

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

ALTON SANDERS, an individual, Charging
Party,

vs.

24 HOUR FITNESS USA, INC., Charged Party.

Case 20-CA-035419

**MOTION FOR LIMITED REOPENING OF THE RECORD OR,
ALTERNATIVELY, FOR ADMINISTRATIVE NOTICE**

Marshall Babson
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620 Eighth Avenue
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Counsel for 24 Hour Fitness USA, Inc.

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Robert S. Strauss Building
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Washington, DC 20036-1564
Telephone: (202) 887-4067

Counsel for 24 Hour Fitness USA, Inc.

Date: January 3, 2013

Pursuant to National Labor Relations Board Rules and Regulations Sections 102.39 102.45(b) and Federal Rules of Evidence Rule 201, Respondent 24 Hour Fitness USA, Inc. requests that the National Labor Relations Board consider the following documents and facts in the record or, alternatively, take administrative notice of the following documents and facts:

1. On or about July 24, 2012, the Los Angeles County Superior Court dismissed with prejudice, at the request of Plaintiff Iva Dominguez, the lawsuit *Dominguez v. 24 Hour Fitness USA, Inc.*, Case No. BC439206. This matter is referenced in Paragraph 18 of Joint Exhibit 1 of this matter. A true and correct copy of the dismissal is attached as Exhibit A.
2. On or about August 24, 2012, the San Bernardino County Superior Court dismissed with prejudice, at the request of Plaintiff Trudy Lawler, the lawsuit *Lawler v. 24 Hour Fitness USA, Inc.*, Case No. CIV DS 1001737. This matter is referenced in Paragraph 20(c) of Joint Exhibit 1 of this matter. A true and correct copy of the dismissal is attached as Exhibit B.
3. On or about October 18, 2012, the Orange County Superior Court dismissed with prejudice, at the request of Plaintiff Max Martinez, the lawsuit *Martinez v. 24 Hour Fitness USA, Inc.*, Case No. 30-2011-00484316-CU-OE-CXC. This matter is referenced in Paragraph 19 of Joint Exhibit 1 of this matter. A true and correct copy of the dismissal is attached as Exhibit C.
4. On October 4, 2012, the United States District Court for the Southern District of Texas denied Plaintiff John Carey's "Motion for Corrective Notice and an Injunction Limiting Future Unapproved Communication with the Potential Class Members" in the matter of *Carey v. 24 Hour Fitness USA, Inc.*, Case No. H-10-

MOTION FOR LIMITED REOPENING OF THE RECORD OR FOR ADMINISTRATIVE NOTICE

3009. This matter is referenced in Paragraph 16 of Joint Exhibit of this matter. A true and correct copy of the Court's order denying Plaintiff Carey's motion is attached as Exhibit D.

5. On December 12, 2012, the United States District Court for the Southern District of Texas dismissed with prejudice, at the request of Plaintiff John Carey and Defendant 24 Hour Fitness USA, Inc., the lawsuit *John Carey v. 24 Hour Fitness USA, Inc.*, Case No. H-10-3009. This matter is referenced in Paragraph 16 of Joint Exhibit 1 of this matter. A true and correct copy of the dismissal is attached as Exhibit E.
6. On November 1, 2012, the United States District Court for the Southern District of Florida dismissed with prejudice, at the request of Plaintiff Jeanlin Lee and Defendant 24 Hour Fitness USA, Inc., the lawsuit *Jeanlin Lee v. 24 Hour Fitness USA, Inc.*, Case No. 11-22700. This matter is referenced in Paragraph 14 of Joint Exhibit 1 of this matter. A true and correct copy of the dismissal is attached as Exhibit F.
7. On November 2, 2012, the United States District Court for the Southern District of Florida dismissed with prejudice, at the request of Plaintiff Elio Constanza and Defendant 24 Hour Fitness USA, Inc., the lawsuit *Elio Constanza v. 24 Hour Fitness USA, Inc.*, Case No. 11-22694. This matter is referenced in Paragraph 15 of Joint Exhibit 1 of this matter. A true and correct copy of the dismissal is attached as Exhibit G.

Section 102.45(b) of the Board's Rules and Regulations provides that the record should include all relevant "orders." The Orders by the Courts in the cases referenced above are

MOTION FOR LIMITED REOPENING OF THE RECORD OR FOR ADMINISTRATIVE
NOTICE

relevant to the issue of the propriety of the remedy in the instant matter and should be included in the formal record. Alternatively, Respondent requests that the Board take administrative notice of the above-referenced Orders since those Orders substantially impact the pending Exceptions.

Respectfully submitted,

SEYFARTH SHAW LLP

LITTLER MENDELSON P.C.

By /s/ Marshall B. Babson

By /s/ Garry G. Mathiason

MARSHALL B. BABSON

GARRY G. MATHIASON

AKIN GUMP STRAUSS
HAUER & FELD LLP

By /s/ Daniel L. Nash

DANIEL L. NASH

Attorneys for 24 Hour Fitness USA, Inc.

Firmwide:117261783.2 034670.1251

MOTION FOR LIMITED REOPENING OF THE RECORD OR FOR ADMINISTRATIVE
NOTICE

Exhibit A

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Jeffrey Spencer, SBN 182440 Spencer Law Firm 903 Calle Amanecer, Suite 220 San Clemente, CA 92673 TELEPHONE NO.: 949-240-8595 FAX NO. (Optional): 949-240-8515 E-MAIL ADDRESS (Optional): jps@spencerlaw.net ATTORNEY FOR (Name): IVA DOMINGUEZ		FOR COURT USE ONLY ORIGINAL FILED JUL 24 2012 LOS ANGELES SUPERIOR COURT
SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES STREET ADDRESS: 111 N. Hill Street MAILING ADDRESS: 111 N. Hill Street CITY AND ZIP CODE: Los Angeles, 90012 BRANCH NAME: Central		
PLAINTIFF/PETITIONER: IVA DOMINGUEZ DEFENDANT/RESPONDENT: 24 HOUR FITNESS USA, INC.		CASE NUMBER: BC439206
REQUEST FOR DISMISSAL <input type="checkbox"/> Personal Injury, Property Damage, or Wrongful Death <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other <input type="checkbox"/> Family Law <input type="checkbox"/> Eminent Domain <input checked="" type="checkbox"/> Other (specify): Employment		
- A conformed copy will not be returned by the clerk unless a method of return is provided with the document. -		

1. TO THE CLERK: Please dismiss this action as follows:
- a. (1) With prejudice (2) Without prejudice
- b. (1) Complaint (2) Petition
 (3) Cross-complaint filed by (name):
 (4) Cross-complaint filed by (name):
 (5) Entire action of all parties and all causes of action
 (6) Other (specify):*

on (date):
 on (date):

2. (Complete in all cases except family law cases.)

Court fees and costs were waived for a party in this case. (This information may be obtained from the clerk. If this box is checked, the declaration on the back of this form must be completed).

Date: 7/20/12

Jeffrey Spencer

(TYPE OR PRINT NAME OF ATTORNEY PARTY WITHOUT ATTORNEY)
 *If dismissal requested is of specified parties only or of specified causes of action only, or of specified cross-complaints only, so state and identify the parties, causes of action, or cross-complaints to be dismissed.

(SIGNATURE)
 Attorney or party without attorney for:
 Plaintiff/Petitioner Defendant/Respondent
 Cross-Complainant

3. TO THE CLERK: Consent to the above dismissal is hereby given.**

Date:

(TYPE OR PRINT NAME OF ATTORNEY PARTY WITHOUT ATTORNEY)

(SIGNATURE)
 Attorney or party without attorney for:
 Plaintiff/Petitioner Defendant/Respondent
 Cross-Complainant

(To be completed by clerk)

4. Dismissal entered as requested on (date): **JUL 24 2012**
5. Dismissal entered on (date): as to only (name):
6. Dismissal not entered as requested for the following reasons (specify):

JOHN A. CLARKE, CLERK

7. a. Attorney or party without attorney notified on (date):
 b. Attorney or party without attorney not notified. Filing party failed to provide
 a copy to be conformed means to return conformed copy

Date: **JUL 24 2012**

Clerk, by [Signature] Deputy

COPY

Exhibit B

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Miriam Schimmel (SBN 185089) Cory Lee (SBN 216921) Joshua Carlon (SBN 263838) Initiative Legal Group APC 1800 Century Park East, Second Floor Los Angeles, CA 90067 TELEPHONE NO.: (310) 556-5637 FAX NO. (Optional): (310) 861-9051 E-MAIL ADDRESS (Optional): ATTORNEY FOR (Name): Plaintiff Trudy Lawler		FOR COURT USE ONLY SUPERIOR COURT OF CALIFORNIA COUNTY OF SAN BERNARDINO AUG 24 2012 By <u>[Signature]</u> Deputy
SUPERIOR COURT OF CALIFORNIA, COUNTY OF San Bernardino STREET ADDRESS: 303 W. Third Street MAILING ADDRESS: CITY AND ZIP CODE: San Bernardino, CA 92415 BY FAX BRANCH NAME: San Bernardino District Civil Division		
PLAINTIFF/PETITIONER: Trudy Lawler DEFENDANT/RESPONDENT: 24 Hour Fitness USA, Inc.		CASE NUMBER: CIV DS 1001737
REQUEST FOR DISMISSAL <input type="checkbox"/> Personal Injury, Property Damage, or Wrongful Death <input type="checkbox"/> Motor Vehicle <input type="checkbox"/> Other <input type="checkbox"/> Family Law <input type="checkbox"/> Eminent Domain <input checked="" type="checkbox"/> Other (specify): Wage & Hour Violations of California Labor Code - A conformed copy will not be returned by the clerk unless a method of return is provided with the document. -		

1. TO THE CLERK: Please dismiss this action as follows:
- a. (1) With prejudice (2) Without prejudice
 - b. (1) Complaint (2) Petition
 - (3) Cross-complaint filed by (name): _____ on (date): _____
 - (4) Cross-complaint filed by (name): _____ on (date): _____
 - (5) Entire action of all parties and all causes of action
 - (6) Other (specify): "

2. (Complete in all cases except family law cases.)

Court fees and costs were waived for a party in this case. (This information may be obtained from the clerk. If this box is checked, the declaration on the back of this form must be completed).

Date: August 23, 2012

Joshua Carlon

(TYPE OR PRINT NAME OF ATTORNEY PARTY WITHOUT ATTORNEY)

*If dismissal requested is of specified parties only of specified causes of action only, or of specified cross-complaints only, so state and identify the parties, causes of action, or cross-complaints to be dismissed.

[Signature]
 (SIGNATURE)
 Attorney or party without attorney for:
 Plaintiff/Petitioner Defendant/Respondent
 Cross-Complainant

3. TO THE CLERK: Consent to the above dismissal is hereby given.**

Date:

Diana Tabacopoulos

(TYPE OR PRINT NAME OF ATTORNEY PARTY WITHOUT ATTORNEY)

** If a cross-complaint - or Response (Family Law) seeking affirmative relief - is on file, the attorney for cross-complainant (respondent) must sign this consent if required by Code of Civil Procedure section 581 (i) of (j).

[Signature]
 (SIGNATURE)
 Attorney or party without attorney for:
 Plaintiff/Petitioner Defendant/Respondent
 Cross-Complainant

(To be completed by clerk)

- 4. Dismissal entered as requested on (date): **AUG 24 2012**
- 5. Dismissal entered on (date): _____ as to only (name): _____
- 6. Dismissal not entered as requested for the following reasons (specify): _____
- 7. a. Attorney or party without attorney notified on (date): **AUG 24 2012**
- b. Attorney or party without attorney not notified. Filing party failed to provide
 a copy to be conformed means to return conformed copy

Date:

AUG 24 2012

Clerk, by

[Signature]
SANDRA ORTEGA
 Deputy
 Page 1 of 2

[Handwritten initials]

PLAINTIFF/PETITIONER: Trudy Lawler DEFENDANT/RESPONDENT: 24 Hour Fitness USA, Inc.	CASE NUMBER: CIV DS 1001737
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Declaration Concerning Waived Court Fees

The court has a statutory lien for waived fees and costs on any recovery of \$10,000 or more in value by settlement, compromise, arbitration award, mediation settlement, or other recovery. The court's lien must be paid before the court will dismiss the case.

1. The court waived fees and costs in this action for (name):
2. The person in item 1 (check one):
 - a. is not recovering anything of value by this action.
 - b. is recovering less than \$10,000 in value by this action.
 - c. is recovering \$10,000 or more in value by this action. (If item 2c is checked, item 3 must be completed.)
3. All court fees and costs that were waived in this action have been paid to the court (check one): Yes No

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date: _____

(TYPE OR PRINT NAME OF ATTORNEY PARTY MAKING DECLARATION)

(SIGNATURE)

Exhibit C

ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address):
Jeffrey Spencer, SBN 182440
Spencer Law Firm
903 Calle Amanecer, Suite 220
San Clemente, CA 92673
TELEPHONE NO.: 949-240-8595 FAX NO. (Optional): 949-240-8515
E-MAIL ADDRESS (Optional): jps@spencerlaw.net
ATTORNEY FOR (Name): MAX MARTINEZ

FOR COURT USE ONLY
FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
OCT 18 2012
ALAN CARLSON, Clerk of the Court
BY: A. PAGUNSAN, DEPUTY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE
STREET ADDRESS: 751 West Santa Ana Boulevard
MAILING ADDRESS:
CITY AND ZIP CODE: Santa Ana, CA 92701
BRANCH NAME: Civil Complex Center

PLAINTIFF/PETITIONER: MAX MARTINEZ
DEFENDANT/RESPONDENT: 24 HOUR FITNESS USA, INC.

REQUEST FOR DISMISSAL
 Personal Injury, Property Damage, or Wrongful Death
 Motor Vehicle Other
 Family Law Eminent Domain
 Other (specify): Employment

CASE NUMBER:
30-2011-00484316-CU-OE-CXC

- A conformed copy will not be returned by the clerk unless a method of return is provided with the document. -

1. TO THE CLERK: Please dismiss this action as follows:
a. (1) With prejudice (2) Without prejudice
b. (1) Complaint (2) Petition
(3) Cross-complaint filed by (name): on (date):
(4) Cross-complaint filed by (name): on (date):
(5) Entire action of all parties and all causes of action
(6) Other (specify):*

2. (Complete in all cases except family law cases.)
 Court fees and costs were waived for a party in this case. (This information may be obtained from the clerk. If this box is checked, the declaration on the back of this form must be completed).

Date: October 12, 2012
Jeffrey Spencer

(SIGNATURE)

(TYPE OR PRINT NAME OF ATTORNEY PARTY WITHOUT ATTORNEY)
*If dismissal requested is of specified parties only of specified causes of action only, or of specified cross-complaints only, so state and identify the parties, causes of action, or cross-complaints to be dismissed.

Attorney or party without attorney for:
 Plaintiff/Petitioner Defendant/Respondent
 Cross-Complainant

3. TO THE CLERK: Consent to the above dismissal is hereby given.
Date:

(TYPE OR PRINT NAME OF ATTORNEY PARTY WITHOUT ATTORNEY)
*If a cross-complaint - or Response (Family Law) seeking affirmative relief - is on file, the attorney for cross-complainant (respondent) must sign this consent if required by Code of Civil Procedure section 581 (f) or (g).

(SIGNATURE)
Attorney or party without attorney for:
 Plaintiff/Petitioner Defendant/Respondent
 Cross-Complainant

- (To be completed by clerk)
4. Dismissal entered as requested on (date): 10/18/12
5. Dismissal entered on (date): as to only (name):
6. Dismissal not entered as requested for the following reasons (specify):

7. a. Attorney or party without attorney notified on (date):
b. Attorney or party without attorney not notified. Filing party failed to provide
 a copy to be conformed means to return conformed copy
Date: 10/18/12 Clerk, by Alan Carlson, Deputy

PLAINTIFF/PETITIONER: Trudy Lawler	CASE NUMBER:
DEFENDANT/RESPONDENT: 24 Hour Fitness USA, Inc.	CIV DS 1001737

Declaration Concerning Waived Court Fees

The court has a statutory lien for waived fees and costs on any recovery of \$10,000 or more in value by settlement, compromise, arbitration award, mediation settlement, or other recovery. The court's lien must be paid before the court will dismiss the case.

1. The court waived fees and costs in this action for (name):
2. The person in item 1 (check one):
 - a. is not recovering anything of value by this action.
 - b. is recovering less than \$10,000 in value by this action.
 - c. is recovering \$10,000 or more in value by this action. (If item 2c is checked, item 3 must be completed.)
3. All court fees and costs that were waived in this action have been paid to the court (check one): Yes No

I declare under penalty of perjury under the laws of the State of California that the information above is true and correct.

Date: _____

(TYPE OR PRINT NAME OF ATTORNEY PARTY MAKING DECLARATION)

(SIGNATURE)

Exhibit D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN CAREY,
Plaintiff,

v.

24 HOUR FITNESS USA, INC.,
Defendant.

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CIVIL ACTION NO. H-10-3009

MEMORANDUM AND ORDER

This Fair Labor Standards Act (“FLSA”) case is before the Court on the Motion for Corrective Notice and an Injunction Limiting Future Unapproved Communication with the Potential Class Members¹ (“Motion”) [Doc. # 78] filed by Plaintiff John Carey. Plaintiff complains that a Notice Regarding Dispute Resolution Agreement (“Notice”), attached as Exhibit A to the Motion, is contrary to a decision of the National Labor Relations Board (“NLRB”) and is coercive and confusing. Defendant 24 Hour Fitness USA, Inc. (“24 Hour Fitness”) filed a Response [Doc. # 79], arguing that the NLRB decision is not binding, persuasive, or applicable, and that the Notice is neither coercive nor confusing. Plaintiff neither filed a reply nor requested

¹ Also pending are Plaintiff’s Renewed Motion for Conditional Certification of a Collective Action, Motion for Notice to Potential Class Members, and Motion for Class Discovery [Doc. # 58] and Plaintiff’s Motion to Strike Paragraphs Nine Through Twenty-One of the Declaration of Jeffrey Ward [Doc. # 70], which will be addressed in a separate Memorandum and Order.

additional time to do so. Based on the Court's review of the record and relevant legal authorities, the Court **denies** the Motion.

I. BACKGROUND

Plaintiff, a former employee of Defendant, filed this lawsuit asserting that Defendant violated the FLSA by failing to pay him overtime wages and instead paying him a commission rate. Defendant sought to compel arbitration based on an arbitration provision in the employee handbook. The Court denied Defendant's request and, on interlocutory appeal, the United States Court of Appeals for the Fifth Circuit affirmed. *See Carey v. 24 Hour Fitness, USA, Inc.*, 669 F.3d 202 (5th Cir. 2012).

After the decisions by this Court and the Fifth Circuit were issued, 24 Hour Fitness revised its arbitration agreement to comply with the Courts' rulings. Defendant then sent employees who are potential plaintiffs in this case Notice of the revised agreement, a copy of the complaint in this case, a copy of the Dispute Resolution Agreement, and a form by which the employee could opt out of the arbitration agreement (collectively, "Notice"). Plaintiff now seeks an order from this Court requiring a "Corrective Notice" and enjoining Defendant from communicating further with its employees who are potential plaintiffs in this case. Plaintiff's Motion is ripe for decision.

II. ANALYSIS

A. Plaintiff's Argument that Notice is Contrary to Binding Law

Plaintiff argues that the Notice is improper because 24 Hour Fitness's revised Dispute Resolution Agreement is void because it precludes collective arbitrations in violation of the NLRB's decision in *In Re D.R. Horton*, 2012 WL 36274 (2012).² In *Horton*, the NLRB held that an employer violates Section 8(a)(1) of the National Labor Relations Act ("NLRA")³ when it requires its employees, as a condition of their employment, "to waive their right to collectively pursue employment-related claims in all forums, arbitral and judicial." *Horton*, 2012 WL 36274, *1, *17. The NLRB's decision in *Horton* is currently on appeal to the Fifth Circuit. *See D.R. Horton, Inc. v. NLRB*, No. 12-60031.

The *Horton* decision has been widely criticized by many district court who have refused to follow its ruling. *See, e.g., Morvant v. P.F. Chang's China Bistro, Inc.*, ___ F. Supp. 2d ___, 2012 WL 1604851 (N.D. Cal May 7, 2012); *LaVoice v. UBS Fin.*

² The Court notes that the validity of the *Horton* decision is subject to question. Of the three NLRB members of the panel, one recused from consideration of the case and the term of another expired before the decision was issued. The Court, however, need not decide this issue.

³ Section 8(a)(1) of the NLRA makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed" by Section 7. 29 U.S.C. § 158(a)(1). Section 7 of the NLRA provides that employees shall have the right "to engage in . . . concerted activities for the purposes of collective bargaining or other mutual aid or protection . . ." 29 U.S.C. § 157.

Servs., Inc., 2012 WL 124590 (S.D.N.Y. Jan. 13, 2012); *see also Tenet HealthSystem Philadelphia, Inc. v. Rooney*, 2012 WL 3550496 (E.D. Pa. Aug. 17, 2012) (granting motion to confirm arbitration award over employee's *Horton* argument).

“Although the NLRB’s construction of the NLRA is entitled to deference, the NLRB has no special competence or experience interpreting the FAA.” *Tenet*, 2012 WL 3550496 at *4; *see also DeLock v. Securitas Security Servs. USA, Inc.*, ___ F. Supp. 2d ___, 2012 WL 3150391, *3 (E.D. Ark. 2012). Consequently, the NLRB’s decision in *Horton* is neither binding authority nor otherwise warranting deference.

Additionally, the *Horton* decision is contrary to prior Fifth Circuit authority and subsequent Supreme Court authority. Before *Horton*, the Fifth Circuit rejected an employee’s argument that the inability to proceed collectively in arbitration deprived them of substantive rights under the FLSA, and held that proceeding collectively under the FLSA is a matter of procedure, not a substantive right. *Carter v. Countrywide Credit Indus., Inc.* 362 F.3d 294, 298 (5th Cir. 2004).

One week after the NLRB issued its *Horton* decision, the Supreme Court decided *CompuCredit Corp. v. Greenwood*, ___ U.S. ___ 132 S. Ct. 665 (2012). In that case, which dealt with the Credit Repair Organization Act, the Supreme Court held that courts are required to enforce arbitration agreements according to their terms “even when the claims at issue are federal statutory claims, unless the [Federal

Arbitration Act's] mandate has been 'overridden by a contrary congressional command.'" *CompuCredit*, 132 S. Ct. at 669. "Nothing in the FLSA's text or legislative history indicates that Congress excepted those claims from the FAA's mandate" to enforce arbitration agreements according to their terms. *DeLock*, 2012 WL 3150391 at *4.

The *Horton* decision is neither binding nor subject to deference, and is inconsistent with Fifth Circuit and Supreme Court authority. On that basis, the Court declines to apply the *Horton* decision to invalidate the Dispute Resolution Agreement adopted by 24 Hour Fitness.

Even were the Court to adopt the *Horton* decision, it would not apply to the Dispute Resolution 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. *See Horton*, 2012 WL 36274 at *1, *5, *11, *12, *15. Employees of 24 Hour Fitness are not required to sign the Dispute Resolution Agreement as a condition of their employment. Instead, 24 Hour Fitness employees are expressly permitted to opt out of the Dispute Resolution Agreement. *See Notice Cover Letter; Dispute Resolution Agreement, ¶ 4*. Consequently, even if *Horton* were followed, it would not invalidate the Dispute Resolution Agreement in this case and

would not provide a basis for requiring “Corrective Notice” to potential plaintiffs in this lawsuit.

B. Plaintiff’s Argument that Notice is Coercive and/or Confusing

Plaintiff argues also that a “Corrective Notice” and injunction are required because the Notice is coercive and/or confusing. As is discussed above, the Notice is not coercive because it advises employees in at least two places that they are permitted to opt out of the Dispute Resolution Agreement. The cover letter and the Dispute Resolution Agreement state clearly that no employee who decides to opt out of the arbitration agreement will be subjected to retaliation. *See* Notice Cover Letter; Dispute Resolution Agreement, ¶ 12.

The Notice is not confusing. The cover letter is written in clear, plain English and explains the provisions of the Dispute Resolution Agreement and the opt-out procedure. The Dispute Resolution Agreement is also written clearly and in a non-confusing manner.

The Notice is neither coercive nor confusing because it explains clearly the existence of the *Carey* lawsuit and supplies the employees with a copy of the complaint. Moreover, the Notice provides the name and contact information for Plaintiff’s counsel should a potential plaintiff have questions or simply want to speak with an attorney regarding the decision whether to agree to the arbitration procedure

or opt-out and participate in the *Carey* lawsuit. See Notice Cover Letter; Dispute Resolution Agreement, ¶ 11.

Plaintiff has failed to demonstrate that the Notice and the Dispute Resolution Agreement are invalid, coercive, and/or confusing. As a result, the Court declines to order a “Corrective Notice” or enjoin either party from communicating with potential plaintiffs.

III. CONCLUSION AND ORDER

The new Dispute Resolution Agreement adopted by 24 Hour Fitness is not in violation of *D.R. Horton*, even if the NLRB’s decision in that case were binding. The Notice sent to potential plaintiffs is neither coercive nor confusing. As a result, Plaintiff has failed to demonstrate a legal basis for this Court to order the issuance of a corrective notice or to enjoin either party from communicating with potential plaintiffs. It is, therefore, hereby

ORDERED that Plaintiff’s Motion for Corrective Notice and an Injunction Limiting Future Unapproved Communication with the Potential Class Members (“Motion”) [Doc. # 78] is **DENIED**.

SIGNED at Houston, Texas, this 4th day of October, 2012.



Nancy F. Atlas
United States District Judge

Exhibit E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN CAREY, Individually and on
behalf of other employees similarly
situated,

Plaintiff,

V.

24 HOUR FITNESS USA, INC.,

Defendant.

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NO. 4:10-CV-3009

ORDER OF DISMISSAL WITH PREJUDICE

The Court has received the parties' joint stipulation of dismissal with prejudice. Based on the parties' stipulation, the Court hereby **ORDERS** that this case is **DISMISSED** with prejudice. All costs and fees are to be borne by the party incurring the same.

SIGNED at Houston, Texas, this 12th day of December, 2012.



Nancy F. Atlas
United States District Judge

Exhibit F

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 11-22700-CIV-ALTONAGA/Simonton

JEANLIN LEE, et al.,

Plaintiffs,

vs.

**24 HOUR FITNESS,
USA, INC.,**

Defendant.

_____ /

ORDER

THIS CAUSE came before the Court upon the parties' Joint Notice of Filing Settlement Agreements [ECF No. 28], filed November 2, 2012, which the Court construes as a motion for reconsideration ("Motion") of the Joint Motion for Approval of Confidential Settlement Agreements and to Dismiss Lawsuit with Prejudice [ECF No. 26]. The Plaintiffs, Jeanlin Lee, Jessie Quijano, and Johnny Dennis (collectively "Plaintiffs"), have each entered into a signed settlement agreement with Defendant 24 Hour Fitness USA, Inc., which the parties have submitted to the Court for review and approval (*see* [ECF No. 28-1]), in accordance with the November 1, 2012 Order (*see* [ECF No. 27]). Upon review of the record and the parties' documented basis for settlement of the FLSA case, including an award of attorneys' fees to Plaintiffs' counsel as the prevailing party, the Court finds that settlement of this action is fair and reasonable and that the requested fee is fair and reasonable and not grossly excessive. Accordingly, it is

ORDERED AND ADJUDGED as follows:

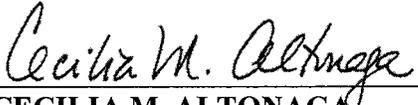
1. The Motion [ECF No. 28] is **GRANTED**.

2. The Confidential Settlement Agreements and Releases of All Claims [ECF No. 28-1] between Plaintiffs, Jeanlin Lee, Jessie Quijano, and Johnny Dennis, and Defendant, 24 Hour Fitness USA, Inc., which have been duly filed as a record of the Court, are **APPROVED** in their entirety.

3. This case is **DISMISSED with prejudice**, and all pending motions are **DENIED as moot**.

4. The Court retains jurisdiction to enforce the terms of the Confidential Settlement Agreements and Releases of All Claims.

DONE AND ORDERED in Chambers at Miami, Florida, this 2nd day of November, 2012.



CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record

Exhibit G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 11-CV-22694-JLK

ELIO CONSTANZA, and all
others similarly situated,

Plaintiff,

v.

24 HOUR FITNESS, USA, INC.,

Defendant.

ORDER APPROVING SETTLEMENT AND DISMISSAL WITH PREJUDICE

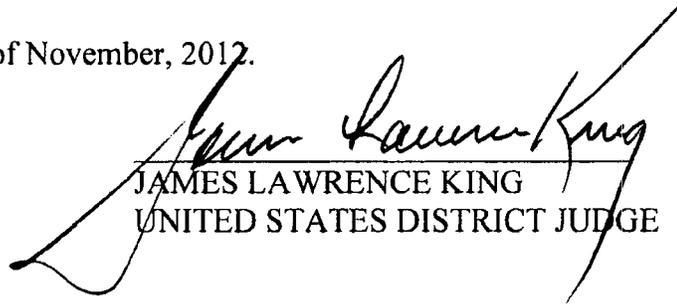
THIS CAUSE having come before the Court upon the parties' Joint Motion for Approval of Confidential Settlement Agreement and to Dismiss Lawsuit with Prejudice (D.E. #18) filed October 31, 2012, and for good cause shown, it is

ORDERED, ADJUDGED and DECREED as follows:

1. The parties' Joint Motion for Approval of Confidential Settlement Agreement and to Dismiss Lawsuit with Prejudice (D.E. #18) be, and the same is hereby **GRANTED**.
2. The parties' settlement agreement is hereby **APPROVED**.
3. All pending motions are deemed **MOOT**.
4. The case is hereby **DISMISSED WITH PREJUDICE**. The Court shall retain jurisdiction for purposes of enforcing the terms of the Confidential Settlement Agreement.

5. The Clerk shall **CLOSE** this case.

DONE and ORDERED in Chambers at the James Lawrence King Federal Justice Building, Miami, Florida, this 1st day of November, 2012.



JAMES LAWRENCE KING
UNITED STATES DISTRICT JUDGE

Copies furnished to:

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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):

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on January 3, 2013, at San Francisco, California.


Olivia Pearl Azevedo

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