it is reserving its right to enforce the individual arbitration provision for any and all disputes which arise under the employment agreements to which Respondent and Respondent's employees are parties. (Stip. R. at ¶ 14(e).) Thus, under either test articulated in *Lutheran Heritage Village*, Respondent's individual arbitration policy violates the Act as alleged.

B. Respondent's Motions to Compel Individual Arbitration and Continued Attempt to Enforce the Individual Arbitration Provision also Violate Section 8(a)(1) of the Act

In addition to the underlying individual arbitration policy itself being unlawful, Respondent's efforts to enforce the individual arbitration policy through its Motion to Dismiss, or In the Alternative, Motion to Compel Arbitration and Motion for Costs ("Motion to Compel") also violates Section 8(a)(1) of the Act. (See Jt. Ex. H at ¶¶ 4(a), 6 ("About April 2011, and at all material times, Respondent has . . . enforced individual arbitration agreements with its current and former employees. . . in violation of Section 8(a)(1) of the Act"); see also Jt. Ex. M.) *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 737 n.5 (1983), supports proceeding against Respondent's motion. In footnote 5 of *Bill Johnson's Restaurants*, the Court stated that it did not intend to preclude the enjoining of suits that have "an objective that is illegal under federal law." *Id.* In such circumstances, "the legality of the lawsuit enjoys no special protection under *Bill Johnson's*." *Teamsters Local 776 (Rite Aid)*, 305 NLRB 832, 834 (1991), *enf'd* 973 F.2d 230 (3d Cir. 1992), *cert. denied* 507 U.S. 959 (1993).

The Board has made clear that it will apply footnote 5 to particular litigation tactics, as well as to entire lawsuits. Thus, for example, in *Wright Electric, Inc.*, the Board found that an employer's discovery request had an illegal objective and violated the Act, even though the lawsuit itself could not be enjoined. 327 NLRB 1194, 1195 (1999), *enf'd* 200 F.3d 1162 (8th Cir.

2000).⁷ Accordingly, a footnote 5 analysis is properly applied to Respondent’s motion at issue here, despite it arising as a defense in the course of lawful employee lawsuits and arbitration claims.⁸

A lawsuit has a footnote 5 illegal objective “if it is aimed at achieving a result incompatible with the objectives of the Act.” *Manno Electric*, 321 NLRB 278, 297 (1996), *enf’d per curiam mem.* 127 F.3d 34 (5th Cir. 1997). In particular, an illegal objective may be found for two reasons relevant to the issues presented here. The first of these is where “the underlying acts constitute unfair labor practices and the lawsuit is simply an attempt to enforce the underlying act.” *Regional Construction Corp.*, 333 NLRB 313, 319 (2001). This category includes the illegal union fine cases cited by the Court in footnote 5 itself.⁹ In those cases, the unions violated Section 8(b)(1)(A) by fining employee/members, and the lawsuits were merely the mechanism to enforce and collect the unlawful fines.

The second of these is where a grievance or lawsuit is itself aimed at preventing employees’ protected conduct. In such cases, the lawsuit is not merely retaliatory for employees’ protected conduct but instead also seeks to use the arbitrator or the court itself to directly

⁷ See also, e.g., *Dilling Mechanical Contractors*, 357 NLRB No. 56, slip op. at 2-3 (Aug. 19, 2011) (finding that employer’s discovery requests had an illegal objective, although the lawsuit itself did not).

⁸ Counsel for the Acting General Counsel notes that legal actions that have an illegal objective may be found to be unlawful *ab initio*, in contrast to legal actions against “arguably protected” conduct, which are only unlawful to the extent they are continued after the General Counsel issues complaint, pursuant to *Loehmann’s Plaza*, 305 NLRB 663 (1991), *rev. denied* 74 F.3d 292 (D.C. Cir. 1996). See, e.g., *Manno Electric*, 321 NLRB 278, 298 (1996), *enf’d per curiam mem.* 127 F.3d 34 (5th Cir. 1997).

⁹ *Granite State Joint Board, Textile Workers Union*, 187 NLRB 636, 637 (1970), *enf. denied* 446 F.2d 369 (1st Cir. 1971), *rev’d* 409 U.S. 213 (1972); *Booster Lodge No. 405, Machinists & Aerospace Workers*, 185 NLRB 380, 383 (1970), *enf’d in relevant part* 459 F.2d 1143 (1972), *aff’d* 412 U.S. 84 (1973).

interfere with the Section 7 activity. Thus, for example, in *Manno Electric*, the Board found that an employer cause of action attacking employee statements made to the Board was not only preempted but also had an illegal objective. 321 NLRB at 297.

Here, both of these reasons apply. Respondent's motion to compel individual arbitration to seek to enforce its individual arbitration policy is unlawful, in addition to the individual arbitration provision being unlawful itself. Thus, as in union fine cases, the underlying acts constitute unfair labor practices and the lawsuit - or rather the motion to compel individual arbitration - is simply an attempt to enforce the underlying unlawful act.

Moreover, Respondent's motion to compel individual arbitration also has an illegal objective because it is directly aimed at preventing employees' protected conduct. Indeed, the only objective of Respondent's motions is to prohibit employees from engaging in Section 7 activity. Therefore, footnote 5 of *Bill Johnson's Restaurants* supports proceeding against Respondent's motion to compel individual arbitration.

C. Taken Together, Respondent's Options A and B Violate Section 8(a)(1) of the Act

Respondent argues that its July 23 proposed amendment to, and substitution for, the unlawful individual arbitration provision – referred to as the Options – should be found lawful because employees have been permitted to choose whether they wish to forgo their Section 7 rights to engage in collective activity. This argument does not overcome the Options' unlawful interference with employees' Section 7 right to file and participate in collective and class litigation, or change the clear applicability of *D.R. Horton* to Respondent's unlawful Options.

On July 23, Respondent issued its Letter to then-current employees, requiring them to, by July 31, choose one of two options to supplant the individual arbitration provision in their employment agreements. (Jt. Ex. R.) Option A requires arbitration, permitting only joinder and

intervention of claims pursuant to FRCP 20 and 24 and prohibiting class action arbitration entirely under FRCP 23. (Jt. Ex. S.) Option B permits joint, collective, and class claims in the judicial forum. (Jt. Ex. S.) When taken together, the Options effectively prohibit employees from exercising their Section 7 rights by permitting employees to opt-out of pursuing prospective class action litigation in both the arbitral and judicial fora. (*See, e.g.*, 357 NLRB No. 184, slip. op. at 4 n.7.)

Respondent's Letter introducing the Options to employees is deceptive and likely formulated to deter employees from choosing Option B. In fact, Respondent describes the "main difference" between the Options as either, as with Option A, one in which the employee could pursue claims in his or her home state against Respondent, or, as with Option B, one in which the employee would have to pursue claims against Respondent in Wisconsin courts, despite the fact that Respondent has offices, and thus employees, nationwide. (Jt. Ex. R.) Moreover, Respondent's Letter characterizes the Options as both permitting employees to "join" together with others but fails to point out that Option A would prohibit employees from filing class arbitration and from participating in class actions filed in the judicial forum by those employees who chose Option B.

Furthermore, by mandating that employees choose an option by July 31, Respondent imposed a prospective waiver in circumstances where employees are unlikely to have notice of employment issues that may require legal action or of other employees' efforts to act concertedly to redress issues of common concern. Giving employees a limited opportunity to choose either Option A or Option B does not adequately protect employees' Section 7 rights. Respondent's Option A, in particular, cannot be considered "voluntary" where it is imposed on employees as a condition of employment except if employees affirmatively choose Option B either by July 31,

or, presumably, upon commencement of their employment with Respondent.¹⁰ Thus, the Options impose a waiver in circumstances where employees have no notice of their Section 7 right to engage in class and collective legal activity or that a prohibition of such activity violates Section 8(a)(1) of the Act. To the extent Respondent argues its Letter adequately notifies employees of the Charging Party's pending arbitration against Respondent, it fails to notify employees of any other possible employment-related concerted litigation, and there is no evidence that Respondent's Letter, and thus notice of the Charging Party's pending arbitration, is provided to employees hired after July 23, or that Respondent in any way notifies such employees that, by choosing Option A, they are waiving their prospective Section 7 rights.

As to the employees who chose Option A by July 31, or who choose Option A upon commencing employment with Respondent, Option A unlawfully interferes with their Section 7 right to engage in collective legal activity by establishing an irrevocable waiver of their *future* Section 7 rights. In analogous circumstances, the Board has found unlawful and unenforceable agreements that condition employment on the employee's waiver of prospective Section 7 rights, concluding that "future rights of employees as well as the rights of the public may not be traded away in this manner." *Ishikawa Gasket America, Inc.*, 337 NLRB 175, 175 (2001), *enf'd* 354 F.3d 534 (6th Cir. 2004) (finding unlawful a separation agreement prohibiting the departing employee from engaging in union and other protected activities for a 1-year period); *Mandel Security Bureau, Inc.*, 202 NLRB 117, 119 (1973) (finding unlawful an employer's conditioning

¹⁰ It is unclear from the Stipulated Record the time frame of when newly hired employees have to choose Option A or Option B. In any event, it is evident that all employees of Respondent, including new employees, must choose one or the other, and that the Option so chosen is intended to replace the individual arbitration provision in the employment agreements between Respondent and its employees. (Stip. R. at ¶¶ 16(c), 16(d), 16(e).)

reinstatement on the employee's refraining from future concerted activities and unfair labor practice charges, in addition to requesting withdrawal of pending charges).

Similarly, the requirement here that employees affirmatively preserve their Section 7 rights by choosing Option B instead of Option A is clearly an unlawful burdening of the employees' right to engage in collective litigation.¹¹ Just as it would be unlawful for an employer to require employees affirmatively to preserve their Section 7 rights to discuss terms and conditions of employment amongst themselves, to strike, or to engage in other union or concerted activities, an employer cannot be permitted to restrict the right to engage in collective and class legal actions unless employees affirmatively preserve that right. *See, e.g., D.R. Horton*, 357 NLRB No. 184, slip op. at 3 ("These forms of collective efforts to redress workplace wrongs or improve workplace conditions are at the core of what Congress intended to protect by adopting the broad language of Section 7. Such conduct is not peripheral but central to the Act's purposes. After all, if the Respondent's employees struck in that order to induce the Respondent to comply with the [Fair Labor Standards Act], that form of concerted activity would clearly have been protected.") By placing the burden on employees to take immediate steps in order to retain their Section 7 rights, or lose them forever, Respondent necessarily interferes with its employees' exercise of those statutory rights.

In addition, a necessary requirement that employees self-identify to Respondent as choosing to preserve their right to engage in Section 7 activity by choosing Option B – and do so at the highly vulnerable time, such as when they are new employees – is itself antithetical to the

¹¹ Cases addressing the separate issue of whether an arbitration agreement is procedurally or substantively unconscionable, such as *Circuit City Stores, Inc. v. Mantor*, 335 F.3d 1101 (9th Cir. 2003) and *Davis v. O'Melveny & Meyers*, 485 F.3d 1066 (9th Cir. 2007), are not dispositive of the lawfulness of such agreements under the Act. Such cases do not address employees' Section 7 right to act concertedly, including their substantive statutory right to bring collective or class claims, or whether that right can be irrevocably waived with respect to all future claims.

representative aspect of collective action and the protection it affords employees from fear of reprisal. *See, e.g., Special Touch Home Care Services*, 357 NLRB No. 2, slip op. at 7 (June 30, 2011) (“The premises of the Act . . . and our experience with labor-management relations all suggest that permitting an employer to compel employees to provide individual notice of participation in collective action would impose a significant burden on the right . . .”). This is so notwithstanding any efforts by Respondent to maintain anonymity.

It must also be stressed that employees who choose Option A are not only prohibited from exercising their own Section 7 rights to file and join collective and class legal actions, but such a choice interferes with the collective action rights of employees *who have* chosen Option B. Those employees who chose Option A are expressly prohibited from acting concertedly with employees who chose Option B, and, likewise, employees who chose Option B are expressly prohibited from acting concertedly with employees who chose Option A.

Respondent may argue that, in providing the opportunity for employees to choose Option A or Option B, the Options are somehow lawful because employees have a Section 7 right to refrain from engaging in collective legal activity, and employees are making a choice to refrain from engaging in collective legal activity by choosing Option A. But this argument ignores that irrevocable waivers of employees’ prospective Section 7 right to collective legal activity are unlawful, just as individual employment contracts that interfere with other prospective Section 7 rights are unlawful, because they are “a continuing means of thwarting the policy of the Act,” *National Licorice Co. v. NLRB*, 309 U.S. 350, 361 (1940), *quoted in D.R. Horton*, 357 NLRB No. 184, slip op. at 4, and present an unjustifiable obstacle to the free exercise of the right to engage in concerted activity for mutual aid and protection. Furthermore, such an argument disregards the fact that concerted activity rights “are not viable in a vacuum; their effectiveness

depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others.” *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972). The Act’s protection of concerted activity for mutual aid and protection as illustrated by the cases cited by the Board in *D.R. Horton*, 357 NLRB No. 184, slip op. at 4-5, recognizes that the decision of whether to engage in concerted activity is not made abstractly by isolated individuals acting on their own but instead is made as a result of concrete grievances and workplace discussions of the options available to employees. Respondent’s Options, even if entered into by choice, unlawfully “sought to erect ‘a dam at the source of supply’ of potential, protected activity” and “thereby interfered with employees’ exercise of their Section 7 rights.” *Parexel International*, 356 NLRB No. 82, slip op. at 4 (Jan. 28, 2011), quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185 (1941).

Counsel for the Acting General Counsel further notes that the essential element of the Section 7 right to refrain from engaging in collective legal activity is the protection of employee choice. Thus, while employees have the right to bring collective and class legal actions, they also have a right to arbitrate any particular claim on an individual basis if they so choose. Respondent’s Options, however, unlawfully bind employees, should they choose Option A, to an irrevocable waiver of their prospective Section 7 rights to engage in collective legal activity that precludes their making choices as to any future claim. To permit the Employer to so limit its employees’ rights to act collectively, in the guise of protecting employees’ right to refrain from engaging in collective legal activity, would be to stand Section 7 on its head.

Moreover, Respondent wrongly asserts it is complying with the Board’s statement in *D.R. Horton* that “employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in *all* forums, arbitral and judicial. So long

as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of classwide arbitration." 357 NLRB No. 184, slip op. at 12-13 (emphasis in original). Respondent is not permitting employees to pursue individual claims in arbitration while contemporaneously leaving open the judicial forum for class actions. Instead, employees have a deadline of either choosing to file prospective employment-related disputes in the arbitral forum in their home state, which does not expressly state that it unlawfully precludes class arbitrations (Option A), *or* choose to file prospective employment-related disputes in Wisconsin federal and/or state judicial courts, which is silent on the fact that class action in the judicial forum is permitted (Option B). This is not, as Respondent would suggest, a circumstance in which an employee who chooses Option A is permitted to file an employment-related class action in the judicial forum; instead, that employee, by choosing Option A, would be precluded from any employment-related judicial action, class action included, in addition to being precluded from class action in the arbitral forum.

Finally, Respondent's contention that Option A is lawful under *D.R. Horton* when it permits joinder but prohibits class action is incorrect. As the Board pointed out, unlike joinder, where each employee must bring his or her own claim which may then be joined to other similar pending claims, class actions allow named plaintiff-employees to protect the *unnamed* class members. 357 NLRB. No. 184, slip op. at 3 n.5 (emphasis added). Indeed, "[e]mployees surely understand what several federal courts have recognized: that named plaintiffs run a greater risk of suffering unlawful retaliation than unnamed class members." *Id.* Just as prohibiting an individual employee from coming to management on behalf of unnamed employees with concerted concerns of a protected nature would violate the Act, giving an employee the option to submit only to arbitration while prohibiting class action is an unlawful infringement on Section 7

activity – activity which is at the core of what Congress intended to protect. *Id.*, slip op. at 3. For all these reasons, Respondent’s Options also violate Section 8(a)(1) of the Act.

D. Respondent’s Remaining Anticipated and Affirmative Defenses Should Be Rejected

1. This case does not present the situation alluded to by the Board in Footnote 28 of *D.R. Horton*.

The Board, in *D.R. Horton*, stated in footnote 28 of its decision that it did not reach the “more difficult questions” of:

(1) whether an employer can require employees, as a condition of employment, to waive their right to pursue class or collective action in court so long as the employees retain the right to pursue class claims in arbitration and (2) whether, if arbitration is a mutually beneficial means of dispute resolution, an employer can enter into an agreement that is not a condition of employment with an individual employee to resolve either a particular dispute or all potential employment disputes through non-class arbitration rather than litigation in court.

357 NLRB No. 184, slip op. at 13 n.28. Both Respondent’s individual arbitration provision and Options present neither scenario. Respondent cannot, and does not, argue that its individual arbitration provision falls under either unresolved question in *D.R. Horton*. The individual arbitration provision clearly relinquishes employees’ rights to file class or collective claims in any forum – judicial or arbitral – and, as stipulated, is a condition of employment. With respect to Respondent’s Options, employees who choose Option A are required to bring their claims in the arbitral forum, giving up the ability to bring any class claim in a judicial or arbitral forum. Thus, neither the individual arbitration provision nor the Options fall under the first scenario enumerated in footnote 28 of *D.R. Horton*.

As to the second scenario, as already demonstrated, both the individual arbitration provision and the Options constitute a condition of employment. It is stipulated that from about April 7, 2011 until about July 23, Respondent’s employees were required, as a condition of

employment, to sign an Employment Agreement containing the individual arbitration provision. (Stip. R. at ¶¶ 14(a)-(b); Jt. Ex. K.) It is also stipulated that, beginning about July 23, Respondent's employees were required, as a condition of employment, to choose one of two options – A or B – to substitute for the individual arbitration provision in their employment agreements. (Stip. R. at ¶¶ 16(a), 16(b); Jt. Exs. R, S.) The employees were required to choose one of the two Options by July 31, which would supersede and thus eliminate the individual arbitration provision. (Stip. R. at ¶¶ 16(a), 16(c); Jt. Exs. R, S.) These policies – both the individual arbitration provision and the subsequent Options – were clearly presented to employees as a condition of employment. As the *D.R. Horton* Board pointed out:

That this restriction on the exercise of Section 7 rights is imposed in the form of an agreement between the employee and the employer makes no difference. From its earliest days, the Board, again with uniform judicial approval, has found unlawful employer-imposed, individual agreements that purport to restrict Section 7 rights – including, notably, agreements that employees will pursue claims against their employer only individually.

357 NLRB No. 184, slip op. at 4.

Prior to July 23, Respondent's employees were bound to the individual arbitration provision in their employment agreements on April 7, 2011, or thereafter, upon hire, which is stipulated as being a condition of employment. (Stip. R. at ¶ 14(a).) Since about July 23 to the present, Respondent's Options have supplanted the individual arbitration provision in the employment agreement. (Stip. R. at ¶ 16(a).) Since about July 23, Respondent has required, as a condition of employment, employees to enter into either Option A or Option B as a replacement to the individual arbitration provision. (Stip. R. at ¶ 16(b).) Respondent intended the individual arbitration provision to be eliminated by July 31. (Stip. R. at ¶ 16(c).) Finally, Respondent intended that employees would choose either Option A or Option B with no alternative agreements that would differ in substance. (Stip. R. at ¶ 16(d).) In short, Respondent's individual

arbitration provision from about April 7, 2011 until about July 23, and Respondent's Options since July 23 to the present, are binding upon *all* employees, including newly hired employees, and are thus presented to employees as a condition of employment. Thus, this case does not present either circumstance alluded to by the Board in footnote 28 of *D.R. Horton*.

It should be stressed that nothing herein, or in the Board's decision in *D.R. Horton*, should be read to preclude employers and employees from lawfully agreeing to individually arbitrate a particular claim in dispute, or otherwise to forego bringing such a claim to a judicial forum or arbitration on a collective or class basis. Rather, it is Respondent's interference with employees' prospective right to choose to act individually or concertedly in *future* labor disputes that unlawfully interferes with their Section 7 rights here.

2. This case does not present a conflict between the FAA and the NLRA.

Respondent wrongly argues that applicable federal law weighs against the enforcement of *D.R. Horton*, asserting that the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1, et. seq., conflicts with the Act. As the Board in *D.R. Horton* explained: "holding that an employer violates the NLRA by requiring employees, as a condition of employment, to waive their right to pursue collective legal redress in both judicial and arbitral forums accommodates the policies underlying both the NLRA and the FAA to the greatest extent possible." 357 NLRB No. 184, slip op. at 12. This is because Section 2 of the FAA "provides that arbitration agreements may be invalidated in whole or in part" for the same reasons any contract may be invalid, including if it is unlawful or contrary to public policy. *Id.*, slip op. at 11. Inasmuch as the individual arbitration provision and Options are inconsistent with the NLRA, neither is enforceable under the FAA.

The Board also emphasized that finding an arbitration policy, such as the one presented here, is unlawful does not conflict with the FAA because "the intent of the FAA was to leave

substantive rights undisturbed.” *Id.* Although Respondent has indicated it will argue that the waiver is not of substantive rights but, rather, of procedural rights, the individual arbitration provision and the Options clearly require employees to forego substantive rights under the NLRA – namely, employees’ current and prospective right to pursue employment-related claims in a collective or class action – and the Board has so held. Thus, the individual arbitration provision and the Options at issue here are unlawful not because they involve arbitration or specify particular litigation procedures, but instead because they prohibit employees from exercising their Section 7 right to engage in collective legal activity in any forum.

Respondent will also likely argue that the complaint in the instant case should be dismissed under *Compucredit Corp. v. Greenwood*, ___ U.S. ___, 132 S.Ct. 665 (Jan. 10, 2012), and the Rules Enabling Act, 28 U.S.C. § 2072(b), which provides that substantive statutory rights shall not be overcome by conflicting procedural or evidentiary rulings. Respondent’s argument would be that, as collective legal activity is generally considered a “procedural device” under other statutes, employees’ preference for that procedure should not be allowed to impede the Employer’s substantive right to enforce its arbitration policy. However, this argument misapplies the “substantive/procedural” dichotomy and ignores the Board’s central holding in *D.R. Horton* that, unlike under the Credit Repair Organization Act at issue in *Compucredit*, the right of employees under the NLRA to bring class and collective claims is itself a *substantive* right.

Respondent may also argue that various federal courts have issued decisions upholding class action waivers in mandatory arbitration policies. However, the interpretation and enforcement of the substantive rights protected by the Act is, in the first instance, accorded to the Board – not to the federal district courts – and it is the Board’s decision in *D.R. Horton* that

binds the Board's determination here. See *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616-617 (1963).

Respondent has further indicated that it will argue that finding the individual arbitration provision and the Options unlawful would compel class arbitration absent agreement of the parties, thus running afoul of the Supreme Court's decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, ___ U.S. ___, 130 S.Ct. 1758 (Apr. 27, 2010), and *AT&T Mobility v. Concepcion*, ___ U.S. ___, 131 S.Ct. 1740 (Apr. 27, 2011). To the contrary, adherence to *D.R. Horton* does not *compel* class arbitration, as Respondent is nonetheless free to limit its arbitration program to individual arbitration so long as employees remain free to exercise their Section 7 right to engage in collective or class legal activity in court and are not compelled to only act individually. Any such policy would be entirely permissible under the FAA and would not run afoul of either *Stolt-Nielsen* or *AT&T Mobility*. Counsel for the Acting General Counsel further notes that, while *Stolt-Nielsen* and *AT&T Mobility* make clear that bilateral arbitration is *favored* under the FAA, neither of these decisions suggests that it is *compelled*. Indeed, *Stolt-Nielsen* makes explicit that an agreement to arbitrate on a class basis is enforceable under the FAA. 130 S.Ct. at 1774-75. Thus, any claimed infringement on the FAA by protected employees' Section 7 rights in these circumstances is entirely illusory.

In contrast, permitting an employer to require employees to limit their legal claims to individual arbitration vitiates the right to collective action that lies at the heart of the NLRA. It is axiomatic that an employer cannot force employees to forego that right. It therefore follows that prohibiting employers from doing so protects the values inherent in the NLRA without offending those inherent in the FAA. Put another way, requiring an employer to adhere to the NLRA is consistent with the FAA.

Finally, as the *D.R. Horton* Board made clear, even if, contrary to the foregoing, there were an irreconcilable conflict between the NLRA and the FAA, “the Supreme Court has held that when two federal statutes conflict, the later enacted statute, here the NLRA, must be understood to have impliedly repealed inconsistent provisions in the earlier enacted statute.” 357 NLRB No. 184, slip op. at 12 n.26.¹² For the reasons stated here, and for those iterated by the Board in *D.R. Horton*, finding Respondent’s individual arbitration policy and Options unlawful under the Act will not pose a conflict with the FAA.

3. The possibility of joinder or intervention under the Federal Rules of Civil Procedure does not make the arbitration policy lawful.

Respondent has indicated that it will argue that the Options are lawful because Option A permits some permissive joinder and intervention of individually-filed arbitration claims under FRCP 20 - Joinder and FRCP 24 - Intervention. However, under *D.R. Horton*, such an “allowance” is insufficient to protect the full scope of employees’ Section 7 right to pursue collective action. *See, e.g., D.R. Horton*, 357 NLRB No. 184, slip op. at 6, where the Board stated, “If the Act makes it unlawful for employers to require employees to waive their right to engage in one form of activity, it is no defense that employees remain able to engage in *other* concerted activities.” First, FRCP 20 – Joinder, and FRCP 24 – Intervention, procedures are available only to employees who have already filed their own individual claims and individually moved for joinder or intervention. Joined claims continue to proceed in the names of the

¹² While the FAA was reenacted and codified as Title 9 of the United States Code in 1947, the legislative history and the Supreme Court make clear that the relevant date of enactment is 1925. *See, e.g.,* H.R. Rep. No. 80-251 (1947), *reprinted in* 1947 U.S.C.C.A.N. 1511 (expressly stating that the 1947 bill made “no attempt” to amend the existing law); H.R. Rep. No. 80-255 (1947), *reprinted in* 1947 U.S.C.C.A.N. 1515 (same); *Compucredit Corp. v. Greenwood*, 132 S.Ct. at 668 (“the Federal Arbitration Act (FAA) enacted in 1925”); *AT&T Mobility v. Concepcion*, 131 S.Ct. at 1745, 1751 (“[t]he FAA was enacted in 1925”); *Vaden v. Discover Bank*, 556 U.S. 49, 58, 129 S.Ct. 1262, 1271 (2009) (“[i]n 1925, Congress enacted the FAA”).

individual claimants. Thus, this option excludes all actions that would present a common claim through a common representative – a procedure that is expressly protected by Section 7 of the Act. *See, e.g., J.H. Stone & Sons*, 33 NLRB 1014, 1023 (1941), *enf'd in relevant part* 125 F.2d 752 (7th Cir. 1942) (“The effect of this restriction [which precluded an employee from dealing with the employer through a representative until after the employee had attempted to settle the dispute by directly dealing with the employer as an unrepresented individual] is that, at the earliest and most crucial stages of adjustment of any dispute, the employee is denied the right to act through a representative and is compelled to pit his individual bargaining strength against the superior bargaining power of the employer.”). Employees who choose not to bring an individual action – out of fear of reprisal or any number of other legitimate reasons – are nevertheless entitled by Section 7 to seek to improve their working conditions by designating a representative to take action on their behalf. *D.R. Horton*, 357 NLRB No. 184, slip op. at 3 n.5. Neither joinder nor intervention effectuates those rights.

Second, because FRCP 20 and FRCP 24 require each claimant to move for joinder or intervention, respectively, claimants must be aware of each others’ legal proceedings before the collective action can occur, and sometimes this is not the case, especially as Respondent is an employer with branches all across the nation.

Finally, joinder and intervention are not practicable with respect to some collective claims because claimants are so numerous. Indeed, by definition, class actions encompass claims that cannot be pursued on a joint basis: under FRCP 23(a)(1), a required element for class certification is proof that “the class is so numerous that joinder of all members is impracticable.”

Therefore, limiting employees' collective claims to those which can be encompassed by joinder or intervention impermissibly limits employees' ability to act concertedly, and the individual arbitration provision and the Options are unlawful under *D.R. Horton*.

4. It is irrelevant whether Pamela Herrington was an employee of Respondent when Options A and B were promulgated and enforced.

Respondent's contention that the Charging Party is not an "employee" protected under the Act because she is a former employee is meritless. The Charging Party was an employee under the Act at the time she signed the employment agreement, and other statutory employees were required to sign either the employment agreement with the individual arbitration provision until at least July 23 or the employment agreement choosing Option A or Option B to substitute the individual arbitration provision from at least July 23 to the present. (Stip. R. at ¶¶ 14(a)-(c), 16(a)-(e); Jt. Exs. K, R, S.) The employees are still subject to enforcement of either the individual arbitration provision and/or their choice of Option A or Option B. (Stip. R. at ¶ 14(e).) Respondent further stipulated that it has required employees to enter into either Option A or Option B as a condition of employment and that, since about July 23 to the present, Respondent has entered into an employment agreement containing Option A with at least one of its current employees. (Stip. R. at ¶¶ 16(b), 16(e).) Moreover, any person or organization – which is not limited to only current employees of a charged party-employer - may file a charge under Section 102.9 of the Board's Rules and Regulations. *D.R. Horton*, 357 NLRB No. 184, slip op. at 10-11.

Counsel for the Acting General Counsel further notes that Judge Crabb also squarely rejected this argument in her March 16, 2012 Opinion and Order at pages 12-13. (Jt. Ex. N at 12-13.) It is also worth noting that the charging party in the *D.R. Horton* case was a former employee.

5. Principles of collateral estoppel do not preclude proceeding against Respondent's motions for individual arbitration.

In its Answer to the Amended Complaint, Respondent has, without further explanation, alleged the doctrine of estoppel as an affirmative defense. (Jt. Ex. I at page 4, ¶ 10.) The principles of collateral estoppel, however, do not preclude proceeding against Respondent's motions for individual arbitration.¹³ The doctrine of collateral estoppel, or "issue preclusion," provides that "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." *Montana v. United States*, 440 U.S. 147, 153 (1979). Thus, collateral estoppel bars not only the decision-making court, but also any other court, from reconsidering the same issue. *United States v. Stauffer Chemical*, 464 U.S. 165 (1984). It is well established that three elements must be satisfied in order for collateral estoppel to apply: (1) the issue at stake must be identical to the one alleged in the prior litigation; (2) the issue must have been actually litigated in the prior litigation by the party against whom preclusion is asserted; and (3) the determination of the issue must have been a critical and necessary part of the final judgment in the earlier action. *Town of North Bonneville v. Callaway*, 10 F.3d 1505, 1508 (9th Cir. 1993) (quoting *Clark v. Bear Stearns & Co.*, 966 F.2d 1318, 1320 (9th Cir. 1992)).

As a general rule, the Federal Government is not barred from subsequently litigating an issue involving enforcement of Federal law which a private party has litigated unsuccessfully, unless the Federal Government was a party in the prior litigation. *United States v. Mendoza*, 464

¹³ It is important to additionally note that, because Respondent is a nationwide employer, it is possible that Respondent has attempted to enforce the individual arbitration provision in litigation other than that involving the Charging Party presently unknown to Counsel for the Acting General Counsel.

U.S. 154, 162 (1984); *Field Bridge Associates*, 306 NLRB 322 (1992), *enf'd sub. nom. Local 32-B-32J Service Employees Intern. Union, AFL-CIO v. NLRB*, 982 F.2d 845 (2d Cir. 1996), *cert. denied* 509 U.S. 904 (1993). The Board has long held that “if the Government was not a party to the prior private litigation, it is not barred from litigating an issue involving enforcement of Federal law which the private [party] has litigated unsuccessfully.” *Field Bridge Associates*, 306 NLRB at 322, *citing Allbritton Communications*, 271 NLRB 201, 202 n.4 (1984), *enf'd* 766 F.2d 812 (3d Cir. 1985), *cert. denied* 474 U.S. 1081 (1986); *see also, e.g., Precision Industries*, 320 NLRB 661, 663 (1996), *enf'd*. 118 F.3d 858 (8th Cir. 1997), *cert. denied* 523 U.S. 1020 (1998). As the Board has stated, “Congress has entrusted to the Board exclusively the prosecution of the proceeding by its own complaint, the conduct of the hearing, the adjudication and the granting of appropriate relief,” and the Board is “the public agency . . . chosen as the instrument to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce.” *Field Bridge Associates*, 306 NLRB at 322 (*quoting Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261, 265 (1940)). Indeed, “the Board, as a public agency asserting public rights should not be collaterally stopped by the resolution of private claims asserted by private parties.” *Id.* at 322.

Counsel for the Acting General Counsel recognizes that two circuit court decisions *have* applied collateral estoppel principles to the Board and denied enforcement of Board orders in unfair labor practice cases that turned on the existence of a contract. *Donna-Lee Sportswear*, 836 F.2d 31 (1st Cir. 1987); *NLRB v. Heyman*, 541 F.2d 796 (9th Cir. 1976). In *Donna-Lee*, the First Circuit held that the Board was precluded from finding an effective contract because a court had already ruled that no binding contract was in existence. 836 F.2d at 35. The court emphasized that: (1) it was not unusual for a court to determine whether there was a valid contract; and (2)

the private interests of the disputants predominated in that case, rather than any public rights at issue. *Id.* at 36-38. In *Heyman*, the Ninth Circuit denied enforcement of a Board order that the employer had unlawfully repudiated a collective-bargaining agreement and refused to bargain with the union. Instead, the court held that the Board was bound by a previous federal district court decision in a Section 301 lawsuit that rescinded the collective-bargaining agreement due to the union's lack of majority status. The Ninth Circuit wrote that “[a]n implicit collateral attack, launched through the filing of charges premised on the contract, may not be entertained by the Board under the guise of different policy considerations.” 541 F.2d at 799. The Board has noted that, in both of those cases, the issue in the unfair labor practice case – whether there was a contract or not – was the same issue as the one that had been decided in the court proceeding. *See, e.g., Precision Industries*; 320 NLRB at 663 n.13.

In the instant case, of course, the Board was not a party to any of the private court actions at issue. Therefore, under established Board law, it is clear that the Board is not precluded from proceeding against Respondent's unlawful motions to compel individual arbitration at issue here. Moreover, the issue at stake is not identical to any decided in any prior litigation – this case deals with whether Respondent's individual arbitration provision and/or Options unlawfully interfere with employees' Section 7 rights under the NLRA, while the courts have considered whether to compel individual arbitration pursuant to the individual arbitration provision under the FAA. Finally, the issue here does not concern a private dispute about the mere existence of a contract in which the particular interests of the disputants predominate, and as to which the courts may be at least as capable of determining as the Board. Rather, this case deals with whether Respondent's enforcement of its individual arbitration provision and/or Options violates employees' Section 7 rights – an issue regarding a public right that is within the exclusive

authority and expertise of the Board. Thus, even under the rationale of *Donna-Lee Sportswear*, the Board is not precluded from finding that Respondent violated Section 8(a)(1) of the Act by moving to compel individual arbitration, even after a state or federal court has considered such a motion.

6. Neither the doctrine of unclean hands nor misconduct by the Charging Party warrant finding in Respondent's favor.

Respondent's Answer to the Amended Complaint asserts an affirmative defense that "[t]he Amended Complaint is barred, in whole or in part, by the doctrine of unclean hands and/or the misconduct of the Charging Party." (Jt. Ex. I at page 4, ¶ 6.) Respondent has not elaborated on that defense, and without further information, Counsel for the Acting General Counsel cannot articulate a meaningful response, especially given that nothing in the stipulated record reflects any misconduct or "unclean hands" by the Charging Party. Should Respondent continue to assert and elaborate upon this defense, Counsel for the Acting General Counsel accordingly respectfully requests that the Board permit her to supplement her Brief to the Board on this issue.

7. The doctrine of waiver does not apply.

Respondent's Answer to the Amended Complaint asserts an affirmative defense that "[t]he Amended Complaint is barred, in whole or in part, by the doctrine of waiver." (Jt. Ex. I at page 4, ¶ 9.) Respondent has not elaborated on that defense, and without further information, Counsel for the Acting General Counsel cannot articulate a meaningful response, especially given that nothing in the stipulated record reflects that the Charging Party somehow "waived" her rights under the NLRA to file the underlying charge. Should Respondent continue to assert and elaborate upon this defense, Counsel for the Acting General Counsel respectfully requests that the Board permit her to supplement her Brief to the Board on this issue.

8. Because the policy has been maintained and enforced within the Section 10(b) period, neither Section 10(b) nor the doctrine of laches bar this action.

Respondent argues that the Board has no jurisdiction over the alleged unfair labor practices set forth in the Amended Complaint because they are barred by Section 10(b) of the Act. Section 10(b) does not preclude the pursuit of a complaint allegation based on the maintenance and/or enforcement of an unlawful rule within the Section 10(b) period, even if the rule was promulgated earlier. *See Control Services*, 305 NLRB 435, 435 n.2, 442 (1991), *enf'd mem.* 961 F.2d 1568 (3d Cir. 1992); *see also The Guard Publishing Co.*, 351 NLRB 1110, 1110 n.2 (2007). Here, although the unlawful individual arbitration provision has been promulgated since at least April 7, 2011, the ramifications of the Policy continue into the Section 10(b) period as amply evidenced by Respondent's recent attempt to enforce its individual arbitration provision with the Charging Party in both the judicial and arbitral fora. (Stip. R. at ¶¶ 14(e), 15(b), 15(e), 15(f); Jt. Exs. M, P, Q.) All of Respondent's employees covered by the individual arbitration provision between about April 7, 2011 and July 23, and/or the Options between about July 23 and the present, have had their Section 7 rights infringed upon. At any time, either the individual arbitration provision or the Options may be enforced against them. As such, the maintenance of Respondent's unlawful individual arbitration provision and Options within the Section 10(b) period was unlawful even though, with respect to the individual arbitration provision, the rule was promulgated before then.

9. The remedy sought is appropriate because Respondent's motions to compel arbitration and continued attempt to enforce the individual arbitration provision are antithetical to the Act.

To the extent Respondent argues that assuming, *arguendo*, any allegation in the Amended Complaint is found to be a violation, the remedy requested is inappropriate as a matter of law,

such an argument fails. As part of the remedy in this matter, Counsel for the Acting General Counsel seeks an order precluding Respondent from maintaining that portion of its individual arbitration provision and its Options found to be unlawful. This would include not only cease-and-desist relief but also notification to employees that it is rescinding the unlawful provisions.

Additionally, Counsel for the Acting General Counsel seeks an order precluding Respondent from enforcing that portion of its individual arbitration provision and Options found to be unlawful. This would include not only cease-and-desist relief but also an order requiring Respondent to notify all judicial and arbitral forums wherein the individual arbitration provision or Option A or Option B has been enforced that Respondent no longer opposes the seeking of collective or class action type relief.¹⁴ In particular, to remedy the legal consequences of the employer's unlawful motion,¹⁵ and return employees to the *status quo ante*, Respondent should be required to withdraw the motion for individual arbitration, if pending, or to move the appropriate court to vacate its order for individual arbitration, if Respondent's motion has

¹⁴ Although only a recent Administrative Law Judge ("ALJ") decision, Counsel for the Acting General Counsel respectfully requests that the Board take administrative notice of *24-Hour Fitness USA, Inc.* (20-CA-035419) (JD(SF)-51-12) (Schmidt, William L., ALJ) (Nov. 6, 2012), in which the ALJ found the employer to have violated the Act by enforcing its unlawful individual arbitration policy against employees and ordering the employer "to notify 'all judicial and arbitral forums wherein the (arbitration policy) has been enforced that it no longer opposes the seeking of collective or class action type relief' . . . [to] include a requirement that [the employer]: (1) withdraw any pending motion for individual arbitration, and (2) request any appropriate court to vacate its order for individual arbitration granted at [the employer's] request if a motion to vacate can still be timely filed." *Id.*, slip op. at 19.

¹⁵ Of course, consistent with the Board's usual practice in cases involving unlawful legal actions, Respondent should be ordered to reimburse employees for any attorney's fees and litigation expenses directly related to opposing Respondent's unlawful motion(s) to compel individual arbitration. See *Bill Johnson's Restaurants*, 461 U.S. at 747 ("If a violation is found, the Board may order the employer to reimburse the employees whom he had wrongfully sued for their attorney's fees and other expenses" and "any other proper relief that would effectuate the policies of the Act"), *on remand* 290 NLRB 29, 30 (1988); *Phoenix Newspapers*, 294 NLRB 47, 51 (1989); *Summitville Tiles, Inc.*, 300 NLRB 64, 67, 77 (1990).

already been granted and a motion to vacate can still be timely filed.¹⁶ Any such motion to vacate should be made jointly with the affected employees, if they so request.¹⁷ Counsel for the Acting General Counsel notes that nothing in the requested order would preclude Respondent from amending its motion to seek lawful collective or class arbitration rather than a class or collective lawsuit, as long as employees were able to exercise their collective legal rights in some forum.¹⁸

Under Board law, such remedies are appropriate. Specifically, the Board has frequently sought remedies requiring a respondent to take affirmative steps in disavowing positions that are antithetical to the Act. Thus, in *Loehmann's Plaza*, 305 NLRB 663, 671 (1991), the Board ordered the respondent to seek to have the injunction granted against the union withdrawn. In *Federal Security, Inc.*, 336 NLRB 703 (2001), *remanded on other grounds*, 2002 WL 31234984

¹⁶ Counsel for the Acting General Counsel notes that, depending on the jurisdiction, a motion for relief from judgment or order due to legal error, pursuant to FRCP 60(b), may be timely filed for a short period beyond the entry of final judgment (*see, e.g., Steinhoff v. Harris*, 698 F.2d 270, 275 (6th Cir. 1983) (“the vast majority of courts that have concluded that legal error comes within the meaning of [FRCP] 60(b)(1) have also determined that . . . the moving party must make his or her motion within the time limits for appeal”), and even beyond the expiration of the period for filing an appeal (*see, e.g., Lairsey v. Advance Abrasives Co.*, 542 F.2d 928, 930-32 (5th Cir. 1976) (permitting an FRCP 60(b) motion after the time limit for appeal had expired, but within one year of the judgment, where there had been a change in the underlying law).

¹⁷ In this regard, Counsel for the Acting General Counsel notes that the Board has in the past ordered such a joint motion or petition where an employer has unlawfully used the legal system to interfere with an employee’s Section 7 rights. *See, e.g., Baptist Memorial Hospital*, 229 NLRB 45, 46 (1977) (“[w]e shall also require Respondent to rectify the effects of its unlawful conduct by joining with [the employee] in petitioning the Memphis Municipal Court and Police Department to expunge any record of [the employee’s] arrest and conviction”).

¹⁸ This would be consistent with the General Counsel’s long-standing position that employers may lawfully require employees to bring their claims in arbitration, rather than in court, as long as all of their substantive rights are preserved (including their statutory right to engage in collective legal activity). *See, e.g., O’Charleys Inc.*, Case 26-CA-19974, Advice Memorandum dated April 16, 2001, at 5-7 (“Section 7 does not provide a right to select any particular forum to concertedly engage in activities for mutual aid and protection”).

(D.C. Cir. 2002), the Board ordered the respondent to take affirmative steps to file a motion with the court to withdraw its lawsuit and file a motion to vacate the default orders entered and those still operative.¹⁹

10. Even if the remedy sought is viewed as retroactive in nature, it is appropriate because Respondent cannot show that manifest injustice will result.

Respondent may argue that the NLRB does not have the authority to require Respondent or a court to undo determinations that have already been made with regard to enforcement of arbitration agreements or, for example, that the Board in *D.R. Horton* did not intend its decision to have a retroactive effect.

The remedy sought is not retroactive in nature, as *D.R. Horton* applies longstanding Board precedent upholding employees' right to join together concerning workplace grievances, including through litigation. 357 NLRB No. 184, slip op. at 2 n.4. (citing multiple Board cases standing for this proposition). Rather, Counsel for the Acting General Counsel merely seeks to have Respondent inform all pertinent judicial and arbitral forums that it no longer opposes the seeking of collective or class type relief. What action follows is for the individual forums to determine.

At any rate, were the remedy to be interpreted as retroactive in nature, the remedy would withstand scrutiny because it does not impose "manifest injustice" on Respondent. In determining whether a respondent party would suffer a manifest injustice in the retroactive application of new policies or standards, the Board applies a three-factor test. *Kentucky River Medical Center*, 356 NLRB No. 8, slip op. at 4-5 (Oct. 22, 2010). The factors are: (1) the

¹⁹ As those cases were based on federal-law preemption, rather than a *Bill Johnson's Restaurant* "illegal objective," the timing of the preemption was considered in applying the remedy. Here, of course, there is no point of preemption and, as noted above, Respondent's motions were unlawful *ab initio*.

reliance of the parties on existing law; (2) the effect of retroactivity on the purposes of the Act; and (3) any particular injustice to the losing party under retroactive application of the change of law. *Wal-Mart Stores, Inc.*, 351 NLRB 130, 134 (2007); *SNE Enterprises, Inc.*, 344 NLRB 673, 673 (2005); *see also DTG Operations, Inc.*, 357 NLRB No. 175, slip op. at 7 n.19 (Dec. 30, 2011) (applying the three-part test).

The first issue under the “manifest injustice” test is whether Respondent relied on preexisting Board law. In *Loehmann’s Plaza*, referenced *supra*, the Board determined that it saw “no injustice to any of the parties here in retroactive application of our rulings because the current state of the law governing lawsuits against trespassers exercising Section 7 rights can fairly be described as unsettled.” 305 NLRB at 672. Similarly, in *Pattern and Model Makers Association of Warren and Vicinity, Pattern Makers League of North America, AFL-CIO*, 310 NLRB 929, 931 (1993), the Board found that the retroactive application of a new rule on fining members was proper because “the [u]nion did not enjoy complete certainty as to how it would fare under Board law.”²⁰ In *SNE Enterprises*, the Board emphasized both that the employer presented no evidence of its supervisors’ reliance on prior precedent and that the complained-of change did not represent a significant departure from well-settled law. 344 NLRB at 673-74; *see also DTG Operations, Inc.*, 357 NLRB No. 175, slip op. at 7 n.19 (noting that the employer supplied no evidence that it had relied on Board precedent to guide its actions).

Here, Respondent could not have relied on Board law when it established its individual arbitration policy on April 7, 2011. Since its earliest days, the Board has held that an employer cannot require employees to waive rights guaranteed under the Act. *D.R. Horton*, 357 NLRB No.

²⁰ *Cf. Kentucky River Medical Center*, 356 NLRB No. 8, where the Board was deciding a remedial issue.

184, slip op. at 4, and cases cited at footnote 7. Further, the Board has long held that the “NLRA protects employees’ ability to join together to pursue workplace grievances, including through litigation.”²¹ *Id.*, slip op. at 2. Respondent can cite to no Board decision that supports the use of its individual arbitration policy or Options in different court actions to stifle collective action.²²

The second issue to be addressed – the effect of retroactivity on the purposes of the Act – also supports retroactive application in this case. The effect of retroactivity here would further the purposes of the underlying law, i.e., an employer cannot require employees to waive their Section 7 rights, which the decision in *D.R. Horton* refined. Ordering Respondent to return to the judicial forums in which it has asserted its individual arbitration provision and/or Options as an impediment to a class action in order to disavow its position may allow those and other employees the opportunity to exercise their right to bring a collective or class action – a right “at the core of what Congress intended to protect by adopting the broad language of Section 7.” *Id.*, slip op. at 3.

The third and last issue to be addressed, whether retroactive application of Board law in this case would cause a particular injustice to Respondent, does not prohibit retroactive application here. The Board has found that reliance on existing Board law alone is insufficient to

²¹ Thus, this matter is easily distinguishable from the court’s decision in *Epilepsy Foundation of Northeast Ohio v. NLRB*, 268 F.3d 1095 (D.C. Cir. 2001), *enfg in part* 331 NLRB 676 (2000). In the underlying ULP case, the Board held that employees in the non-union setting would be afforded *Weingarten* rights. In rejecting the retroactive application of this new rule of law, the court relied heavily on the finding that, “At the time when this case arose, the Board’s policy on the application of *Weingarten* rights was absolutely clear – employees not represented by a union could not invoke *Weingarten*.” *Id.* at 1102. Thus, unlike the instant matter, the *Epilepsy* case did not present “new applications of [existing] law, clarifications, and additions” that are appropriate for retroactive application. *Id.* (quoting *Williams Natural Gas Co. v. FERC*, 3 F.3d 1544, 1554 (D.C. Cir. 1993)).

²² The previous issuance of *Office of the General Counsel*, Memorandum 10-06, dated June 16, 2010, was not binding Board law. *D.R. Horton*, 357 NLRB No. 184, slip op. at 6 n.15.

establish a particular injustice.²³ Further, the Board typically does not find a particular injustice where there is limited monetary liability associated with the corresponding unfair labor practice or when the accompanying remedy is for a limited duration.²⁴ Here, applying the remedy retroactively, i.e., to any pending proceedings, does not impose any particular injustice on Respondent. Respondent relied on no Board law – which, in any event, would be insufficient to evidence an injustice – nor can Respondent point to any monetary liability in notifying the judicial forums where actions are pending that it will not seek to enforce its individual arbitration provision and/or Options. Respondent may have some degree of potential liability relating to the reimbursement of attorney’s fees and litigation expenses incurred in opposing Respondent’s unlawful motion(s) to compel individual arbitration. However, such liability will necessarily be restricted solely to those expenses incurred directly as a result of those particular motions. As such, the liability will be relatively minor and limited, and Respondent cannot point to any cognizable particular injustice it will undergo in complying with the remedy Counsel for the Acting General Counsel is seeking.

Moreover, any reliance by Respondent on the Supreme Court’s decision in *Christopher v. SmithKline Beecham Corp.*, ___ U.S. ___, 132 S.Ct. 2156 (Jun. 18, 2012), is misplaced. In *SmithKline*, the Supreme Court, in interpreting the Department of Labor’s definition of an outside salesman, did not give deference to the agency’s interpretation, stating:

It is one thing to expect regulated parties to conform their conduct to an agency’s interpretations once the agency announces them; it is quite another to require regulated parties to divine the agency’s interpretations in advance or else be held

²³ See *John Deklewa & Sons*, 282 NLRB 1375, 1389 (1987); see also *Wal-Mart Stores, Inc.*, 351 NLRB at 134-36 (conducting separate and distinct analyses of the “reliance on preexisting law” and “particular injustice” prongs).

²⁴ See *John Deklewa & Sons*, 282 NLRB at 1289, where the Board found liability “must be borne only for the duration of the contract involved.”

liable when the agency announces its interpretations for the first time in an enforcement proceeding and demands deference.

Id. at 2168. In *SmithKline*, the DOL's interpretation had a long history, and parties' reliance on that interpretation would lead to massive liability. *Id.* at 2167. The Court considered whether an agency's determination would result in "unfair surprise" or "fines or damages" caused by "good faith reliance on [agency] pronouncements." *Id.* (citing *Long Island Care at Home v. Coke*, 551 U.S. 158 (2007), *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974)). However, the instant case is readily distinguishable because there is no unfair surprise here in that the remedy sought does not invoke fines or damages caused by good faith reliance on contrary Board precedent. Indeed, as explained above, Board precedent has long been clear that an employer may not require its employees to waive away their Section 7 rights as a condition of employment, which Respondent did not take into account in promulgating, maintaining, and enforcing its individual arbitration provision and Options. As such, the Supreme Court's *SmithKline* decision is inapposite. Therefore, for the reasons stated above, Respondent will not suffer a manifest injustice if the remedy sought by Counsel for the Acting General Counsel is granted.

IV. CONCLUSION

For all of the foregoing reasons, the individual arbitration provision and the Options violate Section 8(a)(1) of the Act. Respondent cannot argue that the individual arbitration provision is anything but a clear and blatant violation of *D.R. Horton*, and Respondent's enforcement of the unlawful individual arbitration provision similarly violates the Act.

Respondent's subsequent attempt to circumvent Section 7 by supplanting the unlawful individual arbitration provision with Options A and B also demonstrates Respondent's disregard of the Act. By requiring employees to choose one of two options, with Option A clearly proscribing future class actions in any forum, Respondent requires the employee to take

affirmative steps to retain his or her Section 7 rights. Neither the processes of joinder nor intervention retained by employees who choose Option A protect the full scope of collective action encompassed by Section 7.

Accordingly, Respondent's individual arbitration provision and Options, and enforcement thereof, violate the Act. Counsel for the Acting General Counsel respectfully requests that the Board order that Respondent cease and desist from maintaining and/or enforcing either unlawful policy; affirmatively inform employees by Notice to be posted, including electronically, if applicable, at all locations where either policy was or is in effect, and to be mailed to any employee employed by Respondent at any time from April 7, 2011 to the present, that it will no longer maintain or enforce either policy; and notify all judicial and arbitral fora in which Respondent has taken the position that employees are prohibited from pursuing a collective or class action by virtue of either policy, that Respondent no longer opposes the seeking of collective or class action type relief.

DATED AT Milwaukee, Wisconsin, this 12th day of December, 2012.

Respectfully submitted,

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Waterstone Mortgage Corporation
Case 30-CA-073190

Copies of Counsel for Acting General Counsel's Brief to the Board has been sent December 12, 2012 by the following methods, to the following parties of record:

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