

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.

ALTON SANDERS, an individual, Charging
Party,

vs.

Case 20-CA-35419

24 HOUR FITNESS USA, INC., Charged Party.

**EMPLOYER'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE
LAW JUDGE'S DECISION**

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I. INTRODUCTION AND SUMMARY

Pursuant to 29 C.F.R. § 102.46(c), 24 Hour Fitness USA, Inc. (“24 Hour Fitness,” “Company,” “Employer,” or “Respondent”), submits this Brief in Support of its Exceptions to the Decision of the Administrative Law Judge (“ALJ”) dated November 6, 2012 (“Decision”).¹

24 Hour Fitness seeks review of the ALJ’s decision that the arbitration agreement (“Agreement”) voluntarily entered into by and between 24 Hour Fitness and the Charging Party Alton Sanders (“Charging Party” or “Sanders”) and other 24 Hour Fitness employees (“Team Members”), which precludes class actions, but expressly permits Team Members to join claims in a single proceeding and preserves all substantive legal rights, violated the Act. As the ALJ found, “there is no evidence of interference, restraint, or coercion that brought about Charging Party’s or any other employee’s *voluntary decision* at the start of their employment to forego participation in a class or collective action.” (Dec. 12:36-39) (emphasis added.) But the ALJ nevertheless determined that the Agreement violated that Act under *D. R. Horton*, 357 NLRB No. 184 (January 3, 2012). That conclusion is erroneous.

In holding that a class action waiver contained in an arbitration agreement *mandated* by an employer *as a condition of employment* violates the Act, the Board in *D.R. Horton* expressly reserved “the more difficult question” whether the Act forbids employers and employees from *voluntarily* agreeing to resolve their disputes through arbitration on only an individual basis. *Id.*, slip op. at p. 13 n. 28.² Nothing in the Act or in any prior Board decisions prohibits such

¹ References to the transcript of the hearing will be referred to as “Tr. ___”. References to the Respondent’s exhibits will be referred to as “Resp. Exh. ___”. References to the General Counsel’s exhibits will be referred to as “G.C. Exh. ___”. References to Joint Exhibits will be referred to as “Jt. Exh. ___”. References to the ALJ’s Decision will be referred to as “Dec. ___”.

² As explained below, Respondent expressly reserves all arguments that *D.R. Horton* was incorrectly decided because, *inter alia*, Section 7 does not encompass the procedural right to engage in class or collective actions.

voluntary agreements. To the contrary, it is well-established that a class action is a procedural device and not a substantive legal right. *See, e.g., Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980). As such, a voluntary agreement that fully preserves all substantive legal claims but limits their resolution through individual arbitration in no way interferes with any rights protected by the Act. That is particularly true where, as here, the Agreement expressly permits 24 Hour Fitness Team Members to *join together* in filing claims in a single proceeding, and it is error for the ALJ to conclude otherwise.

The Decision also cannot be reconciled with the Federal Arbitration Act, 9 U.S.C. §§ 1-16, particularly in light of Supreme Court precedent issued since *D.R. Horton* was decided. Contrary to the ALJ's assertion that these cases cannot be applied in the context of employment, the Supreme Court has explained, "[o]ur cases invoking the federal 'policy favoring arbitration' of commercial and labor disputes apply the same framework." *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847, 2858 (2010). Apart from failing to apply U.S. Supreme Court precedent, the ALJ misapplied *D.R. Horton*, in which the Board held only that its decision to bar *employer-mandated* arbitration agreements was consistent with the FAA. By contrast, the ALJ's application of the NLRA to strike down a *voluntary* arbitration agreement amounts to an irreconcilable conflict with the "emphatic federal policy in favor of arbitral dispute resolution" embodied in the FAA. *KPMG LLP v. Cocchi*, 132 S. Ct. 23, 25 (2011) (per curiam) (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985)).

Indeed, the ALJ's erroneous analysis of the FAA is predicated on his repeated assumption that the Agreement was *employer-required* and not, as he expressly found, a *voluntary* agreement. (*See, e.g.,* Dec. 14:17-21 (Respondent's arguments "fail to convince me that the FAA provides employers with a license to *unilaterally* craft arbitration requirement [sic]

in their terms and *conditions of employment*”)); (Dec. 14:21-24 (“[T]his case presents the altogether different question as to whether an employer may design and enforce an arbitration policy that *prevents* its workers from acting in concert for their mutual aid and benefit by initiating and prosecuting a good-faith legal action against their employer.”)); (Dec. 15:1-5 (“[The Supreme Court’s FAA] cases do not address the fundamental question of whether, and to what degree, the FAA may be used as a tool to alter, by way of private ‘agreements’ *that are in large measure imposed unilaterally by employers*, the fundamental *substantive rights* of workers”)). But it is undisputed here that the Agreement was *not* “unilaterally imposed” nor a “condition of employment” – as the ALJ himself found. As well, the Agreement in no way “prevents” or “restricts” any Team Member from exercising any *substantive right*. Under such circumstances, accommodation of the two statutes tips decidedly in favor of enforcement of the Agreement under the FAA and not, as the ALJ concluded, striking it down under the NLRA.

Unaddressed by the ALJ is the requirement that in addition to the FAA, the NLRA must be harmonized with the Rules Enabling Act. The Rules Enabling Act (REA) prohibits any interpretation of Rule 23, the procedural mechanism governing class actions, that would “abridge, modify or enlarge any substantive right.” 28 U.S.C. § 2072(b). The ALJ’s Decision runs afoul of the REA for two reasons. First, by elevating Rule 23 class actions to a right constituting protected, concerted activity, the ALJ has enlarged the substantive rights provided under the National Labor Relations Act. Second, the ALJ’s elevation of Rule 23 class actions to a substantive right under the NLRA apart from violating the REA, creates a direct conflict with the substantive rights provided by the FAA. Harmonizing the three federal statutes—the NLRA, FAA, and REA—requires the enforcement 24 Hour Fitness’s voluntary Agreement waiving class and collective actions.

Apparently recognizing the lack of legal support – in *D.R. Horton* or otherwise – for his decision to strike down the Agreement that he found to be voluntary, the ALJ backtracks by describing the Team Members’ clear and unequivocal right to “opt-out” of the Agreement as “an illusion.” (Dec. 16:17-18.) He cites *no* evidence for this assertion, and indeed there is none. To the contrary, the record makes clear that many Team Members have exercised the right to opt-out, thereby only *confirming* the truly voluntary nature—and therefore the enforceability—of the Agreement.

The ALJ commits a similar error by his pure conjecture about the application of the Agreement’s provision regarding disclosure. As a threshold matter, the ALJ’s last-minute finding that the provision violates the Act was plainly improper, as there was no such allegation made in the Complaint nor was this issue litigated by the parties. On its face, the Agreement does not limit disclosure of any information required by law. The Acting General Counsel did not introduce and there is no *evidence* whatsoever supporting the ALJ’s speculation that the provision has ever been applied, or can reasonably be understood, to limit the rights of Team Members to join together in processing their claims in arbitration. To the contrary, the Agreement makes clear that the opposite is true. (*See* Jt. Exh. 1, ¶ 2; Jt. Exh. 2(A)-(E) (expressly permitting joinder pursuant to Fed. R. Civ. P. 20)).

Finally, 24 Hour Fitness appeals the Remedy ordered by the ALJ. Regardless of the ALJ’s views about the application of the NLRA here, the Board lacks authority to displace the role of Article III courts in resolving the question of whether the Agreement is enforceable under the FAA. That is particularly true with respect to the cases cited in the Decision in which the courts have already issued decisions on the matter or the cases have been dismissed or settled such that no ongoing jurisdiction exists. Nor does the NLRA authorize the Board to require 24

Hour Fitness to waive its due process right to argue about the proper application of the FAA in any court of law.

For these and the other reasons set forth below and in the accompanying Exceptions, the Decision of the ALJ should be reversed. Because of the important issues presented by the Decision, 24 Hour Fitness requests oral argument.

II. FACTS

A. Respondent 24 Hour Fitness.

Founded as a single club in 1983, Respondent 24 Hour Fitness USA, Inc. operates fitness clubs throughout the United States, servicing over three million members in more than 400 clubs across the country. (Jt. Exh. 1, ¶ 21.)

The Company employed 20,563 Team Members as of June 22, 2012. Of those Team Members, 19,614 are Section 2(3) employees. (Jt. Exh., ¶ 22.)

B. Charging Party Alton Sanders.

Charging Party Alton Sanders worked for 24 Hour Fitness for approximately two years from on or about October 6, 2008 to 2010. (Tr. 38:12-21; G.C. Exh. 2.) He worked as a Group Exercise Instructor (“GXI”) teaching yoga, Cycle, and other classes at the Larkspur, Santa Rosa, Petaluma and Fairfield clubs. (Tr. 38:22-39:1.)

When Sanders originally applied for employment on August 25, 2008, he was notified that, if he became employed, he would have the opportunity to agree that both he and 24 Hour Fitness would resolve any subsequent disputes through voluntary and binding arbitration. Thus, the employment application that he signed clearly states that:

I understand that as an expeditious and economical way to settle employment disputes without need to go through courts, 24 Hour Fitness agrees to submit such disputes to final and binding arbitration. I understand that I may opt out of the arbitration

procedure, within a specified period of time, as the procedure provides. 24 Hour Fitness and I also understand that if I am offered employment and I do not opt out, we both will submit exclusively to final and binding arbitration all disputes arising out of or relating to my employment. This means a neutral arbitrator, rather than a court or jury, will decide the dispute. (Resp. Exh. 1, p. 3.)

Sanders was again notified of his right to agree, or not agree, to participate in the Company's arbitration program when he began his employment on October 6, 2008. (Tr. 39:2-16.) At that time, Sanders expressly acknowledged his right to "opt-out" of the arbitration program when he received the 2007 Team Member Handbook and signed the New Team Member Handbook Receipt Acknowledgement. (Tr. 39:17-40:4; G.C. Exh. 2; Jt. Exh. 2(B).) That document states, in part:

I have received the 2007 Handbook and I understand that in consideration for my employment it is my responsibility to read and comply with the policies contained in this Handbook and any revisions made to it. In particular, I agree that if there is a dispute arising out of or related to my employment as described in the 'Arbitration of Disputes' policy, I will submit it exclusively to binding and final arbitration according to its terms, unless I elect to opt out of the 'Arbitration of Disputes' policy as set forth below.

I understand that I may opt out of the 'Arbitration of Disputes' policy by signing the Arbitration of Disputes Opt-Out Form ('Opt-Out Form') and returning it through interoffice mail to the CAC/HR File Room - no later than 30 calendar days after the date I received this Handbook, as determined by the Company's record. I understand that I can obtain the Opt-Out Form by calling the Employee Hotline at 1.866.288.3263. I understand that if I do not opt out, disputes arising out of or related to my employment will be resolved under the 'Arbitration of Disputes' policy. I understand that my decision to opt out or not opt out will not be used as a basis for the Company taking any retaliatory action against me. (G.C. Exh. 2) (emphasis in original.)

Sanders did not opt out of the Agreement. Sanders never sought to bring any legal action

against 24 Hour Fitness.³ There is no evidence that he was subject to any threats, interference, coercion, or pressure that prevented him from opting out of the Agreement. (Tr. 38:12-44:2.) There is no evidence that Sanders had any difficulty understanding the Agreement or his right to opt out of it. (*Id.*)

C. The Arbitration Agreement & Opt-Out Procedure.

Although the specific language has varied somewhat, the Agreement acknowledged and signed by Sanders to arbitrate all disputes has been offered to Team Members by 24 Hour Fitness since January 1, 2007. The Agreement binds both 24 Hour Fitness and any Team Member, like Sanders, who has not exercised the right to opt out to resolve all claims through final and binding arbitration. It provides:

[T]here will be no right or authority for any dispute to be brought, heard or arbitrated as a class action (including without limitation opt out class actions or opt in collective class actions), or in a representative or private attorney general capacity on behalf of a class of persons or the general public.

(Jt. Exh. 2(B); see also Jt. Exh. 2(A, C through E.)

The Agreement affirmatively gives the parties to the arbitration the “right to conduct civil discovery and bring motions, as provided by the Federal Rules of Civil Procedure,” including under the permissive joinder provisions set forth in Rule 20. (*Id.*)

Like Sanders, all Team Members hired since the Agreement have been provided with a written explanation of the Company’s arbitration program and their absolute right to decline to

³ Sanders testified that he read online about a case entitled *Fulcher v. 24 Hour Fitness*, a class action lawsuit brought by another 24 Hour Fitness Team Member in which Sanders believed he could be a class member. (Tr. 40:10-20.) He contacted an attorney in the case. (Tr. 40:17-19.) the case [*sic*].” Sanders testified that he did not participate in the *Fulcher* case because he was later on informed by an unnamed individual that he “had [] to go as an individual to do the – on the case.” (Tr. 40:21-25.)

be participate in it.⁴ Team Members were given as much time as necessary to review the documents provided during the orientation process, including the Handbook. (Tr. 68:13-69:7.) Team Members also had the option to keep a copy of the January 2007 Acknowledgement for their records. (Tr. 80:10-81:24.)

The Team Member Handbook applied to all Team Members, including those who did not sign the January 2007 Acknowledgement, subject to the Team Members' right to opt out of the Agreement within thirty (30) days of receiving the Handbook. (Jt. Exh. 1, ¶ 5.)

Critically, the Agreement did not become effective until the thirty-day opt-out period expired as the Acknowledgement expressly provided, "***I understand that if I do not opt out, disputes arising out of or related to my employment will be resolved under the 'Arbitration of Disputes' policy.***" (Jt. Exh. 5) (emphasis in bold font in original; emphasis in italicized font added.)

As part of the orientation process, the Company also began providing to newly hired Team Members, along with the Handbook and January 2007 Acknowledgement, a document entitled "Information Sheet About How To Obtain Arbitration Policy Opt-Out Form," which describes in further detail how Team Members could obtain the Opt-Out Form and how to contact Human Resources or the employee hotline with any questions.⁵ (Tr. 84:14-85:25, 88:17-

⁴ Team Members hired prior to January 1, 2007, apart from those working in Texas, have not been given the opportunity to opt out of 24 Hour Fitness's Agreement. (Tr. 92:14-22; Jt. Exh. 1, ¶ 10; Jt. Exh. 11, 12 and 13.)

⁵ The employee hotline has been staffed 24-7 with a live person since approximately July 2008. (Tr. 70:15-71:9.) There is no evidence that a Team Member who wanted to opt out of the Agreement was prevented from doing so because of any issue with the hotline. In fact, the record evidence reflects that two Team Members who claims they were unable to connect with a Company representative through the employee hotline were able to opt out of the Agreement anyway. (G.C. Exhs. 4(a)-(e), 5(a)-(g); Tr. 50:5-51:22, 52:8-54:4.) Moreover, the Opt-Out Information Sheet provided to employees (as explained below) expressly informs Team

24; Resp. Exh. 2(A).)

The various versions of the Company's Opt-Out Form used from January 2007 to the present describe in detail the procedure by which the Form can be returned to the Company after it is completed. (Jt. Exh. 1, ¶ 11; Jt. Exh. 14(A)-(F).) For instance, at that time, the Form detailed that it was to be returned via interoffice mail to the CAC/HR file room no later than 30 calendar days after receipt of the Team Member Handbook.⁶ (Jt. Exh. 1, ¶ 11; Jt. Exh. 14(A).)

In effecting the opt-out process, 24 Hour Fitness made the conscious decision not to provide the Opt-Out Form with the rest of the documents provided to new hires. This was done in order to ensure that there would be no retaliation by a manager against a Team Member who might sign the Opt-Out Form in his or her manager's presence and/or return it to the manager. (Tr. 65:25-68:9.)

In 2008, the Company rolled out an identical version of the Team Member Handbook, but updated the Acknowledgement, Opt-Out Form and Opt-Out Information Sheet to reflect the year "2008," rather than "2007." (G.C. Exh. 4(C); Jt. Exh. 14(C).)

In approximately February 2009, the Company moved the entire on-boarding process, including its Team Member Handbook, Handbook Acknowledgement ("Electronic Acknowledgement"), Agreement, and Opt-Out Information Sheet, online. (Jt. Exh. 1, ¶¶ 7, 8; Jt. Exh. 2(D); Jt. Exh. 8; Jt. Ex. 9; G.C. Exh. 3 at 25, 30, 34-35; Tr. 64:12-67:4.) This electronic process has remained in place to the present.

Members they may contact Human Resources or the employee hotline with questions. (Resp. Exhs. 2(A) 2(B); Jt. Exhs. 10(A), 10(B).) In the two instances identified above, the Team Members did just that and successfully opted out of the Agreement. (G.C. Exhs. 4(a)-(e), 5(a)-(g); Tr. 50:5-51:22, 52:8-54:4.)

⁶ The "CAC/HR File Room" is located in Carlsbad, California and houses Team Member personnel files, in addition to a number of other functions. (Tr. 67:9-68:9.)

As part of the electronic on-boarding process, Team Members are required to review and electronically acknowledge each document. (Tr. 55:20-56:19, 58:13-59:12, 60:15-61:4; Jt. Exh. 1 at ¶ 9; G.C. Exh. 3 at 25, 35.) Computers and printers are accessible at each club, and all the materials, including the Agreement and Opt-Out Information Sheet are printable. (Tr. 62:25-63:23, 68:23-69:17, 70:9-14.) The electronic on-boarding process expressly provides a “print” option on the screen of each document that new Team Members review. (G.C. Exh. 3 at 33, 34.)

The Team Member Handbook applies to all Team Members, including those who do not digitally sign the Electronic Acknowledgement, once again subject to their right to opt out of the Agreement within thirty (30) days of receiving the Handbook. (Jt. Exh. 1, ¶ 7.)

In 2010, the opt-out procedure was modified so that Team Members’ requests for an Opt-Out Form were directed to the Legal Department, instead of the employee hotline. Specifically, the telephone number listed on the Agreement and Opt-Out Information Sheet was assigned to a specific corporate paralegal who was responsible for managing Team Member requests. (G.C. Exh. 3 at 35; Jt. Exh. 2(E).)

III. THE ALJ’S DECISION

Sanders filed his charge in which he attacked the legality of the Agreement on February 15, 2011. On April 30, 2012, the Acting General Counsel issued the Complaint regarding Sanders’s charge. The parties participated in a hearing before the ALJ on June 28, 2012.

On November 6, 2012, the ALJ issued his Decision. The ALJ concluded that 24 Hour Fitness violated Section 8(a)(1) of the Act. (Dec. 19:4-6.) He reached this determination despite the fact that, as the ALJ acknowledged, there is no evidence of interference, restraint, or coercion since January 1, 2007, that brought the Charging Party’s or any other Team Member’s voluntary decision at the beginning of their employment to opt out of the Agreement. (Dec. 13:36-39.)

The ALJ ruled that the Agreement unlawfully “requires” 24 Hour Fitness Team Members

EMPLOYER’S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ALJ’S DECISION

to “surrender” their purported right to bring or participate in a class or collective action against his or her employer. (Dec. 16:15-17.) The ALJ ruled that the opt-out process applicable to the Agreement is an “illusion” and thus, the Agreement has never been voluntary. (Dec. 16:17-17:2.) Furthermore, the ALJ determined that the Company’s alleged enforcement of the Agreement in eleven class action lawsuits violated the Act and continues to violate the Act. (Dec. 18:21-23.)

The ALJ also determined that the Agreement’s provision that states “[e]xcept as may be required by law, neither a party nor an arbitrator may disclose the existence, content or results of any arbitration hereunder without the prior written consent of both parties” is unlawful. In doing so, the ALJ opined that the provision “muzzles the employee who did not opt out and who invoked the arbitration process from providing a useful critique of the process, the outcome, or any other worthwhile advice to any fellow worker with a similar dispute whether that employee had opted out or not.” (Dec. 18:9-21.) He reached this issue despite the fact that the legality of this provision was not raised in the Complaint or at any time before, during, or after the hearing as an issue to be litigated. Acting General Counsel did not introduce any testimony or any other evidence of how the provision was enforced, including any possible misapplication of the nondisclosure provision to the Charging Party or any other Team Member. Accordingly, the Acting General Counsel has never asserted that the nondisclosure language violates the Act.

In issuing the remedy, the ALJ ordered that 24 Hour Fitness not only cease and desist from maintaining and/or enforcing the provisions in the Agreement he found unlawful, but also that the Company notify “all judicial forums wherein the [Agreement] has been enforced that it no longer opposes the seeking of collective action or class action type relief.” (Dec. 19:17-19, 20:14-21:5.) With regard to the latter order, the ALJ specifically directed 24 Hour Fitness to:

“(1) withdraw any pending motion for individual arbitration, and (2) request any appropriate court to vacate its order for individual arbitration granted at Respondent’s request if a motion to vacate can still be timely filed.” (Dec. 19:20-22, 20:36-21:5.)

IV. ARGUMENT

As explained in further detail below, the ALJ’s decision is defective in several respects, and thus, his decision must be reversed.

First, the ALJ erred in finding that the Acting General Counsel met his burden to establish a violation of the Act. It is undisputed that since January 1, 2007, 24 Hour Fitness Team Members have maintained the unfettered right to opt out of the Agreement within their first thirty days of employment with the Company with an express assurance that Team Members who choose to opt out will not be subject to retaliation. The ALJ recognized that there is no evidence of interference, restraint, or coercion impacting 24 Hour Fitness Team Members’ ability to voluntarily decide whether to participate in, or opt out of, the Agreement.

Second, the ALJ erred in determining that the Agreement violates Section 8(a)(1) of the Act because it purportedly requires the Employer’s Team Members to waive their right to file or participate in a class action as a condition of employment. In reaching this conclusion, the ALJ failed to acknowledge that since January 1, 2007, the Company’s Agreement has been a voluntary, and not a mandatory condition of employment, as was the case with the arbitration agreement at issue in the Board’s recent decision, *D.R. Horton, supra*.

Beyond that, the ALJ’s decision incorrectly disregards the FAA, which requires that arbitration agreements be enforced in accordance with their terms absent a “contrary Congressional command.” The NLRA in no way prohibits voluntary, bilateral agreements in which employees freely waive the opportunity to bring or join a class or collective action, and thus, the ALJ’s refusal to apply Supreme Court precedent regarding the FAA was erroneous.

Third, the ALJ erred in ruling that the Agreement contains a purported “nondisclosure provision” that chills the Company’s Team Members’ Section 7-protected activities. The issue of the propriety of this provision was not pled, either in the Complaint or in any amendment by the Acting General Counsel during the hearing, and never litigated in this proceeding. Regardless, the Agreement does not in any way chill purported Section 7-protected activity. The record is absent of any support for the ALJ’s supposition that the provision has ever been applied, or can reasonably be understood, to limit the rights of Team Members to join together in processing their claims in arbitration.

Fourth, the ALJ failed to find that the charge is time-barred with respect to the Employer’s Agreement prior to January 1, 2007, when the Agreement lacked an express opt-out provision. Sanders filed the instant charge in February 2011 – well outside the six-month statute of limitations period set forth in Section 10(b) of the Act. Moreover, noticeably absent from the record is any evidence that 24 Hour Fitness ever maintained or enforced the class action waiver in its Agreement with respect to any Team Member not given the opportunity to opt out. Thus, there is no basis for any finding that the Company committed a “continuing violation” that could bring 24 Hour Fitness’s conduct in not allowing Team Members to opt out within the six-month statute of limitations.

Fifth, even if the ALJ’s rulings on the merits were upheld, the ALJ’s remedy exceeds the authority granted to the NLRB. The ALJ’s proposed remedy engineers a predetermined finding of fault by preventing the Company from affirmatively arguing that its Agreement as it relates to class actions is lawful. This eviscerates the judicial process because courts are charged, *inter alia*, with the responsibility to evaluate conflicting federal statutes. If the Company cannot offer its Agreement as a defense to a class action lawsuit, such a disability effectively precludes

consideration of a defense without deciding the underlying merits of that defense. This is highly relevant since nearly all of the courts that have reviewed the legal issues pertaining to the enforceability of arbitration agreements similar to the Agreement have determined that such agreements are lawful and enforceable and have rejected the NLRB's ruling in *D.R. Horton*. The Board may not require the Company to surrender its right to make legal arguments, let alone legal arguments that are, at least, colorable and as yet undecided, not to say almost universally accepted.

Moreover, the ALJ improperly ordered the Company to advise the courts that have enforced the Agreement that the Employer no longer seeks to enforce the Agreement. Such a remedy violates 24 Hour Fitness's due process rights and improperly requires the courts to undo earlier determinations that were made after full briefing and legal argument on the issue, and which are entitled to repose. The Board may not enforce such extraordinary retroactive relief in this matter where such relief is plainly outside the NLRB's authority.

For these reasons, as explained in greater detail below, the Respondent's Exceptions must be granted and Sanders's charge must be dismissed.

A. The ALJ Erred In Finding That The Company Violated Section 8(a)(1) Of The Act With Respect To Sanders Or Any Other Team Member.

Section 8(a)(1) of the NLRA states that it is an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." It is well established that "[t]he test to determine interference, restraint, or coercion under [Section] 8(a)(1) is an objective one." *Miami Systems Corp.*, 320 NLRB 71 n. 4 (1995), citing *American Freightways Corp.*, 124 NLRB 146, 147 (1959).

Even assuming that the right to bring or participate in a class or collective action is protected by Section 7 (which 24 Hour Fitness in no way concedes), the Acting General Counsel

failed to meet his burden of proving that 24 Hour Fitness interfered with, restrained, or coerced Sanders or any of its Team Members in the exercise of such a right.

The undisputed record evidence shows that Sanders (and each Team Member hired since January 1, 2007) was given an uncoerced choice to have disputes decided through arbitration and forgo participation in a class or collective action. As the record herein reveals, Sanders had seventy-two days to make his decision whether to enter into the Agreement. He was informed that his choice would not in any way affect his employment relationship with 24 Hour Fitness, his decision could be made without fear of retaliation, and he could opt out without even having to inform his immediate manager. Sanders voluntarily consented to the Agreement. The record reflects that the Company did not interfere with, restrain, or coerce Sanders in making his choice whether to forego the opportunity to participate in class or collective actions as part of the Agreement. Sanders acknowledged that he received his opt-out notice including the non-retaliation statement. (G.C. Exh. 1(d), Appendix B.) Even more important, perhaps, is what is absent from Sanders's testimony. He at no time even suggested that anyone tried to influence him regarding his choice. Sanders did not claim any difficulty in opting out if that was his choice, nor did he testify that the Arbitration Agreement was a mandatory condition of employment.

There is no evidence that any 24 Hour Fitness representative tried to persuade a single Team Member hired since January 1, 2007 against opting out of the Agreement. Indeed, the ALJ acknowledged, as he must in light of the uncontroverted evidence, that "there is no evidence of interference, restraint, or coercion that brought about the Charging Party's or any other employee's voluntary decision at the beginning of their employment to forego participation in class or collective actions." (Dec. 12:36-39.)

There is no violation of Section 8(a)(1) when employees refrain from exercising their Section 7 rights of their own volition and without any coercion or interference by their employer. *Perkins Machine Co.*, 141 NLRB 697, 700 (1963) (employer did not violate Section 8(a)(1) where there was no “threat of reprisal or promise of benefit” in the event the employees decided not to resign from the union). Because there is no evidence of interference or coercion by the Employer with regard to its Agreement, the Acting General Counsel failed to meet his burden of proof in establishing a violation of Section 8(a)(1). Accordingly, the charge should be dismissed.

B. The ALJ Erred By Determining That The Agreement On Its Face Violates The Act.

Central to the ALJ’s determination that the Agreement on its face violates Section 8(a)(1) is his conclusion that Team Members are bound by the Agreement as a mandatory condition of employment and that the opt-out procedure set forth in the Agreement and utilized with respect to every new Team Member hired since January 1, 2007 is an “illusion.” The ALJ’s conclusion is incorrect as a matter of law. The uncontroverted evidence establishes that with respect to Team Members hired since January 2007, the Agreement is not a mandatory condition of employment, and that the Agreement permits Team Members who wish to preserve their right to bring or participate in class or collective actions to do so. Since then, newly hired 24 Hour Fitness Team Members can opt out of the Agreement, with safeguards in place to protect against retaliation for those who wish to do so. The undisputed record shows that many Team Members have opted out. If even one opted out, it establishes that the process is viable.⁷ Therefore, there

⁷ The Acting General Counsel has the burden of proof to establish that the Agreement with a class action waiver is a mandatory condition of employment. The fact that a high percentage of Team Members do not opt out fails to support the conclusion that the Agreement is a mandatory condition of employment. The strong support for arbitration more likely shows Team Member

is no basis for the ALJ's conclusion that the class action waiver in the Agreement violates the Act and that the opt-out procedure within the Agreement is an illusion.

1. Under *D.R. Horton*, Class Actions Waivers Imposed As A Mandatory Condition Of Employment Violate The Act.

As of the filing of this Brief, *D.R. Horton, supra*, is the only Board decision that directly addresses the extent to which an employer may require its employees to enter into an arbitration agreement with a class action waiver as a condition of employment. In *D.R. Horton*, the employer compelled each new and current employee to be bound by the company's "Mutual Arbitration Agreement" ("MAA"), an agreement requiring that an arbitrator hear only an employee's individual claims without any authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding. The Board held that "an individual who files a class or collective action regarding wages, hours, or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by [the NLRA]." *D.R. Horton*, 357 NLRB, slip op., at p. 3. Thus, by requiring employees as a condition of employment to forego their rights to such purported concerted activity, *D.R. Horton*, according to the Board, violated the NLRA. As the Board stated, "When, as here, employers require employees to execute a waiver as a condition of employment, there is an implicit threat that if they refuse to do so, they will be fired or not hired." *Id.* at p. 7.

satisfaction with the program. Acting General Counsel is required to show coercion or impossibility of opting out to convert a voluntary Agreement into a mandatory condition of employment. Not only were neither of these conditions established, there was no effort whatsoever to even attempt to establish them. The undisputed record shows Agreement language and opt-out procedures that are designed to eliminate even the appearance of coercion. At the same time, the opt-out process was shown to work. Even when some difficulty in securing the form occurred, in each and every instance, the Team Member successfully opted out.

The Board repeatedly specified in *D.R. Horton* that its opinion only addressed the lawfulness of “mandatory” class waivers, “imposed upon” employees and “required” by employers “as a condition of employment.” *Id.* at p. 1. Indeed, *D.R. Horton* is suffused with language that makes clear the decision applies only to arbitration provisions that are forced on employees who have no opportunity to refuse them. *Id.* at p. 1 (noting that under the MAA, all employment-related disputes “must” be resolved through individual arbitration under MAA); *Id.* at p. 4 (noting that the MAA “imposed” on all employees “as a condition of hiring or continued employment” and should be treated as the Board treats other “unilaterally implemented” workplace rules); *Id.* at p. 5 (stating that Section 8 prohibits agreements “imposed on” employees as a means of “requiring” that they waive their right to engage in concerted activity); *Id.* at p. 6 (stating that arbitration agreement “imposed upon” employees “as a condition of employment” may not be held to prohibit employees from engaging in class actions); *Id.* at p. 13 (ruling that *D.R. Horton* violated Section 8(a)(1) of the Act by “requiring” employees to forego their right to collective litigation).

The Board also repeatedly emphasized the narrowness of its *D.R. Horton* holding. *Id.* at p. 12 (“We emphasize the limits of our holding and its basis”); *Id.* at pp. 12-13 (holding that its decision will only affect a “small percentage” of employers, and “finding the MAA class-action waiver unlawful will not result in any large-scale or sweeping invalidation of arbitration agreements”). Significantly, the Board expressly declined to reach the issue of whether a bilateral arbitration agreement between an employer and an employee that includes a class action waiver, and that is not a condition of employment – such as 24 Hour Fitness’s Agreement – violates the Act:

[W]e do not reach the more difficult question [] of ... 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. *Id.* at p. 13, n. 28.

This case presents that question.

2. The ALJ Improperly Expanded The Reach Of *D.R. Horton* To Voluntary, Bilateral Agreements.

Applying the reasoning utilized in *D.R. Horton*, the ALJ ruled that the Company's Agreement on its face "unlawfully requires its employees to surrender core Section 7 rights by imposing significant restraints on concerted action regardless of whether the employee opts to be covered or not" and that "[f]or the purposes of worker rights protected by Section 7, the opt-out process designed by the Respondent is an illusion." (Dec. 16:15-18.) The ALJ's expansion of *D.R. Horton* to the present controversy is unsupported on this record and improper, and thus, his decision must be reversed.

a. The Agreement Is Not A Mandatory Condition Of Employment With Respect To Team Members Hired Since January 1, 2007.

Unlike the MAA at issue in *D.R. Horton*, 24 Hour Fitness's Agreement was and is not mandated "as a condition of employment." When Sanders was first hired by 24 Hour Fitness, he was provided the Agreement as part of the 2007 Team Member Handbook and signed the New Team Member Handbook Receipt Acknowledgement. (Tr. 39:17-40:4; G.C. Exh. 2.; Jt. Exh. 2(B).) In the Handbook Receipt Acknowledgement he signed, the opt-out choice was presented in bold print, normal size font, and in its own paragraph directly above the signature line. The opt-out procedure was also described:

I understand that I may opt out of the 'Arbitration of Disputes' policy by signing the Arbitration of Disputes Opt-Out Form . . . and returning it through interoffice mail to the CAC/HR File Room no later than 30 calendar days after the

date I received this Handbook[.] (G.C. Exh. 2) (emphasis in original.)

The Handbook Receipt Acknowledgement also made clear that the Agreement was not binding unless Sanders chose not to opt out:

I understand that if I do not opt out, disputes arising out of or related to my employment will be resolved under the ‘Arbitration of Disputes’ policy. (*Id.*) (emphasis in original.)

Sanders was given ample notice and opportunity to opt out of the Agreement if he wished to do so. Even before he commenced his employment with 24 Hour Fitness, he was given clear, written notice of the Agreement and his right to opt out. Sanders submitted his job application to the Company on August 25, 2008. (Tr. 42:21-43:15; Resp. Exh. 1, p. 3.) The Applicant’s Certification, which Sanders signed, plainly advised him of the Agreement and his right to opt out. (*Id.*)

Sanders was again reminded of his right to opt out of the Agreement forty-two days later, on October 6, 2008, when he went through the onboarding process. At that time, Sanders signed the Handbook Receipt Acknowledgment form, by which he indicated that he understood his right to freely opt out of the Agreement. From the time he submitted his application and was first advised of his right to opt out of the Agreement to the time that the opt-out period expired, Sanders had *seventy-two days* to consider whether he wished to opt out and consult an advisor.

There was no “implicit threat” Sanders would not be hired if he decided to opt out. The opt-out language provided to Sanders states, “I understand that my decision to opt out or not opt out will not be used as a basis for the Company taking any retaliatory action against me.” (G.C. Exh. 1(d), Appendix B.) This anti-retaliation provision objectively demonstrates that Sanders was free to decline to arbitrate his claims without interference, restraint or coercion by the Company.

Moreover, to ensure that no retaliation would occur against Sanders, the Company had a procedure whereby (at that time) Sanders could request the Opt-Out Form using the Company's employee hotline, and return the completed Opt-Out Form to the Human Resources department rather than his supervisor or a manager. Supervisors and managers at the Company would not know whether Sanders had requested an Opt-Out Form, or whether he opted out, because they had no role in the process.

Simply put, Sanders's employment was not conditioned on accepting the terms of 24 Hour Fitness's Agreement because, objectively, he had the choice to decline coverage under the Agreement, without threat (implicit or otherwise) of retaliation, and retain the right to engage in a class or collective action. The Company has provided all its other Team Members hired since January 1, 2007 with these same rights.

b. The Agreement Leaves Open Forums For Class Litigation.

In *D.R. Horton*, the Board held that Section 8 was violated when an employer "compels" an employee to waive his or her right to collectively pursue litigation of employment claims "in all forums, arbitral and judicial." *D.R. Horton*, 357 NLRB No. 184, slip op. at p. 12 (emphasis in original); see also *id.* (" . . . 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. . .") (emphasis added). If, however, the "employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of classwide arbitration." *Id.* at p. 12. 24 Hour Fitness's Agreement achieves this requirement established under *D.R. Horton*.

24 Hour Fitness's Agreement is objectively voluntary. Moreover, the Agreement makes explicit an employee's right to decline arbitration as his or her exclusive forum for employment-related disputes. By way of the voluntary opt-out procedure, 24 Hour Fitness's Agreement

necessarily leaves open a judicial forum for class and collective claims. *See Brown v. Trueblue, Inc.*, 2012 U.S. Dist. LEXIS 52811, *19 (M.D. Penn. April 16, 2012) (finding that arbitration agreement is enforceable, *D.R. Horton* notwithstanding, because the agreement “[left] the door open to collective action in other forums”). Unlike the agreement at issue in *D.R. Horton*, 24 Hour Fitness’s Policy does not preclude the right to collectively pursue employment-related claims in violation of the NLRA.

c. The Agreement Allows An Arbitrator To Join Claims, And Thus, Provides A Sufficient Substitute For Class Claims.

The Agreement incorporates the Federal Rules of Civil Procedure, and with them, the right to permissive joinder of claims under Rule 20. (See, e.g., Jt. Exh. 1, ¶ 2; Jt. Exh. 2(A)-(E).) As the Supreme Court has recognized, citing Rule 20, “class actions constitute but one of several methods for bringing about aggregation of claims, i.e., they are but one of several methods by which multiple similarly situated parties get similar claims resolved at one time and in one federal forum.” *Sprint Communs. Co., L.P. v. APCC Servs.*, 554 U.S. 269, 291 (2008); *see also Snyder v. Harris*, 394 US 332, 335-337 (1969) (with the amendments to Rule 23, “judgments under class actions formerly classified as spurious may now have the same effect as claims brought under the joinder provisions [of Rule 20]”).

Indeed, the class action procedure under Rule 23 of the Federal Rules of Civil Procedure and the permissive joinder procedure under Rule 20 share the same objectives of efficiency and expediency. The class action device is merely a “means of coping with claims too numerous to secure their ‘just, speedy, and inexpensive determination’ one by one.” *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 618 (1997). Similarly, the purpose of Rule 20 “is to promote trial convenience and expedite the final determination of disputes, thereby preventing multiple lawsuits.” *Mosley v. General Motors Corp.*, 497 F.2d 1330, 1332 (8th Cir. 1974).

Therefore, even if class actions are considered protected, concerted activity, which Respondent denies, permissive joinder serves a similar function as class actions because it permits Team Members to combine their claims against the Company. The availability of joinder allows Sanders to work in concert with other 24 Hour Fitness Team Members in furtherance of these efficiency and expediency principles.

Moreover, the ease with which Team Members may join together under Rule 20 demonstrates that they will not be prejudiced by a class action arbitration waiver. “Federal policy favors joinder.” *Gorence v. Eagle Food Centers, Inc.*, 1996 U.S. Dist. LEXIS 18806, *7 (N.D. Ill 1996); *see also United Mine Workers of America v. Gibbs*, 383 U.S. 715, 724, (1966) (“joinder of claims, parties and remedies is strongly encouraged”). In fact, consistent with the purposes of Rule 20, courts possess “wide discretion relative to the joinder of parties” under Rule 20. *Gorence*, 1996 U.S. Dist. LEXIS 18806 at *7. Joinder under Rule 20 is readily accessible to Team Members under the 24 Hour Fitness Agreement.

d. The ALJ Misapplied Board Precedent In Finding That The Employer Violated Section 8(a)(1).

Despite the undisputed evidence, the ALJ concluded that 24 Hour Fitness’s Agreement includes a “class action ban,” the right to opt out of the Agreement notwithstanding, because the right to opt out, in his view, is “an illusion.” (Dec. 16:17-18.) In doing so, the ALJ concluded that the opt-out process constitutes an unlawful burden on the right of Team Members to engage in collective litigation that may arise in the future because “employees may not be required to prospectively trade away their statutory rights.” (Dec. 16:22-23.) The ALJ’s conclusion that the Agreement effectively requires Team Members to prospectively trade away statutory rights is not supported by the record. Even assuming, *arguendo*, that the right to bring or participate in a class or collective action constitutes protected Section 7 activity (which 24 Hour Fitness

contends is not the case), there is no evidence whatsoever that the Company in any manner requires its Team Members to waive such rights.

The ALJ described the Agreement as a mechanism in which Team Members “prospectively trade away their statutory rights.” (Dec. 16:22-23.) However, there is no “trade off” in this instance as 24 Hour Fitness does not discourage Team Members from opting out and the Company has implemented numerous safeguards to ensure that Team Members are not retaliated against if they choose to opt out of the Agreement. The ALJ relied upon *Ishikawa Gasket American, Inc.* 337 NLRB 175 (2001) in support of his position. However, *Ishikawa* is unavailing in this instance. In *Ishikawa*, the employer entered into a separation agreement with an employee in which the employee agreed not to engage in union-related activities for one year. *Id.* at 175-76. The present matter is readily distinguishable because: (1) since January 1, 2007, 24 Hour Fitness has not required its Team Members to be bound by the Agreement, and (2) as explained in Footnote 11 below, the right to participate in class or collective actions is not protected under Section 7 of the Act.

The ALJ also incorrectly concluded that the Agreement allows 24 Hour Fitness to “effectively prevent concerted activity” between Team Members who opt out and those who did not opt out because the Agreement “limits the assistance the opt-out employees may obtain from fellow workers even in pursuit of their individual claims.” (Dec. 16:25-31.) The ALJ provided no evidence to support this mistaken conclusion. The Agreement in no way restricts 24 Hour Team Members from assisting one another with respect to potential claims against the

Company.⁸

Through the opt-out process, 24 Hour Fitness's Agreement provides for, and promotes, choice among its Team Members as to how they wish to resolve potential disputes with the Company. It is well understood that when employees are given the choice to participate in the arbitration process through an opt-out provision, the arbitration agreement cannot be considered mandatory, employer-imposed, or coercive. NLRB precedent provides no direction regarding the extent to which opt-out processes can create voluntary, bilateral agreements between employers and employees to arbitrate disputes. However, there are several federal court decisions that offer guidance on the issue and confirm that opt-out processes are a well-accepted method of facilitating voluntary, bilateral arbitration agreements between employers and employees. *See, e.g., Michalski v. Circuit City Stores, Inc.*, 177 F.3d 634, 636 (7th Cir. 1999) (employee could be required to arbitrate her Title VII claims in part, because by not opting out, she chose to be bound by the enforceable arbitration agreement); *Black v. JP Morgan Chase & Co.*, 2011 U.S. Dist. LEXIS 99428, 57-58 (W.D. Pa. 2011) (because an opt-out provision gives a plaintiff "the option to say 'no' to the arbitration provision" and thus "complete control over the terms of the agreement," "it cannot be said that the arbitration agreement was presented to him on a take-it-or-leave it basis"); *Fluke v. Cashcall, Inc.*, 2009 U.S. Dist. LEXIS 43231, *18 (E.D. Pa. May 21, 2009) (agreements to arbitrate that contain opt-out provisions "are not unilaterally imposed" but instead give "a meaningful choice as to the contract's terms"); *Clerk v. ACE Cash Express, Inc.*, 2010 U.S. Dist. LEXIS 7978, *8 n. 22 (E.D. Pa. 2010) (the opt-out provision in the arbitration agreement, and plaintiff's failure to exercise it, precluded her argument that the

⁸ To the extent that the ALJ relied upon his interpretation of what he referred to as the "nondisclosure provision," the Agreement does not restrict protected, Section 7-related communications, as explained further below.

arbitration agreement was presented on a take-it-or-leave-it basis); *Marley v. Macy's South*, 2007 U.S. Dist. LEXIS 43891 *9-10 (S.D. Ga. 2007) (employee not coerced into the arbitration process where plaintiff had the option to opt out).⁹

The ALJ's conclusion that the right to opt out of the Agreement is an "illusion" is misplaced and incorrect. The right to opt out set forth under the Agreement is meaningful and genuine. No less than thirty-five (35) – and perhaps as many as seventy (70) – of the Employer's Section 2(3) employees have opted out of coverage under 24 Hour Fitness's Agreement. (Jt. Exh. 1, ¶ 24.) One of those 35 opt-outs successfully pursued litigation against the Company. (Tr. 93:3-10.) The fact that even a single Team Member has successfully opted out, let alone as many as 70, confirms that the Agreement is truly voluntary. Even more importantly, no evidence is offered to show that anyone seeking to opt out was unable to do so. The fact that the vast majority of Team Members do not opt out cannot by itself prove anything about whether their decisions were voluntary. This fact is more consistent with overall satisfaction with the

⁹ See also *Davis v. O'Melveny & Meyers*, 485 F.3d 1066, 1073 (9th Cir. 2007) ("if an employee has a meaningful opportunity to opt out of the arbitration provision when signing the agreement and still preserve his or her job, then it is not procedurally unconscionable"); *Legair v. Circuit City Stores, Inc.*, 213 Fed. Appx. 436, 439 (6th Cir. 2007) (unpublished) (arbitration agreement providing thirty-day opt-out period not procedurally unconscionable and plaintiff bound to it because he failed to exercise his right to opt out); *Arellano v. T-Mobile USA, Inc.*, 2011 U.S. Dist. LEXIS 41667, *10-13 (N.D. Cal. 2011) (arbitration provision containing class action waiver, but providing for thirty-day opt out period, was not unconscionable); *Hicks v. Macy's Dep't Stores Inc.*, 2006 U.S. Dist. LEXIS 68268, *10-12 (N.D. Cal. 2006) (class action waiver not procedurally unconscionable because plaintiff had a meaningful opportunity to opt out of the arbitration agreement); *Hopkins v. World Acceptance Corp.*, 2011 U.S. Dist. LEXIS 79770, *14 (N.D. Ga. 2011) ("when a party challenges an arbitration agreement that contains an opt-out provision and fails to opt out, her unconscionability argument is diluted because the provision was not offered on a take-it-or-leave-it basis"); *Teah v. Macy's Inc.*, 2011 U.S. Dist. LEXIS 149274, 16-17 (E.D.N.Y. 2011) (arbitration agreement with opt-out provision not provided on a "take it or leave it basis" and not procedurally unconscionable); *Passmore v. Discover Bank*, 2011 U.S. Dist. LEXIS 123918, *20-21 (N.D. Ohio 2011) (arbitration agreement enforceable, in part, because it provided "a readily apparent opt-out arbitration clause, of which the Plaintiff has failed to avail herself").

Agreement than any suggestion that the Agreement is not voluntary.

In sum, there is no basis for the ALJ's conclusion that the Agreement on its face violates Section 8(a)(1). The Company's Agreement is a voluntary, bilateral agreement permissible under the Act. The opt-out provisions with the Agreement are meaningful and by no means an illusion as the ALJ found.

C. The ALJ Erred By Failing To Provide Proper Deference To The FAA.

It is well established that the NLRB's broad discretion under the NLRA does not authorize the Board to ignore other Congressional objectives. As explained by the Supreme Court:

[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another, and it is not too much to demand of an administrative body that it undertake this accommodation without excessive emphasis upon its immediate task. *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942).

See also Hoffman Plastic Compounds, Inc. v. NLRB, 535 U.S. 137, 147 (2002) ("The *Southern S. Co.* line of cases established that where the Board's chosen remedy trenches upon a federal statute or policy outside the Board's competence to administer, the Board's remedy may be required to yield"); *Connell Constr. Co. v. Plumbers & Steamfitters Local Union No. 100*, 421 U.S. 616, 634-35 (1975) (rejecting a claim that federal antitrust policy should defer to the NLRA); *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 902-04 (1984) (holding that Board's remedial authority was limited by equally important Congressional objective adopted in the Immigration Reform and Control Act). In reaching his decision, the ALJ impermissibly disregarded the federal policies set forth in the FAA, which required that the Agreement be enforced in accordance with its terms absent contrary Congressional command, which is lacking in this case.

1. The Voluntary Nature Of The Agreement Is Consistent With The Principles Of Both The FAA And The NLRA.

The FAA requires that a voluntary arbitration agreement not be invalidated by the Board. In *D.R. Horton*, the Board determined that finding the MAA at issue unlawful did “not conflict with the letter or interfere with the policies underlying the FAA, and even if it did, that the finding represents an appropriate accommodation of the policies underlying the two statutes.” *D.R. Horton*, 357 NLRB No. 184, slip op. at p. 8. The Board based this holding on four considerations: (1) the agreement was treated as favorably as other private contracts that required employees, as a condition of employment, to pursue claims solely on an individual basis; (2) by categorically prohibiting class claims in “any” forum, the agreement required employees to forego substantive rights, something the FAA does not require or permit; (3) holding that an employer violates the NLRA by requiring employees, to adopt mandatory arbitration agreements with class action waivers “accommodates the policies underlying both the NLRA and the FAA to the greatest extent possible”; and (4) the FAA would be required to yield to the NLRA’s policies, as expressed in the Norris-LaGuardia Act, in a circumstance where a private agreement “seeks to prohibit a ‘lawful means [of] aiding any person participating or interested in’ a lawsuit arising out a labor dispute . . .” *Id.* at pp. 9-12.

The above rationale presented in *D.R. Horton* clearly does not apply to 24 Hour Fitness’s voluntary Agreements. First, unlike the agreement in *D.R. Horton*, this Agreement contains an opt-out provision giving Team Members hired since January 2007 freedom of choice. The MAA in *D.R. Horton*, by contrast, was a mandatory condition of employment. Finding it unlawful would violate the FAA by treating it less favorably than other voluntary private contracts. *See, e.g., AT&T Mobility v. Concepcion*, 131 S. Ct. 1740, 1745 (2011).

Second, even assuming the right to bring or join, class, or collective actions is a

substantive right protected under the NLRA (which Respondent does not concede), 24 Hour Fitness's Agreement does not require Team Members to forego class or collective claims because, unlike the agreement in *D.R. Horton*, it does not categorically prohibit such claims in "any" forum. Instead, as explained above, 24 Hour Fitness's Agreement leaves open the judicial forum for joint, class, or collective claims so long as an interested Team Member opts out of the Agreement. Moreover, as explained above, the Agreement permits joinder of arbitrable claims.

Third, on balance, the public policy interest in enforcing 24 Hour Fitness's Agreement outweighs the public policy against enforcing it. In *D.R. Horton*, the Board refused to enforce the MAA at issue because the MAA "required" waiver of class action rights as a "condition of employment." Here, however, the 24 Hour Fitness's Policy is not a "condition of employment" but is instead a voluntary agreement for the mutual benefit of arbitration.

The FAA explicitly recognizes a strong public policy favoring enforcing arbitration agreements according to their terms. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24-25 (1983). In fact, the Board recognized in *D.R. Horton* that the "overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings" and that "'the switch from bilateral to class arbitration' . . . sacrifices the principal advantage of arbitration—its informality." 357 NLRB No. 184, slip op. at p. 11 (citing *Concepcion*, 131 S.Ct. at 1748, 1750). By contrast, the NLRA contains no express language excepting its provisions from the concomitant requirements of the FAA. Once an employee has freely selected arbitration, the FAA's policy favoring arbitration becomes even stronger. *See Concepcion*, 131 S.Ct. at 1751. As such, the express policies of the FAA must prevail.

Finally, *D.R. Horton*'s holding that the FAA would be required to yield to the NLRA in a

circumstance where a private agreement “seeks to prohibit a ‘lawful means [of] aiding any person participating or interested in’ a lawsuit arising out a labor dispute . . . ,” simply does not apply here. The Agreement does not prohibit persons “participating or interested in” a lawsuit arising out of a labor dispute. Instead, the Agreement allows persons disinterested in litigating in a collective fashion to exercise their free choice to do so. Those individuals who have freely chosen to opt out of the Agreement are the only persons who may participate in collective or class court proceedings. In contrast to being interested in class proceedings, people satisfied with arbitration as an alternative means of resolving their disputes will be allowed to proceed as they have chosen. Therefore, unlike the Board's finding in *D.R. Horton*, there are no “strong indications” that the FAA would have to yield under the terms of the NLRA or the Norris-La Guardia Act. 357 NLRB No. 184, slip op. at p. 12.

Accordingly, the Board properly must consider the policies behind the NLRA in light of the express policy in favor of arbitration set forth in the FAA, especially in light of the decisions of numerous courts finding that arbitration agreements containing opt-out clauses are not mandatory “conditions of employment.” Such a consideration compels the conclusion that an employer does not violate the NLRA by offering employees a voluntary choice to waive their right to class or collective action. Such an outcome lessens or obviates conflict between the NLRA and the FAA. Employee choice is preserved, and the FAA’s mandate that arbitration agreements be enforced is honored.

2. Post-*D.R. Horton* Supreme Court Authority Confirms That The Agreement Is Enforceable Under The FAA.

Recent Supreme Court authority, including *CompuCredit v. Geenwood*, 132 S.Ct. 665 (2012) – a Supreme Court decision issued after *D.R. Horton* – and *Concepcion, supra*, clarify even if the Agreement is deemed involuntary (which is not the case with respect to Team

Members hired since 2007), the Agreement is lawful and enforceable pursuant to the FAA. Arbitration agreements must be enforced according to their terms absent a contrary Congressional command. This principle extends to employment-related arbitration agreements with equal force.

In *Concepcion*, the Supreme Court upheld a class action waiver in an arbitration agreement and invalidated a state law that conditioned the enforceability of such an agreement on the availability of classwide arbitration. 131 S. Ct. at 1753. The Court concluded that the state law was “an obstacle to the accomplishment and execution of the full purposes and objectives of Congress,” and that it was therefore preempted by the FAA. *Id.* at 1753. The Court reasoned that “[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA.” *Id.* at 1748. *Concepcion*, applying longstanding Supreme Court precedent, including *Moses H. Cone*, 460 U.S. at 24-25, concluded the FAA establishes a strong federal policy in favor of enforcing arbitration agreements in accordance with their terms — including provisions that waive the right to pursue class or collective relief in arbitration.

The Supreme Court reaffirmed these principles shortly after the *D.R. Horton* decision in *CompuCredit*, 132 S. Ct. at 669. In that case, the Court reiterated that the FAA “requires courts to enforce agreements to arbitrate according to their terms.” *Id.* Moreover, the Court emphasized that this requirement applies “even when the claims at issue are federal statutory claims, unless the FAA’s mandate has been overridden by a contrary congressional command.” *Id.* (citations omitted) (emphasis added). In support of this conclusion, the Court relied upon *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) — an employment case arising under the Age Discrimination in Employment Act, a federal statute. *Id.* at 669-71.

In addition, *CompuCredit* held that the burden rests on the party opposing arbitration to show that Congress intended to preclude a waiver of judicial remedies, and further held that a federal statute's silence on the subject of arbitration must lead to the enforcement of an arbitration agreement in accordance with its terms. *Id.* at 672 n. 4. To meet this burden, a "Congressional command" must be found in an unambiguous statement in the statute and cannot be gleaned from ambiguous statutory language. *See id.* at 670-73. Thus, the Court held that if a federal statute "is silent on whether claims under [it] can proceed in an arbitrable forum, the FAA requires the arbitration agreement to be enforced according to its terms." *Id.* at 673.

There is no "contrary Congressional command" in Section 7 of the NLRA – or anywhere else in the Act – that requires the Board to abrogate otherwise lawful and enforceable arbitration agreements that contain class or collective action waivers. 24 Hour Fitness respectfully contends that *D.R. Horton's* conclusion on this issue was wrongly decided.¹⁰ There is nothing in the

¹⁰ The NLRB's decision in *D.R. Horton* is currently pending before the Fifth Circuit Court of Appeals. Since *D.R. Horton*, the vast majority of courts that have considered *D.R. Horton* have concluded that the decision was incorrect and have refused to apply *D.R. Horton*. *See, e.g., Carey v. 24 Hour Fitness USA, Inc.*, 2012 U.S. Dist. LEXIS 143879, *4-6 (S.D. Tex. October 4, 2012) (declining to apply *D.R. Horton* as a basis for invalidating the Agreement); *Jasso v. Money Mart Express, Inc.*, 2012 U.S. Dist. LEXIS 52538, *26-28 (N.D. Cal. April 13, 2012) (granting employer's motion to compel and rejecting plaintiff employee's contention that class action waivers are not enforceable in employment disputes in light of the Board's reasoning in *D.R. Horton*); *Morvant v. P.F. Chang's China Bistro, Inc.*, 2012 U.S. Dist. LEXIS 63985, *32-34 (N.D. Cal. May 7, 2012) (same); *Delock v. Securitas Security Services USA, Inc.*, 2012 U.S. Dist. LEXIS 107117, *12-18 (E.D. Ark. August 1, 2012) (noting that *D.R. Horton* Board "did not have the benefit of *CompuCredit*" and finding that "[a] fair reading of the FAA and the precedents, on the other hand, requires this Court to enforce the [parties'] agreement to arbitrate all employment-related disputes individually, not collectively" and that the FAA prevails in the conflict with the NLRA); *Spears v. Waffle House*, 2012 U.S. Dist. LEXIS 90902, *5-6 (D. Kan. July 2, 2012) (rejecting argument that *D.R. Horton* rendered arbitration agreement's delegation clause unenforceable even though agreement included a waiver of class claims); *De Oliveira v. Citicorp North America, Inc.*, 2012 U.S. Dist. LEXIS 69573, *6-7 (M.D. Fla. May 18, 2012) (finding collective action waiver in arbitration agreement enforceable despite plaintiff's argument that *D.R. Horton* renders the agreement unenforceable); *LaVoice v. UBS Fin. Servs.*,

NLRA’s plain language or the Act’s legislative history that indicates that Section 7 creates a substantive right for employees to bring or participate in class or collective actions particularly where those claims are premised upon rights not contained in the NLRA itself.¹¹

Inc., 2012 U.S. Dist. LEXIS 5277 (S.D. N.Y. Jan. 13, 2012) (declining to follow *D.R. Horton*); *Cohen v. UBS Fin. Servs.*, 2012 U.S. Dist. LEXIS 174700 (S.D. N.Y. Dec. 4, 2012) (declining to follow *D.R. Horton*); *Palmer v. Convergys Corp.*, 2012 U.S. Dist. LEXIS 16200, *7 n. 2 (M.D. Ga. February 9, 2012) (finding that *D.R. Horton* did not “meaningfully apply” to the facts of the case, which involved the validity of employee class action waiver agreements); *Nelsen v. Legacy Partners Residential, Inc.*, 207 Cal. App. 4th 1115, 1134 (2012) (declining to follow *D.R. Horton* and noting that *D.R. Horton* reflected a “novel interpretation of section 7 and the FAA”); *Iskanian v. CLS Transportation Los Angeles LLC*, 206 Cal. App. 4th 949, 962 (2012) (declining to follow *D.R. Horton* and noting that “the NLRB’s attempt to read into the NLRA a prohibition of class action waivers is contrary to [*CompuCredit*]”); *Truly Nolen of America v. Superior Court*, 2012 Cal. App. LEXIS 871, *50-51 (August 9, 2012) (“As have other courts, we find the NLRB’s conclusion on the preemption issue to be unpersuasive and we decline to follow it. The United States Supreme Court has held that arbitration agreements pertaining to statutory claims must be enforced according to their terms, absent an express ‘contrary congressional command’ overriding the FAA.’ In light of this clear authority, *Horton’s* analysis is unsupported”) (internal citations omitted).

¹¹ The ability to litigate on behalf of a class is merely a *procedural*, rather than *substantive* device provided by Rule 23 of the Federal Rules of Civil Procedure. *Roper*, 445 U.S. at 332 (“[T]he right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims”).

In any event, there is nothing in the NLRA’s plain language or the Act’s legislative history that even remotely indicates that Section 7 creates a substantive right for employees to bring or participate in class or collective actions. As explained by the Supreme Court, “the term ‘concerted [activity]’ is not defined in the Act.” *NLRB v. City Disposal*, 465 U.S. 822, 830 (1984).

At the time the NLRA was enacted, neither Rule 23 of the Federal Rules of Civil Procedure nor the Fair Labor Standards Act existed. This is significant because the Senate Report accompanying the NLRA provided:

[the] bill is specific in its terms. Neither the National Labor Relations Board nor the courts are given any blanket authority to prohibit whatever labor practices that in their judgment are deemed to be unfair. Sen.Rep.No.573, 74th Cong., 1st Sess. 8 (1935).

Because Congress never intended to guarantee individual employees a statutory right to file putative class actions, there is no basis for concluding that Section 7 encompasses the right to participate in a class or collective action.

The ALJ erroneously concluded that *Concepcion* and *CompuCredit* do not govern the outcome of this case because those cases “have little, if anything, to do with arbitration in the context of the employer-employee relationship.” (Dec. 14:27-30.) The Supreme Court has repeatedly determined that the FAA applies to employment claims that are subject to mandatory arbitration agreements. *See, e.g., Gilmer*, 500 U.S. at 28-29 (rejecting argument that the Age Discrimination in Employment Act conflicts with the FAA’s goal of enforcing arbitration agreements in accordance with their terms); *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001); *14 Penn Plaza LLV v. Pyett*, 556 U.S. 247 (2009). The Supreme Court has carefully

Moreover, the Board’s pre-*D.R. Horton* authority does not establish any Section 7 protection with respect to employee class action rights. Board precedent clearly provides that the NLRA prohibits employers from taking adverse employment actions against an employee in retaliation for the employee bringing a good faith or non-malicious lawsuit or administrative complaint against the employer. *See, e.g., Harco Trucking, LLC*, 344 NLRB 478, 482 (2005); *Le Madri Restaurant*, 331 NLRB 269, 275-78 (2000); *Mojave Elec. Coop.*, 327 NLRB 13, 18 (1998); *United Parcel Service*, 252 NLRB 1015, 1018, 1022 fn. 26 (1980); *Trinity Trucking & Materials Corp.*, 221 NLRB 364, 365 (1975); *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948–49 (1942). However, this line of Board cases generally protects resort to legal process, *not* the particular procedural form that process may take. Never before *D.R.Horton* has the Board intruded into the interplay of court rules and procedural devices in an effort to extend the reach of the NLRA. Moreover, the above cases certainly do not outlaw arbitration agreements in which an employee voluntarily agrees to waive the right to bring or participate in class or collective actions.

Section 7 simply prohibits employers from interfering with the efforts of employees who knowingly, voluntarily, and affirmatively wish to engage in legal process to act concertedly. The statute does not extend to procedural steps internal to the litigation itself, such as class actions. If this concept was accepted, there are many additional procedural rights that could come under Section 7 including interpleader actions, joint defense agreements, mandatory and voluntary joinder, mass actions, related case motions, motions to consolidate, to list only a few. Clearly, no one in Congress nor any witness brought to testify about the enactment of Section 7 even remotely extended the concept to internal court procedures. In fact, in 2006, the then-General Counsel declared in a Guideline Memorandum that the substantive guarantee of the NLRA is only that employees may not be “disciplined or discharged for exercising rights under Section 7 by attempting to pursue a class action claim.” GC Memo. 10-06, at 6, available at <http://tinyurl.com/bvv7j8o>). As the Board’s General Counsel admonished, whether such actions can proceed to judgment, and in what forum, are “normally determined by reference to the employment law at issue and do[] not involve consideration of the policies of the National Labor Relations Act.” *Id.* at 5.

developed the law surrounding the enforcement of the FAA to rest on operative legal principles that transcend specific industries or types of contracts (apart from those identified on the face of the statute). This is well illustrated in *Granite Rock Co. v. Int'l Bhd. of Teamsters*, 130 S. Ct. 2847 (2010), in which the Supreme Court noted, “Our cases invoking the federal ‘policy favoring arbitration’ of commercial and labor disputes apply the same framework.” *Id.* at 2858.

The ALJ also found *Concepcion/CompuCredit* inapplicable in the employment context because he contends that the class action waiver unfairly exacerbates the employer-employee power imbalance. Even assuming that Congress intended for Section 7 to preserve the employee right to participate in a class or collective action, concerns regarding a supposed imbalance of power in this case are not present whereas here the Agreement includes a voluntary waiver, and has done so since 2007. Sanders or any other Team Member hired since 2007 could have rejected arbitration including the class action waiver without fear of retaliation or any other adverse consequence. If the underlying purpose of Section 7 is to ensure that employees can redress a power imbalance and that somehow access to class and collective actions may be perceived to make a difference in such an imbalance, a voluntary system puts the decision in the employee’s hands, not the employer’s. Thus, with a **voluntary** Agreement, the policy reasons are even stronger for the application of *Concepcion* and *CompuCredit*. Accordingly, the ALJ’s purported distinction between *Concepcion/CompuCredit* and cases that address the arbitration in the context of employer-employee disputes is unavailing.¹²

¹² Recently, several courts have applied *Concepcion* and *CompuCredit* to class action waivers in arbitration agreements between employers and employees. *See, e.g., Quilloin v. Tenet HealthSystem Phila., Inc.*, 673 F.3d 221, 223 (3rd Cir. 2012) (applying *Concepcion* to rule that employer-employee arbitration agreement was enforceable and rejecting argument that class action waiver in arbitration agreement rendered arbitration agreement unenforceable); *Green v. SuperShuttle Int'l, Inc.*, 653 F.3d 766, 769 (8th Cir. 2012) (relying on *Concepcion* in affirming

D. The ALJ Erred By Failing To Follow The Rules Enabling Act.

The ALJ's conclusion that voluntary class action waivers violate the NLRA is also in conflict with the Rules Enabling Act. This analysis was entirely ignored by the ALJ who merely cited the Rules Enabling Act without comment. (Dec. 13:29-31.)

The ability to pursue class-wide relief on behalf of employees is a procedural right provided under Rule 23 of the Federal Rules of Civil Procedure. *Roper*, 445 U.S. at 332. The Rules Enabling Act prohibits any interpretation of the procedural right to litigate a class action that would “abridge, modify or enlarge any substantive right.” 28 U.S.C. § 2072(b); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) (“The Rules Enabling Act underscores the need for caution....[N]o reading of the Rule can ignore the Act’s mandate that ‘rules of procedure shall not abridge, enlarge or modify any substantive right’”) (internal citation omitted). As such, the Supreme Court has held that Rule 23 “must be interpreted with fidelity to the Rules Enabling Act.” *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 629 (1997). For that reason, Rule 23 cannot be interpreted as providing a substantive right to participate in class actions under the National Labor Relations Act. Such an interpretation would constitute an enlargement of the rights enumerated in the NLRA to engage in protected, concerted activity. Accordingly, to the extent the *ALJ has expanded the procedural class action mechanism set forth in Rule 23 to constitute a substantive right, the ALJ has clearly run afoul on the REA.*

Since it is a direct violation of the Rules Enabling Act to “enlarge” the reach of the NLRA by infusing substantive Section 7 rights into a judicially created mechanism governing court procedures for multiparty litigation, Rule 23 must remain a procedural right. This means that whatever traces of concerted activity that can be gleaned from Rule 23 or multiple other

the district court’s order enforcing class action waiver in employer-employee arbitration agreements).

rules governing multi-party litigation, the FRCP cannot be a conduit for enlarging the application of Section 7. Since the REA precludes the NLRA and Section 7 from compelling Team Member access to Rule 23 class actions, it becomes unnecessary to balance the NLRA with the FAA regarding class action waivers.¹³ Accordingly, voluntary class action waivers become clearly enforceable pursuant to the FAA.¹⁴

E. The ALJ Erred In Determining That The Agreement Contains An Unenforceable “Nondisclosure Provision.”

The ALJ improperly concluded that the Agreement’s provision that states “[e]xcept as may be required by law, neither a party nor an arbitrator may disclose the existence, content or results of any arbitration hereunder without the prior written consent of both parties” is unlawful.

As a dispositive preliminary matter, the ALJ’s ruling on this discrete issue was improper as the Acting General Counsel did not assert in the Complaint that this provision was unlawful.

¹³ Even if the REA did not prevent Section 7 from being absorbed into a Rule 23 class action, the mandate of the FAA would prevail as explained in Section IV.C, *supra*. Furthermore the FAA’s substantive mandate encouraging arbitration agreements and enforcing them as written does not seek to enlarge the role of the FAA through the FRCP. On the other hand the FRCP, including Rule 23 on class actions, cannot “abridge” the FAA’s substantive mission to enforce arbitration agreements including those that waive class actions. Accordingly, the Supreme Court has held that when there is a direct conflict between Rule 23 and a substantive statutory right such as the FAA, Rule 23 cannot “abridge” that right. *See e.g., Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011) (citing the Rules Enabling Act and holding that a class of employees could not be certified under Rule 23 where the employer would “not be entitled to litigate its statutory defenses to individual claims”); *Ortiz*, 527 U.S. at 842, 845 (adopting “limiting construction” of Federal Rule of Civil Procedure 23 that, *inter alia*, “minimizes potential conflict with the Rules Enabling Act”); *Shady Grove Orthopedic Associates v. Allstate Ins.*, 130 S. Ct. 1431 (2010); *Amchem Products*, 521 U.S. at 612-13.

¹⁴ *See Concepcion*, 131 S. Ct. at 1748 (imposing class arbitration is inconsistent with the substantive provisions and policy of the FAA); *Stolt-Nielsen v. Animal Feeds*, 130 S. Ct. 1758, 1776 (2010) (the right of a party to enforce an arbitration agreement under Section 2 of the FAA is a substantive right, and a party to such an agreement cannot be compelled to submit claims to class arbitration unless it has agreed to do so); *Rodriguez v. United States*, 480 U.S. 522, 524 (1987) (when more than one statute arguably applies to an issue, the statutes “must” be read to give effect to each unless the statutes are “in irreconcilable conflict.”); *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 468 (1982); *Watt v. Alaska*, 451 U.S. 259, 267 (1981); *TVA v. Hill*, 437 U.S. 153, 189 (1978); *Morton v. Mancari*, 417 U.S. 535, 549 (1974).

In fact, neither the Acting General Counsel nor the Charging Party asserted in their post-hearing briefing that the provision violated the Act. At no time during the hearing (or afterward) did the Acting General Counsel move to conform the pleadings. The Company was provided no notice that the lawfulness of the “nondisclosure” provision was at issue. The issue was not litigated, and thus, the ALJ’s decision regarding the nondisclosure provision must be reversed. *See, e.g., J.C. Penny Co. v. NLRB*, 384 F.2d 479, 483 (10th Cir. 1967) (finding that trial examiner’s failure to amend the complaint to encompass allegations regarding matters first raised at the hearing mandated reversal of unfair labor practice with respect to those allegations because the “[f]ailure to clearly define the issues and advise an employer charged with a violation of the law of the specific complaint he must meet and provide a full hearing upon the issue presented is, of course, to deny procedural due process of law”); *Siracusa Moving & Storage Service Co.*, 290 NLRB 143, 143 (1988) (dismissing Section 8(a)(1) allegation on the basis that the conduct alleged was not identified in the complaint and the General Counsel failed to identify the conduct as a separate and distinct basis for a charge).

Should the Board nevertheless decide to consider this portion of the ALJ’s decision, language in the “nondisclosure” provision does not improperly limit 24 Hour Fitness Team Member communications regarding their terms and conditions of employment. On its face this provision does not apply to disclosures that “may” be legally protected. To the extent that disclosures about an arbitration involved protected communications among Team Members, including communications regarding their wages, hours, and terms and conditions of employment, they would be legally permissible and not subject to the limitation in the Agreement. *See Lutheran Heritage Village*, 343 NLRB 646, 652 n.7 (2004) (Member Liebman noting that “an employer can easily eliminate” the problems that inhere in an arguably

impermissible work rule by including a statement that the rule does not apply to legally protected activity under the NLRA) (dissenting in part). The Agreement's use of the term "except as may be required by law" is significant because it broadens the clear exception to the provision. If a Team Member wishes to disclose information that the Team Member reasonably believes in good faith is permissible under the law, the Agreement does not preclude the disclosure even if the employee is wrong about the law. The limited prohibition on issues pertaining to procedural matters pertaining to the arbitration can in no way be construed to limit such discussions.

Even if the Team Member has a Section 7 right to disclose information that might fall under the Agreement's nondisclosure provision, as we have explained above, the "nondisclosure" provision itself is not facially illegal. Under this circumstance, the minimum obligation on the Acting General Counsel would be to show how the restriction negatively impacted Sanders or at least another Team Member. Yet, there is nothing in the record even suggesting that Sanders or any other Team Member was in anyway impacted by the nondisclosure language. While it might be theoretically possible for a Team Member to have an adverse consequence from the language and the Board may elect in dictum to express concerns, there is absolutely no basis for a ruling that language lawful on its face can be struck down retroactively. Nor can it be assumed that 24 Hour Fitness is applying this language in an unlawful manner, or has ever disciplined anyone or otherwise enforced this provision for any reason. Clearly the lack of a proper pleading and a litigated record makes the finding of a violation unsustainable.

F. The ALJ Erred By Not Finding That The Charge Is Time-Barred As It Pertains To Team Members Hired Before 2007.

It is undisputed that 24 Hour Fitness's Team Members hired prior to January 1, 2007, apart from those working in Texas, have not yet been given the opportunity to opt out of 24 Hour

Fitness's Agreement.¹⁵ (Tr. 92:14-22; Jt. Exh. 1, ¶ 10; Jt. Exh. 11, 12 and 13.) Since 2007, 24 Hour Fitness has offered to all new hires the opportunity to opt out of the Agreement. (Jt. Exh. 1, ¶¶ 1-10.)

The ALJ should have concluded that the unfair labor practice charge is time-barred to the extent 24 Hour Fitness failed to provide Team Members hired before January 1, 2007 with the right to opt out. Unfair labor practices under Section 8(a)(1) of the Act must be brought within six months of the alleged unfair labor practice. 29 U.S.C. § 160(b). January 1, 2007 is far outside the six-month statutory period in this case. Moreover, there was no record evidence whatsoever, whether with respect to Sanders or any of the litigation cited in the record, that 24 Hour Fitness ever maintained or enforced the class action waiver in its Agreement with respect to any employee not given the opportunity to opt out. Accordingly, there was and is no "continuing violation" that might bring 24 Hour Fitness's conduct in not allowing Team Members to opt out within the six-month statute of limitations. *Cf. Higgins Industries, Inc.*, 150 NLRB No. 25, 58 L.R.R.M. (BNA) 1059, 1061 (1964) (employer did not violate Act by promulgating unlawful solicitation rule in plant, as there is no evidence of promulgation within six months of charge; employer did, however, violate the Act by maintaining such rule); *Mason & Hanger-Silas Mason Co.*, 167 NLRB 894, 894 (1967) (no violation of the Act with respect to employer's promulgation of an unlawful no-solicitation rule because promulgation occurred more than six months prior to filing of charge; however, there was evidence that rule was "maintained and enforced" during statutory period). As such, the ALJ erred in failing to find Sanders's charge time-barred to the extent it seeks a remedy on behalf of those 24 Hour Fitness

¹⁵ Only 18% of 24 Hour Fitness's Section 2(3) employees were hired prior to January 1, 2007. (Jt. Exh. 1, ¶ 22.) Therefore, as of the time of the hearing 82% of 24 Hour Fitness's Section 2(3) employees have had the opportunity to opt out.

Team Members not given the opportunity to opt out of the Agreement.

G. The Remedy Issued By The ALJ Is Impermissible.

Instead of requiring the Employer to cease and desist its maintenance and enforcement of the Agreement on a prospective basis, the ALJ impermissibly issued a remedial order that effectively seeks to undo earlier rulings by Article III courts and deprives 24 Hour Fitness of the right to make legal arguments in support of the enforceability of the Agreement. Such a sweeping remedial order is unprecedented and beyond the Board's authority. Moreover, given the novelty of the ALJ's decision (and the *D.R. Horton* decision), retroactive relief is not appropriate in this case.

1. The Board Does Not Have The Authority To Require Courts To Undo Determinations They Have Already Made And To Require Courts To Accept The Board's Interpretation Of The Act Without Reservation.

By compelling 24 Hour Fitness to withdraw its legal position regarding the enforceability of the Agreement, the ALJ effectively compels the Company to seek to negate earlier Article III court determinations regarding the enforceability of the Agreement, which were arrived at by duly-appointed Judges who reviewed legal arguments made by many parties, and to forfeit well-accepted legal arguments regarding the validity of the Agreement. The remedy is not permissible because it essentially strips 24 Hour Fitness of its due process right to be heard with respect to its argument that the Agreement is lawful and enforceable.

It is widely recognized that “[t]he fundamental requisite of due process of law is the opportunity to be heard.” *See, e.g., Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)); *see also Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 542 (1985) (“An essential principle of due process is that a deprivation of life, liberty, or property ‘be preceded by notice and opportunity for hearing appropriate to the nature of the case.’”). By requiring the Company to concede the issue of the

enforceability of the Agreement's class or collective action waiver in cases where courts have already determined the Agreement and waiver to be enforceable and in future cases in which the Agreement may be applicable, the ALJ's remedial order deprives the Company of its due process right to be fully heard on the issue.

The Board cannot compel courts to capitulate to the Board's interpretation of the Act, which is what the ALJ's Order effectively seeks to accomplish by precluding the Employer from arguing in favor of the validity of the Agreement. Courts are free to reject the Board's interpretation of the Act. Indeed, as explained above, several courts have upheld class or collective action waivers and have expressly refused to follow the Board's decision in *D.R. Horton*. (See Footnote 10, *supra*.)

Finally, with regard to the lawsuits involving 24 Hour Fitness identified by the ALJ in his decision, the issue of the enforceability of the Agreement is moot as a practical matter. Specifically, in the matter of *Beauparthuy v. 24 Hour Fitness USA, Inc.*, the Company did not seek to compel individual employee arbitration pursuant to the Agreement. (Jt. Exh. 1, ¶ 19; Jt. Exhs. 1, 16, 17, 18, and 19.) In the matter of *Carey v. 24 Hour Fitness USA, Inc.*, the Company's motion to compel arbitration based on the Agreement was denied by the Southern District of Texas, and the Fifth Circuit Court of Appeals affirmed the district court's denial of the motion to compel arbitration. (Jt. Exh. 1, ¶ 16.) Similarly, in both *Rosenloev v. 24 Hour Fitness USA, Inc.* (and its companion case, *Suppa*) and *Burton v. 24 Hour Fitness USA, Inc.*, the Orange County Superior Court denied the Company's motion to compel arbitration. (Jt. Exh. 1, ¶ 20.) The Company appealed the rulings in both *Rosenloev/Suppa* and *Burton*, but in each case, the California Court of Appeal affirmed the trial court's ruling on the matter. *Id.* Given that the Agreement is not being enforced in these matters, no affirmative relief is necessary for these

cases.

In the other lawsuits in the record in this case, each of those plaintiffs was afforded the opportunity to oppose the Company's motion to compel individual arbitration. (Jt. Exh. 1, ¶¶ 12, 14, 15, 17, 18, 19, 20(c).) In each case, the plaintiffs had the right to make any and all arguments supporting their contention that the Agreement is invalid or unenforceable, including any arguments that the Agreement violated the Act. Furthermore, each of the plaintiffs could have sought leave from the courts to raise issues relating to the enforceability of the Agreement in light of *D.R. Horton*. Indeed, this is the direction that Judge Wynne Carvill of the Alameda County Superior Court in California provided to the plaintiff in the matter of *Raoul Fulcher v. 24 Hour Fitness USA, Inc.* (Jt. Exh. 15, 12:22-13:13.) Judge Carvill expressly instructed the parties:

[D]on't go briefing the *Horton* issue. If you want to raise the *Horton* issue, you need to make a showing to me that I even have the ability to consider the *Horton* issue, given the appellate history of this case. So if you want to do that, you can make an application for leave to file on the *Horton* motion, explaining to me why procedurally that's even an option if I were to agree with you.
Id.

Consequently, the plaintiffs in each of these matters had several months to seek relief in light of the *D.R. Horton* decision and they retain the right to do so if they so choose.¹⁶ These cases are now in judicial repose. It is inappropriate to require the Company to re-raise these issues with each of the courts and concede its position regarding the enforceability of the Agreement.

¹⁶ Six of the eleven lawsuits identified in the ALJ's Decision, the *Dominguez*, *Martinez*, *Lawler*, *Lee*, *Constanza*, and *Carey* matters, have been dismissed with prejudice since the hearing in this matter and are no longer under the continuing jurisdiction of the respective courts. See Respondent's Motion For Limited Reopening Of The Record Or, Alternatively, For Administrative Notice. Respondent requests that the Board take administrative notice of these developments. Given that these lawsuits have been dismissed with prejudice, Respondent should not, and procedurally cannot, be compelled to re-raise the issue of the enforceability of the Agreement with the courts that presided over these matters.

2. A Retroactive Remedy In This Case Is Inappropriate.

Under Board law, “the propriety of retroactive application [of a ruling] is determined by balancing any ill effects of retroactive activity against ‘the mischief of producing a result which is contrary to statutory design or to legal and equitable principles.’” *John Deklewa & Sons*, 282 NLRB 1375, 1389 (1987), *enfd. sub nom. Iron Workers, Local 3 v. NLRB*, 843 F.2d 770 (3rd Cir. 1988). Retroactive application of a ruling is not warranted when the Board issues a decision that “marks a significant departure from preexisting law.” *Dana Corp.*, 351 NLRB 434, 443-44 (2007), overruled on other grounds by *Lamons Gasket Co.*, 357 NLRB No. 72 (2011). The reasoning for not retroactively applying new policies and standards in cases such as this is sound. It is unfair to penalize a party for its past actions if the party could not have reasonably understood at the time of the activity at issue that such activity violated the Act. *Id.* It is also inequitable to punish a party for past actions that were undertaken in reliance on the law at the time the action was taken. *Id.*

Even if the Board determines that *D.R. Horton* controls this case, it is important to note that *D.R. Horton* was a case of first impression before the Board. Prior to *D.R. Horton*, there was no precedent finding class action waivers invalid under the Act. In fact, the previous General Counsel of the Board issued a memorandum stating that employers may require individual employees to sign a waiver of their right to file a class or collective claim as part of an agreement to arbitrate all claims without per se violating the Act. (General Counsel Memorandum GC 10-06.) In the memorandum, the former General Counsel opined that “[s]o long as the wording of these agreements makes clear to employees that their right to act concertedly to challenge these agreements by pursuing class and collective claims will not be subject to discipline or retaliation by the employer, and that those rights—consistent with Section 7—are preserved, no violation of the Act will be found.” *Id.* at p. 7.

As such, prior to January 3, 2012, the date the Board issued *D.R. Horton*, there was no authority remotely suggesting that class action waivers violated the Act *per se*. Moreover, there is still no NLRB precedent suggesting voluntary, bilateral arbitration agreements in which an employer and employee agree to resolve all claims through individual arbitration are unlawful, as the Board expressly declined to reach that question in *D.R. Horton*. 357 NLRB No. 183, slip op. at p. 13, n. 28.

It is telling that in the *D.R. Horton* decision, the Board made no reference whatsoever to retroactive application of its ruling. Indeed, there is nothing in the case that suggests that the Board intended to enforce *D.R. Horton* retroactively. Rather, in *D.R. Horton*, the Board directed the employer to: (1) cease and desist from enforcing the MAA; (2) rescind or revise the MAA; (3) notify its employees of the rescission or revision of the MAA; and (4) post a notice. *D.R. Horton*, 357 NLRB No. 184, slip op. at pp. 13-14. The Board did not require *D.R. Horton* to notify all judicial and arbitral forums in which *D.R. Horton* had enforced the MAA that the company “no longer oppose[d] the seeking of collective or class action type relief.”

In this case, retroactive application of any remedy is improper. As explained by the Supreme Court in its recent decision, *Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2168 (2012), “where . . . an agency's announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute.” *Id.* at 2168. The Court further noted, “while it may be ‘possible for an entire industry to be in violation of the [law] for a long time without the [governmental enforcement agency] noticing,’ the ‘more plausible hypothesis’ is that the [agency] did not think the industry’s practice was unlawful.” *Id.* quoting *Yi v. Sterling Collision Centers, Inc.*, 480 F.3d 505, 510-511 (7th Cir. 2007). Here, the Board did not take a position with respect to class action waivers until January of 2012. It is

manifestly unjust to penalize employers based on the Board's novel and recent *D.R. Horton* ruling. See *Alan Ritchey*, 359 NLRB No. 40, slip op. at p. 11 (2012) (holding that retroactive application of NLRB's change in the law did not warrant retroactive application because it would not have been unreasonable for the charged party to believe its conduct was permissible under existing Board precedent at the time).

Unlike the circumstances such as those at issue *John Deklewa & Sons*, there are no significant countervailing interests in this case justifying retroactive application. In *John Deklewa & Sons*, the Board determined that the statutory benefits for employees, employers, and unions in the constructive industry arising out of the Board's changes in its interpretation of Section 8(f) far outweighed any hardships resulting from immediate imposition of the changes. Thus, the Board decided to apply the change in Section 8(f) retroactively. *John Deklewa & Sons*, 282 NLRB at 1389. The Board's determination in that case simply required employers to honor Section 8(f) agreements through the duration of such agreements, which the Board concluded to be an appropriate remedy in order to stabilize existing bargaining relationships entered into pursuant to Section 8(f). *Id.* at 1377-78. Here, by contrast, the ALJ's remedial order invalidates thousands of agreements that 24 Hour Fitness and its Team Members voluntarily entered into in reasonable reliance on the law as it existed at the time the parties entered into those agreements. The ALJ issued this order without engaging in the careful balancing of important competing policy interests underlying the Act as was done in *Deklewa*. Interests favoring retroactive application such as the restoration or preservation of "employee free choice" and "labor relations stability" are not applicable in this case because the agreements at issue are already voluntary and 24 Hour Fitness does not have any bargaining obligations with respect to any labor organizations. Accordingly, the balance of the equities weighs strongly against a

retroactive remedy that requires the Company to undo its prior efforts to enforce the Agreement.

3. Even If The Board Determines That The Company Violated The Act With Respect To Team Members Hired Before 2007, The Appropriate Remedy Is To Provide Those Team Members With The Opportunity To Opt Out.

Even if it is determined that the Company violated the Act with respect to the application of the Agreement with regard to those Team Members hired prior to January 1, 2007, and that Sanders's charge is not time-barred with respect to those individuals, the most appropriate and just remedy is to provide each of those Team Members with a thirty-day window to opt out of the Agreement – the same right that all 24 Hour Fitness Team Members have upon receipt of the Team Member Handbook. This is exactly the same opportunity that 24 Hour Fitness provided to its Team Members in Texas in June 2012 after the Fifth Circuit Court of Appeals rendered its decision in the matter of *John Carey v. 24 Hour Fitness USA, Inc.*, in which the court affirmed an order denying the Company's motion to compel individual arbitration based on the Agreement. (Jt. Exh., 1 ¶¶ 10, 16; Jt. Exhs. 11, 12, 13.) The District Court for the Southern District of Texas, like virtually all other courts to consider the *D.R. Horton* decision, found it unenforceable citing *Concepcion* and *CompuCredit*. However, the Court went on to consider arguments that the Company's thirty-day notice for those Team Members was improper because the Agreement violates the Act even with the thirty day opt-out opportunity. *Carey*, 2012 U.S. Dist. LEXIS 143879 at *3-*7. In doing so, the Court explained:

Even were the Court to adopt the *Horton* decision, it would not apply to the [Agreement] in this case. In *Horton*, the NLRB focused on and emphasized that the employer required its employees to sign the arbitration agreement as a condition of their employment. Employees of 24 Hour Fitness are not required to sign the [Agreement] as a condition of their employment. Instead, 24 Hour Fitness employees are expressly permitted to opt out of the [Agreement]. Consequently, even if *Horton* were followed, it would not invalidate the [Agreement] in this case and would not provide a basis for requiring "Corrective Notice" to potential

plaintiffs in this lawsuit. *Id.* at *6-*7 (citations omitted).

As explained above, the Agreement is valid and enforceable, *D.R. Horton* notwithstanding. Permitting Team Members hired prior to January 1, 2007 with the opportunity to opt out within a thirty-day period satisfies the objective of protecting those Team Members' right to participate, or not participate, in the Agreement.

V. CONCLUSION

For the foregoing reasons and based on the record evidence, 24 Hour Fitness respectfully requests that the Board reject those portions of the ALJ's Decision excepted to by the Employer. As explained above, it must be found that 24 Hour Fitness's Agreement does not violate Sections 7 and 8(a)(1) of the National Labor Relations Act and Sanders's charge must be dismissed.

Respectfully submitted,

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STATEMENT OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 650 California Street, 20th Floor, San Francisco, California 94108.2693. On January 3, 2013, I served the within document(s):

EMPLOYER'S BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION

- Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses on the attached service list on the dates and at the times stated thereon. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. The electronic notification address of the person making the service is oazevedo@littler.com.

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