UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

24 HOUR FITNESS USA, INC.	)	
	)	
and	)	CASE NO. 20-CA-35419
	)	
ALTON J. SANDERS, an individual.	)	
	)	

BRIEF OF CHARGING PARTY ALTON SANDERS AND INTERVENOR SEIU IN OPPOSITION TO EMPLOYER'S EXCEPTIONS AND IN SUPPORT OF CROSS-EXCEPTION TO ADMINISTRATIVE LAW JUDGE DECISION

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INTRODUCTION[1/]

In *D.R. Horton,* Inc., 357 NLRB No. 184, 2012 WL 36274 (January 3, 2012), the Board held that an employer violates Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. §158(a)(1), by implementing a workplace policy that prohibits employees from exercising their Section 7 right to initiate or participate in class, collective, or other concerted legal actions. In this case, Administrative Law Judge William L. Schmidt applied the reasoning of *D.R. Horton* – and the seven decades of federal labor law that preceded and supported it – in holding that Respondent 24 Hour Fitness, Inc. similarly violated Section 8(a)(1) by prohibiting its employees, including Charging Party Alton J. Sanders, from pursuing workplace claims on a concerted action basis.

24 Hour Fitness tries to distinguish this case from *D.R. Horton* factually, by asserting that in 2007 it began allowing new employees to "opt out" of mandatory arbitration (or, more accurately, to regain their otherwise forfeited Section 7 right to engage in concerted legal activity) if, within the first 30 days of employment, those employees completed a multi-step procedure to declare themselves not bound by Respondent's arbitration policy. Jt. Stip. 11; Jt. Ex. 14. For purposes of Section 8(a)(1), however, that factual distinction makes no difference. Under longstanding Board law, Section 8(a)(1) is violated whenever an employer's policy, viewed objectively, interferes with, restrains, or coerces employees in the exercise of their Section 7 right to engage in concerted protected activity – and that includes the well-established Section 7 right to engage in concerted legal activity to improve workplace conditions. ALJ

[1/] This brief is filed jointly by Charging Party Alton J. Sanders and by the Service Employees International Union, which was granted leave to intervene on behalf of Charging Party by the Division of Judges on May 18, 2012 for purposes of participating in briefing to the Administrative Law Judge and the Board. *See* Order on Mot. to Intervene.

Decision at 16; *D.R. Horton*, 2012 WL 36274 at *7. By unilaterally imposing a workplace policy that strips this core Section 7 right from every employee who fails to take the required steps to regain that right within the first 30 days of employment – which the record shows includes *at least* 99.2% of the employees 24 Hour Fitness has hired since 2005, *see infra* at 11 – Respondent has unlawfully interfered with its employees' free exercise of Section 7 rights. *See D.R. Horton*, 2012 WL 36274 at *5-*6 & n.6 and cases cited.

It makes no difference that a tiny fraction of 24 Hour Fitness's employees (roughly one-half of one percent) overcame their fear of retaliation and the lack of accurate information about the Section 7 forfeiture and timely regained their statutory rights. Section 8(a)(1) prohibits employers from forcing their employees to take affirmative steps in order to secure fundamental Section 7 rights. By flipping the usual default rules and transforming Section 7 from a guaranteed right that every new employee automatically enjoys into a right that requires affirmative steps to secure (subject to permanent forfeiture if those steps are not completed within the first 30 days of employment), 24 Hour Fitness interfered with, restrained, and coerced its employees in their ability to exercise Section 7 rights, as ALJ Schmidt correctly concluded.

24 Hour Fitness tries to justify its unlawful prohibition against class, collective, or representative actions by asserting that its employees still have the option of pursuing workplace claims in arbitration on a joint or consolidated action basis. Op. Br. at 22. Even if this were true, it would make no difference. An employer that unlawfully bars participation in one broad category of concerted activity cannot avoid Section 8(a)(1) liability by pointing to some *other* category of concerted activity that has not been prohibited. *D.R. Horton*, 2012 WL 36274 at *8. The Federal Rules of Civil Procedure, like most states' procedural rules, make clear that class actions are only available in circumstances where joinder of individual claims is neither possible

nor appropriate. *See* Fed.R.Civ.Pro. Rule 23(a)(1). For that reason, an employer that permits joinder while prohibiting class actions (which are the classic "representative" action, in which one or more employees act on behalf of their co-workers for their mutual aid and protection) does nothing to protect the concerted action rights of those who would be eligible for class action membership.

In any event, ALJ Schmidt was surely correct in concluding (based on evidence and argument presented by Charging Party Sanders and addressed by Respondent in its post-hearing brief) that 24 Hour Fitness's policies unlawfully prohibit joint and consolidated actions as well. Respondent's confidentiality/nondisclosure clause precludes employees from engaging in any discussion or disclosure of their individual arbitrations. As a practical matter, this gag rule makes it impossible for co-workers to know that a claim has been filed, which in turn makes it impossible to seek joinder or consolidation. Worse still, while 24 Hour Fitness suggests that a passing reference in its arbitration policy to the Federal Rules of Civil Procedure is sufficient to establish and to inform employees of their right to seek joinder of individual arbitration under Fed.R.Civ.Pro. Rule 20, that is an illusory right. There is no procedural mechanism under most arbitration providers' rules for consolidating or joining the claims of different claimants that have been filed before different arbitrators or at different times.

24 Hour Fitness also challenges the provision in the ALJ's remedial order requiring it to "[n]otify any arbitral or judicial tribunal where it has pursued the enforcement of" its class action prohibition that it no longer objects to its employees bringing or participating in such class or collective actions. Op. Br. at 41-47. 24 Hour Fitness's exceptions mischaracterize this remedy as somehow directing Article III courts how to conduct their business. The order does nothing of the kind. No court is required to take any particular action, and nothing in the order precludes 24

Hour Fitness from continuing to challenge the validity of *D.R. Horton* itself. The ALJ's order does, however, properly direct 24 Hour Fitness to stop interfering with or coercing its employees' exercise of their Section 7 rights, including by instructing Respondent that it may no longer continue to seek enforcement of its unlawful prohibition against joint, class, and collective actions. Such relief is well within the authority of the Board, and is an appropriate remedy for 24 Hour Fitness's longstanding violations of Section 8(a)(1).

STATEMENT OF FACTS

In 2005, after 24 Hour Fitness, Inc., was hit with a series of employment class and collective actions (including one that was allowed to proceed on a class action basis in arbitration (*In the Matter of James C. Allen et al. and Sport and Fitness Clubs of America, Inc. dba 24 Hour Fitness*, AAA No. 11 160 03041 04 (Sochynsky, Arb., April 13, 2005 Clause Construction Ruling)) and seven others that were consolidated into a single wage-and-hour lawsuit that ended up settling for $38 million (*Boyce v. Sport and Fitness Clubs of America*, Case No. 03-CV-2140 BEN (S.D. Cal.)), 24 Hour Fitness instituted a new policy that prohibited any of its employees from pursuing any workplace claims as a class, collective, or representative action in arbitration or in any other forum, and that further prohibited its employees from disclosing to their co-workers or others that any arbitration proceeding was pending. Jt. Stip. 2-4; Jt. Ex. 2(a).[2/] Those

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[2/] In a typical "class action" governed by Fed.R.Civ.Pro. Rule 23 and its state law counterparts, the action is filed by one or more workers on behalf of themselves and as the representatives of all other similarly situated workers. If the class is certified as meeting the Rule 23 standards, all affected workers are included unless they affirmatively exclude themselves from the class. *See D.R. Horton*, 2012 WL 36274 at *4. In a "collective" action, sometimes described as an "opt-in" class action, one or more workers file an action on behalf of themselves and as the representatives of all others similarly situated, under a particular statute (such as the Fair Labor Standards Act, 29 U.S.C. §216(b), or the Age Discrimination in Employment Act, 29 U.S.C. §626(b)) that requires each participating worker to file a "Consent to Sue" to be included in the class. A "representative" action, such as under California's Labor Code Private Attorneys

(continued...)

new policies applied to all then-current 24 Hour Fitness employees, whether or not those employees signed any document agreeing to be bound or even acknowledged receipt of the handbook setting forth the new policy. *See* Jt. Stip. 4.

Respondent first instituted its unilaterally devised arbitration policy for resolving employment-related disputes by publishing that policy in its 2005 Employee Handbook. The Arbitration of Disputes Policy set forth in that 43-page Handbook stated (in non-highlighted language buried in the last sentence of the fifth paragraph on the second page):

> . . . However, there will be no right or authority for any dispute to be brought, heard or arbitrated *as a class action, private attorney general, or in a representative capacity* on behalf of any person.

Jt. Ex. 2(a) (emphasis added). Two paragraphs later, the policy further limited employee collaboration by including a confidentiality/nondisclosure rule (in the next to last sentence of the seventh paragraph):

> . . . Except 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.

Id.; *see also* Jt. Ex. 3(a) (43-page 2005 Handbook).

All subsequent editions of the Employee Handbook also included these restrictions on concerted employee activity. In the next version of the Arbitration of Disputes Policy, for example, 24 Hour Fitness slightly modified the class action prohibition to ensure (through the use of more technical, even *less* comprehensible language) that its prohibitory policy would

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[2/] (...continued)
General Act, Cal. Labor Code §2698 *et seq.* or other private attorney general statues, allows one or more individual workers to bring a representative lawsuit on behalf of all aggrieved persons, without having to satisfy the procedural requirements of class certification, under statutes that specifically allow representative actions to enforce public law rights. *See, e.g., Arias v. Superior Court*, 46 Cal.4th 969 (2009).

encompass all possible forms of concerted legal actions. That next version of the Employee Handbook, which had expanded to 63 pages, thus stated:

> . . . However, there 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*. . . .
>
> . . . Except 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.

Jt. Ex. 2(b), 3(b) (emphasis added).

Beginning at least in 2005, 24 Hour Fitness also began requiring new employees to sign an Acknowledgment of Receipt form to acknowledge that they had received the version of the company's Employee Handbook then in effect. Employees who failed or refused to sign the receipt acknowledgment were still bound by all handbook policies, including the Arbitration of Disputes Policy. Jt. Stip. 4. The Receipt Acknowledgment form that 24 Hour Fitness used between 2005 and at least January 1, 2007 made no reference to any opt-out provisions (because no opt-out procedure existed). *See* Jt. Ex. 4. 24 Hour Fitness concedes that no employee hired prior to January 1, 2007 was *ever* given any opportunity to opt out of 24 Hour Fitness's mandatory arbitration agreement or the concerted action prohibition/non-disclosure clauses it contained. Jt. Stip. 22; Tr. at 92:14-22.[3/]

Although 24 Hour Fitness revised its employee handbook and handbook receipt acknowledgment several times over the next few years, the Arbitration of Disputes policy

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[3/] 24 Hour Fitness has stipulated that approximately 18% of its current NLRA-covered workforce comprises employees whom it hired prior to January 2007. Jt. Stip. 22. Each of those employees was thus forced to waive their Section 7 right to pursue concerted action remedies without being given any opportunity to regain that right through the later-adopted opt-out process.

continued to include the same prohibition against class, collective, or representative actions and against any disclosure of pending arbitrations with co-workers. *See* Jt. Stip. 6 & Jt. Ex. 6; *see also* Jt. Ex. 3(b), 3(c) (revised handbooks, apparently from 2007). For example, the "Team Member Handbook" issued in 2010 also contains an Arbitration of Disputes Policy that states:

> . . . However, there 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. . . .
>
> . . . Except 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.

Jt. Ex. 3(d).[4/]

On or about January 1, 2007, 24 Hour Fitness began presenting new employees with a different version of the Employee Handbook Receipt Acknowledgment that described a new, multi-step opt-out process.. Jt. Stip. 5; Jt. Ex. 5. That 2007 Receipt Acknowledgment form states:

> I have received the January 2005 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

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[4/] There is another version of the Handbook, identified as Jt. Ex. 3(e) that appears not to have any arbitration provision at all, although the record shows that workers given this handbook were given a stand-alone copy of the Arbitration of Disputes policy. *See* Jt. Stip. 9. ALJ Schmidt found that a similar Arbitration of Disputes policy has applied to all employees hired after 2005. ALJD 5:34-36.

> Company's records. 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.

Jt. Ex. 5 (emphasis added).

24 Hour Fitness also began adding a reference to this new opt-out procedure in its Employment Application form. *See* Resp. Ex. 1. That language begins by touting arbitration (misleadingly) as a mutually beneficial dispute resolution procedure, stating: "I understand that as an expeditious and economical way to settle employment disputes without need to go through court, 24 Hour Fitness agrees to submit such disputes to final and binding arbitration." *Id*. The form then informs the new applicants that they "may opt out of the arbitration procedure within a specified period of time, as the procedure provides," but that if the employee does not opt out, the arbitration agreement is binding on both parties. *Id*.

Nothing in the Employment Application form or the Employee Handbook Receipt Acknowledgment explains that by failing to opt out, and regardless of whether he or she signs the Employee Handbook Receipt Acknowledgment, an employee will permanently forfeit any and all right to pursue class, collective, or representative actions in court *or* in arbitration, and will be barred from discussing with co-workers the pendency or results of any arbitration. *Id*. Nor does the Employment Application form or the Employee Handbook Receipt Acknowledgment explain that the right to engage in such concerted activity is protected by the NLRA and the Norris-LaGuardia Act, or that by forfeiting those concerted actions rights, the employees are giving up their right to represent or be represented by others or, as a practical matter, to find qualified counsel willing to represent them.

At some point in 2009 or 2010, 24 Hour Fitness also began offering some employees an electronic version of its Arbitration of Disputes Policy. *See* Jt. Ex. 2(d). That electronic version includes the same prohibition on class, collective or representative actions and on disclosure of pending proceedings. The electronic version also adds three paragraphs at the end to describe the company's opt-out procedures, which state:

> 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 click on the button below. 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 24 Hour Fitness taking any retaliatory action against me.
>
> I UNDERSTAND THAT BY ENTERING MY INITIALS AND CLICKING THE "CLICK TO ACCEPT" BUTTON, I AM AGREEING TO THE ARBITRATION OF DISPUTES POLICY (WHICH INCLUDES MY ABILITY TO OPT-OUT OF THE POLICY WITHIN THE PERIOD OF TIME NOTED ABOVE). I ALSO AGREE THAT THIS ELECTRONIC COMMUNICATION SATISFIES ANY LEGAL REQUIREMENT THAT SUCH COMMUNICATION BE IN WRITING.

Jt. Ex. 2(d).

Beginning at some point in 2010, 24 Hour Fitness shifted responsibility for handling opt-out inquiries from its Human Resources to its Legal Department, and revised the Arbitration of Disputes Policy to state:

> 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 to the Legal Department* through interoffice mail or by fax to 925-543-3358 no later than 30 calendar days after the date I click on the button below. I understand that I can obtain the Opt-Out Form *by calling the Team Support Center at 1.888.256.5485, ext. 3339*. 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 24 Hour Fitness taking any retaliatory action against me.

Id. (emphasis added).[5/]

An employee who succeeds in obtaining an opt-out form receives a document that states:

> DISPUTE RESOLUTION AGREEMENT
> OPT-OUT FORM
>
> By signing and dating below, I am choosing to opt-out of the 24 Hour Fitness' Dispute Resolution Agreement ("Agreement"). I understand that by opting out, I will not participate in or be bound by the alternative dispute resolution procedures described in the Agreement.
>
> ***
>
> IN ORDER TO OPT-OUT OF THE DISPUTE RESOLUTION AGREEMENT, YOU MUST SIGN AND RETURN THE FORM TO THE LEGAL DEPARTMENT THROUGH INTEROFFICE MAIL OR BY FAX TO 925-543-3358, NO LATER THAN 30 CALENDAR DAYS AFTER DATE OF HIRE.

Jt. Ex. 14(e). *None* of these documents – or other documents used by 24 Hour Fitness – includes any promise that employees can opt out anonymously, or that 24 Hour Fitness will keep confidential from managers or others the identity of those who choose to opt out of the company's favored arbitration policy. *See also* Jt. Ex. 14(a)-(f) (versions of the opt-out form in use since January 1, 2007).

Although 24 Hour Fitness's employees have been allowed for several years to review the company's policies on-line and to sign the Acknowledgment of Receipt form electronically, the company's Custodian of Records testified that she was "not aware of the specific functionality"

[5/] The record also contains several versions of an electronic document entitled "Arbitration Policy Opt-Out Information": the first directs employees to send any opt-out form to the "Legal Department"; the second directs employees to send that form to the CAC/HR File Room; and the third directs employees to send that form to the MSC/HR File Room. Jt. Ex. 10(a), 10(b). It is not clear which versions of those forms were used for which employees, or whether some employees received multiple versions with different directions.

of the electronic on-line version of the company's policies. Tr. at 45:8, 60:4-9. It seems clear from the screen shots submitted in response to the GC's subpoena, though, that a new employee sitting at a computer terminal in a busy 24 Hour Fitness Center can click through the electronic form checklists without reading, or even opening, any of the linked policies and without downloading any of those policies for future reference. *See* GC Ex. 3; Tr. at 63:15-64:8. The "Click to Sign" button on the upper left-hand side of the page is not grayed-out on the screen shot provided by 24 Hour Fitness. This means that new employees can sign the Acknowledgment without actually reviewing the complete text of any of the company's linked policies (and thus never learning what rights they have been required to forfeit). GC Ex. 3 at 29-32. Even if a new employee clicked on the link to 24 Hour Fitness's Arbitration of Disputes Policy, the screen shot shows that the employee will *not* see the language prohibiting class actions or prohibiting the disclosure of a pending arbitration unless that employee physically scrolls down to the second or third screen page of that policy. *Id*. at 34; *see also* Tr. at 68:13-69:7.

24 Hour Fitness can only identify 35 employees who timely and successfully completed this opt-out process since it first became available in 2007 (although the company believes that up to 70 such individuals may have actually opted out). Jt. Stip. 24. As of the date of trial in June 2012, 24 Hour Fitness employed 19,614 NLRA-covered employees, of whom 3,605 were hired before any opt out procedure existed. Jt. Stip. 22; Tr. at 92:14-22. The total number of new hires between January 1, 2007 and June 2012 was approximately 70,000 individuals. Jt. Stip. 24. The record thus establishes that between 99.2% to 99.6% of 24 Hour Fitness's new hires permanently forfeited their Section 7 rights by failing to complete 24 Hour Fitness's multi-step opt-out procedure within the first 30 days of being hired.

24 Hour Fitness claims to have no idea how many additional employees tried to opt out but failed. The company's Custodian of Records acknowledged that 24 Hour Fitness cannot determine how many employees tried to contact the employee hotline to request an opt out form but were not able to opt out successfully because no one answered the telephone, or because the interoffice mail was not properly delivered, or because they sent the forms to the wrong address, or for some other reason. *See* Tr. at 70:15-71:19. There is evidence, however, that several employees complained about the telephones not being answered at the employee hotline and about being given inaccurate information. *See* GC Ex. 4(a), 5(g), Tr. at 50:5-51:20, 52:8-54:2, 70:19-71:21.

Since August 15, 2010, 24 Hour Fitness has sought to enforce the class action ban in its arbitration policy in at least 11 court cases involving class or collective actions by employees regarding their wages, hours, or working conditions. *See* ALJD 8-11.

PROCEDURAL HISTORY

Charging Party Alton Sanders submitted an application for work at 24 Hour Fitness on August 25, 2008 and began working on October 6, 2008. He remained employed at 24 Hour Fitness as a group exercise instructor for approximately two years. Mr. Sanders did not complete 24 Hour Fitness's multi-step opt-out process. Mr. Sanders filed the underlying unfair labor practice charge challenging 24 Hour Fitness's violation of Section 8(a)(1) on February 15, 2011. On April 30, 2012, the Acting General Counsel issued the Complaint. The parties participated in a hearing before the ALJ on June 28, 2012.

The ALJ issued his decision on November 6, 2012. The ALJ concluded that 24 Hour Fitness violated Section 8(a)(1) because "both the class action ban and the nondisclosure restriction . . . unlawfully limit [24 Hour Fitness's] employees from exercising their Section 7

right to commence and prosecute employment-related legal actions in concert with other employees." ALJD at 16:8-11.

In holding that 24 Hour Fitness's prohibition against concerted legal action violates the Act, the ALJ rejected 24 Hour Fitness's reliance on its opt-out procedure. The ALJ found that "[f]or the purposes of the worker rights protected by Section 7, the opt-out process designed by the Respondent is an illusion." *Id*. at 16:15-16. In fact, "[t]he requirement that employees must affirmatively act to preserve rights already protected by Section 7" is "an unlawful burden on the right of employees to engage in collective litigation." *Id*. at 16:16-19. Moreover, the ALJ held, 24 Hour Fitness's policy also interferes with the Section 7 rights of those who successfully complete the opt-out process because it "limits the assistance the opted-out employee may obtain from fellow workers" who have not opted out (and who therefore cannot themselves participate in any concerted legal action and are bound by the nondisclosure provision), and because an opt-out employee is unlikely to be able to "identify other opted out individuals." *Id*. at 16:28-32.

Turning to the nondisclosure restriction, the ALJ further held that 24 Hour Fitness's nondisclosure policy "imposes extreme limitations on activities protected by Section 7" in violation of the Act. *Id*. at 17:4-5. The ALJ thus concluded that "by way of the restrictions in its arbitration policy," 24 Hour Fitness "seeks to restore the power imbalance between workers and their employers that existed prior to congressional passage of Norris-LaGuardia and the NLRA." *Id*. at 18:10-12.

The ALJ ordered 24 Hour Fitness to cease and desist from maintaining or enforcing an arbitration of disputes policy that "prohibits its employees from bringing or participating in class or collective actions brought in any arbitral or judicial forum that relates to their wages, hours, or other terms and conditions of employment." *Id*. at 20:12-14. He also ordered 24 Hour Fitness to

"[n]otify any arbitral or judicial tribunal where it has pursued the enforcement of the prohibition against bringing or participating in class or collective actions relating to the wages, hours, or other terms and conditions of employment . . . that it desires to withdraw[] any such motion or request, and that it no longer objects to it[s] employees bringing or participating in such class or collective actions." *Id*. at 20:37-41.

ARGUMENT

I. *D.R. HORTON* WAS CORRECTLY DECIDED AND GOVERNS THIS CASE

In *D.R. Horton, Inc.*, the Board held that an employer violates Section 8(a)(1) by implementing a workplace policy that prohibits employees from exercising their core, substantive Section 7 right to initiate or participate in class, collective, and other representative legal actions. Despite the Board's well-reasoned decision in *D.R. Horton* and the long line of precedent on which it rests, Respondent 24 Hour Fitness maintains that *D.R. Horton* was wrongly decided, and that Section 7 does not protect the right of employees to engage in class or collective actions. Op. Br. at 1 n.2. The well-supported reasoning of *D.R. Horton* is, however, unassailable, and it governs this case.

This Board rested its analysis in *D.R. Horton* on three basic principles. First, the "right to engage in collective action – including collective *legal* action – is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest." 2012 WL 36724 at *12 (emphasis in original); *see also id*. at *7 ("the substantive right to engage in concerted activity aimed at improving wages, hours or working conditions through litigation or arbitration lies at the core of the rights protected by Section 7. . . ."); *id*. at *4 ("Such conduct is not peripheral but central to the Act's purposes."); *id*. at *14 ("Section 7 of the NLRA manifests a strong federal policy protecting employees' right to engage in protected concerted action,

including collective pursuit of litigation or arbitration."). In particular, a long line of Supreme Court and Board precedent clearly establishes that the right of employees to act together to pursue *legal* claims related to wages, hours, and working conditions on a concerted basis is protected by the "core substantive" Section 7 right to engage in concerted activity.[6/]

Second, Section 8(a)(1) prohibits employers from imposing individual employment agreements on employees that interfere with their right to engage in protected concerted activity for mutual aid and protection. As the Board explained, "[t]hat this restriction on the exercise of Section 7 rights is imposed in the form of an agreement between the employee and the employer makes no difference." *Id*. at *5. The Board and the Supreme Court have repeatedly "found unlawful employer-imposed, individual agreements that purport to restrict Section 7 rights – including, notably, agreements that employees will pursue claims against their employer only individually." *Id*. at *5-*6 (citing *National Licorice Co. v. NLRB*, 309 U.S. 350 (1940) (individual employment contract including a clause discouraging a discharged employee from presenting his grievance to the employer through a representative was unenforceable because "employers cannot set at naught the National Labor Relations Act by inducing their workmen to agree not to demand performance of the duties which it imposes"); *J.I. Case Co. v. NLRB*, 321

[6/] *See* 2012 WL 36274 at *2-4 (citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978); *Spandsco Oil & Royalty Co*., 42 NLRB 942, 948-49 (1942) (three employees' joint FLSA lawsuit); *Salt River Valley Water Users Ass'n*, 99 NLRB 849, 853-54 (1952), *enf'd* 206 F.2d 325 (9th Cir. 1953) (designating employee as co-workers' representative to seek FLSA back wages); *NLRB v. City Disposal Systems* (1984) 465 U.S. 822 (pursuing collective grievances in arbitration)); *see also Brady v. National Football League*, 644 F.3d 661, 673 (8th Cir. 2011) (a "lawsuit filed in good faith by a group of employees to achieve more favorable terms or conditions of employment *is* 'concerted activity' under §7 of the National Labor Relations Act"); *Mohave Elec. Co-op, Inc. v. NLRB*, 206 F.3d 1183, 1188 (D.C. Cir. 2000); *NLRB v. United Parcel Service*, 677 F.2d 421 (6th Cir. 1982), *enf'g* 252 NLRB 1015, 1018, 1022 n.26 (1980); *NLRB v. Trinity Trucking & Materials Corp.*, 567 F.2d 391 (7th Cir. 1977) (mem. disp.), *cert. denied*, 438 U.S. 914 (1978), *enf'g* 221 NLRB 364, 365 (1975); *Le Madri Restaurant*, 331 NLRB 269, 275 (2000); *Harco Trucking, LLC*, 344 NLRB 478 (2005).

U.S. 332, 337 (1944) ("Individual contracts no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act."); *J.H. Stone & Sons*, 33 NLRB 1014 (1941), *enf'd in relevant part*, 125 F.2d 752 (7th Cir. 1942) (clause in individual employment contracts that required employees to attempt to resolve employment disputes individually with the employer and then provided for arbitration was unlawful); *see also Western Cartridge Co.*, 44 NLRB 1, 6-8 & n.5, 19 (1942) (invalidating individual employment contracts that purportedly gave employer right to fire any employee who "participated in a strike or any other concerted activity regarded as interfering with his 'faithfully' fulfilling 'all his obligations'" because it effectively restricted employees' right to engage in concerted activity), *enf'd*, 134 F.2d 240 (7th Cir. 1943)). The Board thus had little difficulty concluding in *D.R. Horton* that an employer's prohibition against concerted legal action on its face interferes with, coerces, and restrains employees in the exercise of protected Section 7 rights, and is thus unlawful under Section 8(a)(1) as well as under the parallel provisions of the Norris-LaGuardia Act. *D.R. Horton*, 2012 WL 36274 at *5, *7-*8 (citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004)).

Third, there is no conflict between the NLRA (as the Board construed it in *D.R. Horton*) and any implied policies of the Federal Arbitration Act of 1925, 9 U.S.C. §1 et seq. *See* 2012 WL 36274 at *10-*16 ("[Our] well-established interpretation of the NLRA . . . does not conflict with the letter or interfere with the policies underlying the FAA."). As the Board explained, "the purpose of the FAA was to prevent courts from treating arbitration agreements less favorably than other private contracts," and "[t]o find that an arbitration agreement must yield to the NLRA is to treat it no worse than any other private contract that conflicts with Federal labor law." *Id*. Moreover, "the Supreme Court's jurisprudence under the FAA . . . makes clear that the

[arbitration] agreement may not require a party to 'forgo the substantive rights afforded by the statute,'" and the "categorical prohibition of joint, class, or collective federal[,] state[,] or employment law claims in any forum directly violates the substantive rights vested in employees by Section 7 of the NLRA." *Id*. at *12 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)).

Furthermore, Section 2 of the FAA, commonly referred to as the FAA's savings clause, expressly provides that "arbitration agreements may be invalidated in whole or in part upon any 'grounds as exist at law or in equity for the revocation of any contract.'" 2012 WL 36274 at *11-*12 (quoting 9 U.S.C. §2). Because any contract term that violates the NLRA and/or NLGA is legally invalid and unenforceable as a matter of federal law and national labor policy, *see, e.g.*, *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83-84 (1982); *J.I. Case Co.*, 321 U.S. at 337; 29 U.S.C. §103, such a contract term may be invalidated without causing any conflict with the FAA even if it is included in an otherwise enforceable arbitration agreement.

Even if there were a conflict between the NLRA and the FAA, moreover, the FAA would have to yield. Where a case involves rights and obligations under two federal statutes, the relevant inquiry is not one of "preemption," but of "implied repeal" – whether Congress intended to repeal part or all of a previously enacted statute as a result of its enactment of a subsequent, inconsistent statute. Findings of implied repeal, though, are highly disfavored and should never be presumed. *See, e.g.*, *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) (intention to repeal must be "clear and manifest"). Even when two federal statutes cover the same subject, "the rule is to give effect to both if possible." *Id.*; *D.R. Horton*, 2012 WL 36274 at *10 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974) (when two federal statutes "are capable of co-existence," both should be given effect "absent a clearly expressed congressional intention to

the contrary."); *see also Direct Press Modern Litho*, 328 NLRB 860, 861 (1999); *Image Systems*, 285 NLRB 370, 371 (1987).

In those rare cases in which two federal statutes are in "irreconcilable conflict," moreover, it is the *later*-enacted statute – in this case the 1932 Norris-LaGuardia Act and 1935 NLRA – that must be found to have impliedly repealed any inconsistent provisions in the *earlier* statute – the 1925 FAA. *See Posadas v. National City Bank of New York*, 296 U.S. 497, 503 (1936).[7/] Thus, to the extent any actual conflict existed between the FAA and the NLRA – a conclusion the Board in *D.R. Horton* expressly and correctly rejected – the proper question to ask would be whether the two statutes could be reconciled; and, if not, the NLRA would have to be found to have impliedly repealed any inconsistent provisions in the earlier enacted FAA, not vice versa.

24 Hour Fitness also cites *CompuCredit Corp. v. Greenwood*, __ U.S. __, 132 S.Ct. 665 (2012), as support for its position that the NLRA conflicts with the FAA. But *CompuCredit* does not undercut the Board's analysis in *D.R. Horton* in the slightest. For one, the present case has nothing to do with the actual issue in *CompuCredit*, which was whether a consumer credit company could enforce an arbitration agreement that encompassed statutory claims arising under the Credit Repair Organization Act ("CROA"), 15 U.S.C. §1679. Applying traditional indicia of statutory construction, the Supreme Court held that in the absence of more specific language or evidence of congressional intent, CROA's right-to-sue language was not sufficient to guarantee a judicial forum in the face of an agreement to arbitrate CROA disputes. *See* 132 S.Ct. at 669-70.

[7/] Although the FAA was included in Congress's 1947 recodification of the U.S. Code, the legislative history of that recodification made clear that Congress did not make, or intend to make, any substantive change in the law through that recodification. *See* H.R. Rep. No. 80-251 (1947), *reprinted in* 1947 U.S.C.C.A.N. 1511 (1947 recodification made "no attempt" to amend existing law); H.R. Rep. No. 80-225 (1947), *reprinted in* 1947 U.S.C.C.A.N. 1515 (same).

The Supreme Court also noted that if Congress had intended to preclude arbitration of all CROA claims, it could easily have done so – as Congress has done in several recent federal statutes. *Id.* at 672 (citing statutes).

The issue in *D.R. Horton* and in this case, on the other hand, is not whether Congress intended a particular federal statute to *preclude any arbitration* of the substantive rights it establishes (as the NLRA, for example, precludes employers from forcing employees to arbitrate unfair labor practice charges, rather than submitting them to the Board). Rather, the issue here is much narrower – whether Sections 7 and 8(a)(1) of the NLRA vest covered employees with a statutory right to join with their co-workers in seeking to pursue workplace claims on a concerted action basis in *at least some forum*. The answer to that question, as discussed *supra* at 14-16 and as Sections 7 and 8(a)(1) of the NLRA and Sections 2 and 3 of the NLGA make clear, is that Congress did *not* intend to allow employers to require employees to waive the rights guaranteed by those statutes. All of the traditional indicia of statutory construction, including those addressed in *CompuCredit*, fully support this Board's conclusion that federal labor law – in particular, the guaranteed right to engage in "concerted activities for the purpose of . . . mutual aid or protection" – *does* encompass the right to be allowed to pursue workplace legal claims on a joint, class, or other collective action basis. *See supra* at 14-15 & n.6.

D.R. Horton is thus fully consistent with *CompuCredit* and the many Supreme Court cases reiterating that Congress through FAA §2 retained the authority to enact statutes whose core protections would not be deemed repealed by any implied general policies of the FAA. *See* 132 S.Ct. at 669 (courts should defer to the federal policies underlying the FAA "unless the

FAA's mandate has been 'overridden by a contrary congressional command.'") (citations omitted); *id*. at 672 (citing statutes).[8/]

The Board thus correctly held in *D.R. Horton* that an employer-imposed ban on concerted legal actions violates Section 8(a)(1).

II. THE ILLUSORY ABILITY TO OPT-OUT DOES NOT DISTINGUISH THIS AGREEMENT FROM *D.R. HORTON*

24 Hour Fitness's central argument is that its prohibition against concerted legal action (which it implemented after having been sued in class actions by several groups of its employees, *see supra* at 4) is distinguishable from the prohibition in *D.R. Horton* because 24 Hour Fitness permits employees to regain their otherwise-forfeited Section 7 rights by complying with a time-limited, multi-step opt-out procedure. Op. Br. at 19. According to 24 Hour Fitness, its 30-day "opt out" procedure transformed what would otherwise be a facially unlawful prohibition of concerted Section 7 activity into a lawful individual agreement by more than 99.2% of its employees without any interference, restraint, or coercion. But 24 Hour Fitness's multi-step opt out procedure does not render its concerted legal action ban lawful under Section 8(a)(1).

First, to the extent that 24 Hour Fitness's policy imposes its concerted action prohibition on employees during the first 30 days of their employment and prior to the expiration of any

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[8/] 24 Hour Fitness suggests that the Board's reasoning in *D.R. Horton* has been undermined because some courts have disagreed with the Board's holding in that case. *See* Op. Br. at n.10. Decisions by federal district courts and state trial and appellate courts have no effect on the validity of Board decisions; and even if the Fifth Circuit were to reverse *D.R. Horton* in the pending cross-appeals, that ruling would at most only be binding in Board cases arising out of regions within the geographic boundaries of the Fifth Circuit. *See Iowa Beef Packers, Inc*., 144 NLRB 615, 616-17 (1963) ("It has been the Board's consistent policy for itself to determine whether to acquiesce in the contrary views of a circuit court of appeals or whether, with due deference to the court's opinion, to adhere to its previous holding until the Supreme Court of the United States has ruled otherwise."). For the reasons described *supra*, the reasoning of *D.R. Horton* is well-founded, and it should be reaffirmed.

opportunity to opt out, that policy necessarily violates Section 8(a)(1). 24 Hour Fitness asserts that the arbitration of disputes policy does not go into effect for the first 30 days. Op. Br. at 8. That is not likely to be what a reasonable employee reading that language would understand. Nowhere in the application form, Acknowledgment of Receipt form, or Employee Handbook does 24 Hour Fitness state that the provisions of its mandatory arbitration agreement do not go into effect until 30 days after the start of employment. Instead, those provisions are all drafted to state that *all* disputes must be arbitrated in accordance with 24 Hour Fitness's rules (not all disputes arising more than 30 days after the start of employment). If the policy meant what 24 Hour Fitness contends, surely there would be some indication in the thousands of pages of court documents in the many wage and hour, discrimination, and other employment-related claims against 24 Hour Fitness (*see* Jt. Stip. 12-20) that any such claims reaching back to an employee's first month of employment could be litigated in court, or pursued in court or arbitration on a concerted action basis. Yet 24 Hour Fitness does not dispute that imposing a concerted action ban that takes effect before any opt-out window closes violates *D.R. Horton*, and that an employer violates Section 8(a)(1) by announcing a policy of requiring the forfeiture of Section 7 rights prior to entry into an agreement covered by the FAA.[9/]

Second, the existence of an opt-out procedure would not save 24 Hour Fitness's concerted action ban even if that ban did not go into effect for an employee's first 30 days. 24 Hour Fitness argues repeatedly that the existence of its multi-step opt-out procedure renders its

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[9/] Employees hired before 2007 never had any opt out rights. As 24 Hour Fitness concedes, before 2007 it did not allow any of its employees to opt out of its mandatory individualized arbitration program. Even after that date, it apparently took several months for 24 Hour Fitness to roll out the new agreement in several locations. Thus, to the extent 24 Hour Fitness seeks to enforce its agreement against employees who were never given any opt-out option, it has no conceivable Section 8(a)(1) defense.

arbitration of disputes policy a "voluntary" agreement that is not a "condition of employment" and therefore does not violate Section 8(a)(1). *See, e.g.*, Op. Br. at 19-21. This argument betrays a fundamental misunderstanding of what constitutes interference, coercion, or restraint within the meaning of the Act. A Section 8(a)(1) violation does not require express coercion in the form of discipline, discharge, or other retaliation, or even an express threat of such actions. Indeed, such a violation may be found even when the employer has not taken any affirmative steps to enforce its unlawful policy. *See NLRB v. Northeastern Land Servs. Ltd.*, 645 F.3d 475, 481 (1st Cir. 2011) (mere maintenance of an unlawful policy is sufficient). If an employer's actions "would reasonably tend to chill employees in the exercise of their Section 7 rights," they violate Section 8(a)(1). *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998); *see also D.R. Horton*, 2012 WL 36274 at *5 (citing *U-Haul Co. of Calif.,* 347 NLRB 375, 377-78 (2006); *Lutheran Heritage Village-Livonia*, 343 NLRB 646); *Supply Technologies, LLC*, 359 NLRB 1 (2012)); *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 374 (D.C. Cir. 2007).

Moreover, in determining "'[w]hether the words or actions of an employer constitute interference, restraint, or coercion, within the meaning of the Act, [they] must be judged, not as an abstract proposition, but in the light of the economic realities of the employer-employee relationship.'" *Jahn & Ollier Engraving Co.*, 24 NLRB 893, 906-07 (1940), *enf'd in relevant part*, 123 F.2d 589, 593 (7th Cir. 1941) (internal citation omitted) (cited in *D.R. Horton*, 2012 WL 36274 at *5 n.7). The "dominant position of an employer" gives its statements "an immediate and compelling effect that they would not possess if addressed to economic equals" even when they are not addressed as a command. *Id*.

Courts and the Board have thus repeatedly held that Section 8(a)(1) prohibits individual employment agreements that effect a waiver of Section 7 rights even in the absence of any

express threats of termination or discipline, and *even when some employees refuse to sign the agreements without consequence*. *See* 2012 WL 36274 at *5-*7 (citing *National Licorice Co. v. NLRB*, 309 U.S. 350, 360 (1940) (affirming Board ruling that individual employment contract violated Section 8(a)(1) because it *discouraged*, without forbidding, discharged employee from presenting grievance to employer except on an individual basis); *NLRB v. J.H. Stone & Sons*, 125 F.2d 752, 756 (7th Cir. 1942) (individual employment contract language requiring employees first to attempt to resolve employment disputes individually with employer is a per se violation of the Act, *even if "entered into without coercion"* and *even though some employees declined to sign those contracts without apparent consequence*, because it was a "restraint upon collective action" (emphasis added)); *Jahn*, 24 NLRB at 900-01, 906-07 ("profit-sharing" contract offered to employees who had worked for employer for at least one year that purported to waive employees' right to strike was unlawful interference under Section 8(a)(1), *even though one employee had declined to sign it, apparently without consequence*)). That a few employees may not succumb to pressure from an employer to enter into an individual agreement waiving Section 7 rights does not mean their employer's actions have not chilled Section 7 activity in violation of the Act.

Here, 24 Hour Fitness presents new employees with an employment contract containing an Arbitration of Disputes Policy with a concerted action prohibition, and it deems that contract binding on the employee even if the employee has not signed the Acknowledgment of Receipt or otherwise agreed in writing to be bound. Under Respondent's policy, every new employee is permanently deprived of the protected Section 7 right to engage in concerted litigation activity unless that employee timely completes the multi-step opt-out process and thereby communicates that he or she wishes to preserve the right to bring a lawsuit in court. In light of 24 Hour

Fitness's "dominant position," allowing it to make forfeiture of Section 7 rights its favored default constitutes an impermissible burden on the exercise of those rights, as ALJ Schmidt concluded. That its policy has the likely (and intended) effect of "chilling" employees in the exercise of their Section 7 rights is underscored by the fact that only about one-half of one percent of all employees hired since 2005 were actually successful in opting out of 24 Hour Fitness's mandatory arbitration policy.[10/]

24 Hour Fitness requires its employees to effectively place a target on their backs, identifying themselves at the outset of employment as potential litigants who wish to preserve their Section 7 right to engage in collective legal action, rejecting their employer's recommended dispute resolution procedure in favor of the right to pursue collective lawsuits. An employee wishing to opt out of 24 Hour Fitness's concerted legal action ban must contact either the 24 Hour Fitness Human Resources Department or the 24 Hour Fitness Legal Department and request an opt out form, and then must return the completed form. 24 Hour Fitness's own witnesses acknowledged that there was no way to remain anonymous in requesting an opt out

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[10/] It is worth noting that, although employer-imposed default forfeiture of Section 7 rights is alone sufficient to establish interference with concerted activity, 24 Hour Fitness has unnecessarily chosen to impose a particularly burdensome opt-out process. 24 Hour Fitness forces new employees to make a telephone call to an employee hotline to obtain the opt-out form, rather than providing that form to all new hires in the same packet as their handbook along with every other form they received on their first day of work. It buries the class action prohibition and non-disclosure policies in dense, technical language in a multi-paragraph Arbitration of Disputes Policy set forth in a lengthy employee handbook. And it has continued those practices even after digitizing its hiring process so new hires can opt in and out of all *other* company policies with a simple click of a mouse. See Tr. at 64:4-67:8. In contrast to its burdensome opt-out procedure, 24 Hour Fitness has not imposed any such multi-step process for obtaining employees' signatures on the Handbook Receipt Acknowledgment form itself, a form that 24 Hour Fitness undoubtedly *wants* its employees to sign. *See, e.g.*, Jt. Exs. 3(a), 4, 5, 6. As the ALJ indicated, based on these facts, he "would be startled to learn that the number of employees who made a conscious, fully-informed decision to be bound by [24 Hour Fitness's] highly self-serving arbitration policy even came close to the infinitesimal number of employees who actually opted out." ALJD at 16:44-47.

form. Tr. at 65:17-68:2. This self-identification is no less a burden on the exercise of protected rights than any other case where an employer's efforts to "poll" or "interrogate" employees about their interest in engaging in concerted activity has been held to violate Section 8(a)(1).[11/]

In *Allegheny Ludlum Corp.*, 333 NLRB 734, 739 (2001), for example, the employer had taped an anti-union video that included images of employees at their work stations. When the union complained, the employer distributed a notice to employees stating that if they did not want to participate in the video, they must inform the company. The Board held that this "opt out" approach was inherently coercive because it forced employees "'to make an observable choice that demonstrates their support for or rejection of the union.'" *Id.* at 745. Consequently, the "requirement that employees wishing to 'opt out' notify the Respondent or its agents, constitute[s] an unlawful poll of employees in violation of Section 8(a)(1) of the Act." *Id.* at 746; *cf. Chinese Daily News & Communications Workers of Am.*, 353 NLRB No. 66, 2008 WL 5382359, at *3 (2008) ("an employer's interrogation of an employee concerning how that employee intends to vote, or has voted, in a secret-ballot election violates the Act"); *Gladieux Food Serv., Inc.*, 252 NLRB 744, 745 (1980) ("Ortiz' question to Molero asking her how she intended to vote in the forthcoming election constituted an unlawful coercive interrogation.").

[11/] 24 Hour Fitness cites several cases (some not even involving employment contracts) decided under state contract law that had particular arbitration provisions that were imposed after a meaningful opportunity to opt out were not "unconscionable." Op. Br. at 26 n.10 (citing, *e.g.*, *Davis v. O'Melveny & Meyers*, 485 F.3d 1066, 1073 (9th Cir. 2007)). Unconscionability analysis depends on all of the circumstances surrounding the making of the contract and varies from state to state. *See, e.g., Gentry v. Superior Court*, 42 Cal.4th 443, 460 (2007) (applying state unconstitutionality law to invalidate mandatory arbitration agreement with 30-day opt-out clause). More important, the question in this case is not whether the class action ban in 24 Hour Fitness's Arbitration of Disputes policy is unconscionable or otherwise unenforceable under any state's *contract law* but rather whether it burdens the exercise of *Section 7* rights. The protections of the NLRA are not limited by state law unconscionability standards. Regardless of whether 24 Hour Fitness's cumbersome, multi-step opt out procedure is unconscionable, its default ban on concerted activity interferes with its employees' exercise of their Section 7 rights.

Although *any* opt out procedure to preserve Section 7 rights is likely to chill employee concerted activity, 24 Hour Fitness's procedure appears particularly designed to discourage opt outs. As the Board and many courts have repeatedly recognized, rank-and-file workers reasonably fear that they will be retaliated against if they take steps that might be seen as "disloyal" or adversarial.[12/] To be sure, 24 Hour Fitness informs new hires in the Acknowledgment of Receipt form accompanying the Employee Handbook, that: "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." But the convoluted wording of that promise, which is far from an unconditional promise not to engage in retaliation, seems more likely designed to plant the fear of retaliation in an employee's mind rather than to offer clear, unequivocal assurance that there will be no retaliation and that no supervisor or manager will know whether an employee has

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[12/] *See, e.g.*, *D.R. Horton,* 2012 WL 36274 at *3 n.5; *Gentry*, 42 Cal.4th at 460 (collecting cases) ("federal courts have widely recognized that fear of retaliation for individual suits against an employer is a justification for class certification in the arena of employment litigation . . ."); *Mitchell v. Robert De Mario Jewelry, Inc.*, 361 U.S. 288, 292 (1960) ("it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept substandard conditions"); Sung Hui Kim, *Ethics in Corporate Representation: The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, 74 Fordham L.Rev. 983, 1024-26 (2005) (discussing reasons for employee silence about issues and problems at work, including fear of retaliation or punishment, and fear of being labeled or viewed negatively as a troublemaker or complainer); David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Enforcement in the U.S. Workplace*, 27 Comp. Lab. L & Pol'y J. 59, 83 (Fall 2005) (citing studies showing that "being fired is widely perceived to be a consequence of exercising certain workplace rights"); Milliken, Morrison & Hewlin, *An Exploratory Study of Employee Silence: Issues that Employees Don't Communicate Upward and Why,* New York University School of Business (Nov. 4, 2003), http://w4.stern.nyu.edu/emplibrary/Milliken.Frances.pdf (discussing study on employee fear of retaliation or punishment, and employee fear of being labeled or viewed by employer negatively, as reasons for employee not acting on concerns or problems, including disagreement with company policies or decisions); Cynthia Estlund, *Free Speech and Due Process in the Workplace*, 71 Indiana L.J. 101, 120-23 (Winter 1995) (discussing fear of employer retaliation as key reason for workers not reporting wrongdoing); *The Litigation Stigma: Lawsuits Come Back to Haunt*, HR Focus, Vol. 70, No. 2 (February 1993)).

chosen to participate in the arbitration program. 24 Hour Fitness *never* promises new employees that they can opt out of the Arbitration of Disputes policy anonymously or that the identity of employees who opt out will be kept confidential – a deliberate omission that only increases the reasonable fear of retaliation. *See* Tr. at 72:12-73:5, 73:24-74:11 (testimony of 24 Hour Fitness's Custodian of Records).

In sum, an arbitration policy that requires employees to surrender core Section 7 rights violates Section 8(a)(1) regardless of whether an employer provides the option to "opt out" to preserve Section 7 protection. As the ALJ thus properly concluded, 24 Hour Fitness's policy restrains, coerces, or interferes with employees' exercise of their Section 7 rights.

III. THE PURPORTED ABILITY OF AN ARBITRATOR TO JOIN OR CONSOLIDATE CLAIMS IS NOT A SUFFICIENT SUBSTITUTE FOR PERMITTING CLASS, COLLECTIVE, OR OTHER REPRESENTATIVE CLAIMS

24 Hour Fitness further contends that an arbitrator's purported ability to join claims under its arbitration agreement is a sufficient substitute for the ability to bring class, collective, or other representative actions. Op. Br. at 22. That cannot be. "[I]f the Act makes it unlawful for employers to require employees to waive their right to engage in one form of activity, it is no defense that employees remain able to engage in *other* concerted activities." *D.R. Horton*, 2012 WL 36274 at *6 (emphasis in original); *see also* G.C. Advice Memorandum (32-CA-072231) at 4 n.11 ("We note that the limited collective activity that the Employer offers, i.e., consolidation of individual arbitration claims, does not make lawful its opposition to class proceedings based on" its arbitration agreement). In *D.R. Horton*, this Board specifically rejected the argument that an employer's failure to interfere with employees' ability to file "similar or coordinated individual claims" excused its imposition of a ban on other concerted litigation activity, noting by way of example that "if an employer refrains from interfering with concerted protests short of

a strike, that does not entitle the employer to compel employees, as a condition of their employment, to waive the right to strike." *D. R. Horton, Inc.*, 2012 WL 36274 at *8.

24 Hour Fitness's arguments also evidence confusion about the difference between joinder of individual actions under Fed.R.Civ.Pro. Rule 20 and class actions under Fed.R.Civ.Pro. Rule 23 and their state law counterparts. Joint actions under Rule 20 involve fewer workers, most of whom are already known to each other, and each of whom is required to proceed in his or her individual name. Class, collective, and other representative actions, by contrast, involve far more workers, most of whom can participate through representative evidence and testimony without publicly coming forward in an individual capacity. 24 Hour Fitness asserts that joint actions and class actions are essentially equivalent because they both share objectives of "efficiency and expediency." Op. Br. at 22. But under the Federal Rules, those two categories of actions are completely separate, as one of the threshold requirements for a class action is the showing that the named employees seek to represent a class of co-workers that "is so numerous that joinder of all members is impracticable." *See* Fed.R.Civ.Pro. Rule 23(a)(1). In other words, not only are class actions *representative* actions (thus fulfilling one of the purposes of Section 7, which is to permit employees to select their own representatives), but they are limited to challenges that affect so many individuals that joinder or consolidation of individual claims would not be a practical alternative.

There are at least two other reasons as well that ALJ Schmidt properly rejected 24 Hour Fitness's attempt to equate the Section 7 right to participate in a class or other representative action with the right to participate in a joint action. First, 24 Hour Fitness never informed its employees that its arbitration policy permitted joinder of individual claims. The terms "joinder" and "consolidation" are nowhere to be found in that policy. Nor is there an express reference to

Fed.R.Civ.Pro. Rule 20 (the joinder rule), let alone any explanation of how joinder might work (which itself is a puzzle, because even if an arbitrator had the contractual authority to consolidate one individual's arbitration with another's, if the claims are pending before different arbitrators there is no mechanism for deciding which arbitrator would decide whether to consolidate, or which arbitrator would be assigned the consolidated claims). Second, and even more important, as a practical matter 24 Hour Fitness's nondisclosure/confidentiality policy makes it impossible for any aggrieved worker to know whether other aggrieved workers have filed claims in arbitration or what the status of those claims might be. Because Fed.R.Civ.P. Rule 20 requires a claimant affirmatively to move for joinder, each claimant must be aware of the status of the others' arbitration before the joinder process could even be initiated. Yet Respondent prohibits its employees from sharing that information, because its Arbitration of Disputes Policy precludes the "disclos[ure of] the existence, content, or results of any arbitration hereunder without the prior written consent of both parties." *See, e.g.,* Jt. Ex. 2A; Jt. Ex. 3A at p. 15. For these reasons as well, the ALJ correctly concluded that any exemption of joinder of claims from 24 Hour Fitness's concerted litigation ban did not save its policy[13/]

[13/] 24 Hour Fitness also asserts that the Rules Enabling Act precludes the Board from holding that an employer's prohibition of concerted actions otherwise authorized by the Federal Rules of Civil Procedure could violate the NLRA. That assertion is clearly without merit. The Rules Enabling Act simply provides that the Federal Rules must not "abridge, enlarge or modify any substantive right." 28 U.S.C. §2072(b). Nothing in *D.R. Horton* or the ALJ's decision is to the contrary, because neither ruling construes or applies Rule 23 or expands its reach beyond what the Rule already provides; they simply make clear that federal labor law precludes employers from adopting workplace policies that force employees to waive whatever procedural protections Rule 23 otherwise provides. As the Board made clear in *D.R. Horton*, Sections 7 and 8(a)(1) do not expand Rule 23 by conferring upon employees a substantive entitlement to class certification in every case where it is sought; instead, they merely preserve the threshold right of employees, acting in concert for mutual aid and protection, to seek class action status in accordance with whatever procedural rules otherwise exist, free from the interference, restraint, or coercion of an employer's policy prohibiting access to otherwise available concerted action

(continued...)

IV. 24 HOUR FITNESS'S NONDISCLOSURE RULE VIOLATES SECTION 7 ON ITS FACE

24 Hour Fitness also takes exception to ALJ Schmidt's conclusion that its nondisclosure requirement "imposes extreme limitations on activities protected by Section 7" and that "limitations on employee communications about their wages, hours and working conditions such as those imposed by this nondisclosure policy [are] unlawful." ALJD at 17. As a threshold matter, 24 Hour Fitness contends that the ALJ's ruling on its nondisclosure policy "was improper as the Acting General Counsel did not assert in the Complaint that this provision was unlawful." Op. Br. at 37. The very authority it cites, however, makes clear that "a material issue which has been fairly tried by the parties should be decided by the Board regardless of whether it has been specifically pleaded." *J.C. Penney Co. v. NLRB*, 384 F.2d 479, 482-83 (10th Cir. 1967) (citing *Am. Boiler Manufacturers' Assoc. v. NLRB*, 366 F.2d 815, 821 (8th Cir. 1966)). The ALJ correctly found that, at the hearing on this matter, 24 Hour Fitness's "arguments encompassed the entirety of its arbitration policy." ALJD 18:36-37. At the trial, the Charging Party raised the argument that the nondisclosure provision prevents employees from bringing claims in a concerted manner. *See* Tr. 32:17-22 ("[T]his agreement says that you may not disclose the existence or the content of the first arbitration to anybody. So the notion that someone can join an arbitration they don't know about is somewhat illusory."); *see also* Tr. 83:6-24. 24 Hour Fitness responded to that argument in its post-hearing brief. *See* Post-Hearing Br. at 28 n.7. As the issue was "fairly tried," it was properly decided by the ALJ and should be reached by the Board.

[13/] (...continued)
procedures. *See* ALJD at 16 n.8 (emphasis in original) ("All *Horton*, and this decision for that matter, seek to protect is the right of employees to *invoke* the ordinary rules that apply to all.").

24 Hour Fitness's nondisclosure provision violates Section 7 on its face. It states that, "[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." Employer-imposed limitations on employee communications about wages, hours, and working conditions are unlawful. *See, e.g.*, *Kinder-Care Learning Centers*, 299 NLRB 1171 (1990) (Section 7 protects right of employees to communicate "regarding their terms and conditions of employment"). In particular, employers may not bar employees from communicating about grievances or complaints. *See Double Eagle Hotel & Casino*, 341 NLRB 112 (2004) (rule prohibiting employees from disclosing, among other things "grievance/complaint information" is unlawful on its face). 24 Hour Fitness's nondisclosure provision explicitly bars employees from discussing with each other even the existence of an arbitration proceeding regarding wages, hours, or working conditions. The ALJ properly concluded that this broad ban violates the Act. ALJD 17:4.

24 Hour Fitness disingenuously asserts that its nondisclosure provision does not actually bar employee communications about pending arbitrations because it contains the clause "except as may be required by law." 24 Hour Fitness claims that this clause should be interpreted to mean that an employee may make any "disclosures that 'may' be legally protected." Op. Br. at 38. That argument fails as a matter of plain language and common sense. On its face, 24 Hour Fitness's nondisclosure rule prohibits disclosure "except as may be *required* by law" – that is, it permits either party to disclose the existence of an arbitration when disclosure is *required* by law. Section 7 never "requires" an employee to disclose any information about his employment-related disputes to his fellow employees; what it protects is the employee's right to make such disclosures to co-workers if he or she so chooses.

Even if there were some slight ambiguity in this language – which there is not – that would not save it from invalidation. A reasonable employee would likely interpret the provision to prohibit disclosure, and it therefore interferes with the exercise of Section 7 rights. *See Lutheran Heritage Village-Livonia*, 343 NLRB 646. As the ALJ explained, "[a]bsent the unlikely consent of Respondent, this non-disclosure provision could be read by a reasonable employee as requiring the retention of a lawyer just to learn, among other things, whether it would be permissible to openly solicit one's fellow workers" for assistance in an arbitration. ALJD at 17:43-46. The nondisclosure provision therefore violates Section 8(a)(1).

V. THE REMEDY ORDERED BY THE ALJ WAS WELL WITHIN HIS DISCRETION

The ALJ's order required 24 Hour Fitness to, among other things, inform those courts in which it attempted to enforce its unlawful prohibition against concerted legal action that it no longer seeks to enforce that prohibition. That order was well within his power, and was not impermissibly retroactive.

A. The Board Has Authority To Order 24 Hour Fitness to Withdraw Its Attempts to Enforce the Concerted Action Ban

24 Hour Fitness's challenge to the ALJ's remedy rests upon a mischaracterization of the relief ordered. The ALJ's Order directs 24 Hour Fitness to notify any judicial or arbitral forum in which it has pursued enforcement of its concerted action ban since August 15, 2010 "that it desires to withdraw[] any such motion or request." ALJD 20:39-40. The ALJ's Order does *not* require those courts themselves to do anything, either by reconsidering a prior ruling or issuing a further order. The relief is directed against 24 Hour Fitness only, and only requires 24 Hour Fitness to provide notice that it will no longer pursue enforcement of its unlawful policy.

24 Hour Fitness, then, is simply wrong in asserting that the ALJ's remedy "seeks to undo earlier rulings of Article III judges" or "seek[s] to negate earlier Article III court determinations." The Order requires only the far more limited relief of 24 Hour Fitness no longer insisting on unlawfully prohibiting class and collective workplace actions, and providing notice to the courts with continuing jurisdiction over its pending cases that it no longer opposes having those disputes resolved on a class or collective action basis, if otherwise appropriate under the law.

This is well within the scope of permissible relief under the NLRA. The Board has "broad discretionary" power to "fashion[] remedies to undo the effects of violations of the Act." *NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 346-47 (1953). It may order all remedies "necessary 'to dissipate fully the coercive effects of the unfair labor practices found.'" *Federated Logistics & Operations*, 340 NLRB 255, 256 (2003). In order to fully remedy the coercive effects of the unlawful concerted action bar, 24 Hour Fitness must be ordered to take steps no longer to seek enforcement of that unlawful provision.[14/]

B. The ALJ's Remedy Is Not Impermissibly Retroactive

Even if some Article III courts might choose to reconsider their own prior rulings in light of this remedy, that does not make the remedy impermissibly "retroactive," as 24 Hour Fitness suggests. Nothing about the decision or remedy ordered by the ALJ is "retroactive." Neither *D.R. Horton* nor this action applying its reasoning created any new rule of law, and therefore they do not apply any new rule "retroactively." The holding of *D.R. Horton* was "consistent with the well-established interpretation of the NLRA," and was based on the Board's long-held view "that

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[14/] 24 Hour Fitness is also incorrect in asserting that the ALJ's Order deprives it of its due process right to be heard on the question whether the Agreement is lawful under Section 8(a)(1). 24 Hour Fitness will obtain a hearing on that question before this Board and before a federal appellate court if either party chooses to seek review or enforcement.

the NLRA protects employees' ability to join together to pursue workplace grievances, including through litigation." 2012 WL 36274 at *2, *10. There is therefore no new rule and no question of retroactivity.

In addition, 24 Hour Fitness appears to believe that ordering an employer to undo the negative effects of its unlawful actions is necessarily retroactive. That is not so. As the Board explained in a case in which it ordered an employer to bargain as of the date on which it began to violate the Act, rather than just ordering the employer bargain prospectively:

> No element of retroactivity is present in imposing the bargaining obligation as of the time the employer began his subversion of the statute. No new law or rule is being enacted governing conduct or relations previously not subject to the law. Instead, the remedy we impose does no more than reach all the unlawful actions committed, whether early or late in the course of the misconduct. The only element of retroactivity is that the misconduct being remedied occurred prior to issuance of the complaint and our consideration of the case; but this is the situation in every civil or criminal case where a wrong is remedied, for the remedy can be applied only after the wrong has been committed.

Peaker Run Coal Co., 228 NLRB 93, 96 (1977) (quoting *Baker Machine & Gear, Inc.*, 220 NLRB 194, 195 (1975)). The ALJ's order requiring 24 Hour Fitness to undo the effect of all its unlawful acts is thus not "retroactive."

Finally, "retroactivity" is not, in any event, impermissible. "The Board's usual practice is to apply new policies and standards retroactively 'to all pending cases in whatever stage.'" *SNE Enterprises, Inc. & United Steelworkers of Am.*, 344 NLRB 673, 673 (2005). Although there is a narrow exception to this rule in cases in which applying a rule retroactively would cause "manifest injustice," 24 Hour Fitness cannot make any showing that it is manifestly unjust to require it to notify courts that it no longer wishes to enforce an unlawful contract. The relief ordered by the ALJ is both appropriate and necessary to undo the severe coercive effects of 24 Hour Fitness's unlawful actions.

VI. THE BOARD SHOULD SUSTAIN THE CHARGING PARTY'S CROSS-EXCEPTION

The ALJ correctly held in this matter that "both the class action ban and the nondisclosure restriction contained in [24 Hour Fitness's] arbitration policy unlawfully limit [its] employees from exercising their Section 7 right." ALJD 16:8-10. With respect to the class action ban in particular, the ALJ concluded that "Respondent's arbitration policy unlawfully requires its employees to surrender core Section 7 rights by imposing significant restraints on concerted action," and that "[t]he requirement that employees must affirmatively act to preserve rights already protected by Section 7 . . . through the opt-out process is . . . an unlawful burden on the right of employees to engage in collective litigation." ALJD 16:13-18. Based on these conclusions, the ALJ properly held that 24 Hour Fitness "engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act," ALJD 18:27-28, which prohibits an employer from "interfer[ing] with, restrain[ing], or coerc[ing] employees in the exercise of the rights guaranteed in section 7." *See* Section 8(a)(1).

On page 13 of his decision, however, in describing 24 Hour Fitness's arguments, the ALJ writes that "Respondent correctly argues 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." ALJD 13:36-39. This sentence is inconsistent with the rest of the ALJ's extensive and well-reasoned decision and Order. The ALJ concluded that 24 Hour Fitness's class action ban "interfere[d] with, restrain[ed], or coerc[ed]" its employees in the exercise of their Section 7 rights in holding repeatedly that 24 Hour Fitness violated Section 8(a)(1). The ALJ may have intended to indicate, with his statement on p.13, that he found no evidence that any 24 Hour Fitness manager directly verbally instructed Sanders or other employees that they would be terminated or retaliated against

if they chose to opt out of the Agreement. Or the ALJ may simply have not written what he intended. In any event, to avoid any confusion about the ALJ's findings, the Charging Party respectfully requests that, if the Board adopts the order of the ALJ, it delete the sentence located at ALJD 13:36-39.

Dated: February 7, 2013

Respectfully submitted,

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PROOF OF SERVICE

CASE: ***24 Hour Fitness USA, Inc.***

CASE NO: 20-CA-35419

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to the within action; my business address is 177 Post Street, Suite 300, San Francisco, California 94108. On February 7, 2013, I served the following document(s):

BRIEF OF CHARGING PARTY ALTON SANDERS AND INTERVENOR SEIU IN OPPOSITION TO EMPLOYER'S EXCEPTIONS AND IN SUPPORT OF CROSS-EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE DECISION

on the parties, through their attorneys of record, by placing true copies thereof in sealed envelopes addressed as shown below for service as designated below:

(A) By First Class Mail: I placed the envelope, sealed and with first-class postage fully prepaid, for collection and mailing following our ordinary business practices. I am readily familiar with the practice of Altshuler Berzon LLP for the collection and processing of correspondence for mailing with the United States Postal Service. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Mail Postal Service in San Francisco, California, for collection and mailing to the office of the addressee on the date shown herein.

(B) By Email: I caused such document(s) to be served via electronic mail on the parties in this action by transmitting true and correct copies to the following email address(es):

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I declare under penalty of perjury that the foregoing is true and correct. Executed this February 7, 2013, at San Francisco, California.

J. Perley

Jean Perley