

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**Washington, D.C.**

ALTON SANDERS, an individual, Charging  
Party

vs.

Case 20-CA-035419

24 HOUR FITNESS USA, INC., Charged Party

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**EMPLOYER'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGE'S DECISION AND IN RESPONSE TO CHARGING  
PARTY ALTON SANDERS'S AND AMICUS SEIU'S ANSWERING BRIEF**

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## I. INTRODUCTION

24 Hour Fitness USA, Inc. (“the Employer,” “the Company,” “Respondent,” or “24 Hour Fitness”) submits this Reply to Charging Party Alton Sanders’s (“Sanders”) and Amicus Service Employees International Union’s<sup>1</sup> (“SEIU”) Answering Brief to the Employer’s Exceptions to the Decision of the Administrative Law Judge (“ALJ”).<sup>2</sup>

Sanders’s efforts to invalidate the Company’s voluntary, bilateral arbitration agreement program (“the Arbitration Agreement” or “the Agreement”) should be rejected.<sup>3</sup> As a preliminary matter, *D.R. Horton*—the foundation upon which Sanders bases his case—was incorrectly decided. Since *D.R. Horton* issued, courts have almost unanimously rejected *D.R. Horton*. Contrary to the conclusion reached in *D.R. Horton*, Section 7 of the National Labor Relations Act (“NLRA” or “the Act”) does not protect an employee’s procedural right to litigate via a class or collective action, as opposed to potentially protecting the individual from discipline for bringing or participating in such action. Moreover, as courts have also routinely ruled since January 2012, *D.R. Horton* improperly fails to follow the requirements of the Federal Arbitration Act (“FAA”).

Even applying the standard set in *D.R. Horton*, however, the voluntary, bilateral Arbitration Agreement satisfies the requirement of the Act. As the ALJ determined, “there is no evidence of interference, restraint, or coercion that brought about Charging Party’s or any other

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<sup>1</sup> In the Answering Brief, Sanders and the SEIU incorrectly refer to the SEIU as an “Intervenor.” As explained in the ALJ’s Decision, Associate Chief Judge Mary Cracraft granted the SEIU’s motion to intervene but limited the degree of the SEIU’s participation to that of “an amicus curiae in briefing to the administrative law judge and to the Board.” (Dec. 2, fn. 1.) Consequently, any reference to the SEIU as an Intervenor should be stricken.

<sup>2</sup> This Reply Brief is accompanied by a separate Reply Brief to Acting General Counsel’s (“AGC”) Answering Brief and an Answering Brief to Exceptions raised by the AGC and Sanders. To avoid unnecessary duplication, 24 Hour Fitness has responded only once to arguments that are duplicated between the AGC, the Charging Party and the SEIU. Arguments in all of 24 Hour Fitness’s briefs apply equally to the AGC, Sanders, and the SEIU.

<sup>3</sup> For purposes of this Brief, Sanders and the SEIU will be referred to collectively as “Sanders.”

employee's *voluntary decision* at the start of their employment to forego participation in a class or collective action." (Dec. 12:36-39) (emphasis added.) The record is absent of any evidence to the contrary. (See Respondent's Answering Brief to Cross-Exceptions, pp. 14-15.) Similarly, there is no factual basis to support Sanders's argument that the opt-out process set forth in the Agreement is "illusory." It is not surprising that an overwhelming majority of Team Members elected to have any employment disputes handled quickly, cost-effectively, and with relative finality in arbitration. The opt-out procedure was confidential and included a simple pledge against retaliation. While two employees reported problems acquiring the opt-out forms, they were successful in opting out. No evidence was introduced of anyone who wished to opt out of the Agreement being unable to opt out during the first thirty days of employment.

## II. ARGUMENT

### A. *D.R. Horton* Was Wrongly Decided.

#### 1. **Section 7 Does Not Encompass The Right To Bring or Participate In Class Or Collective Actions In A Court Of Law Or In Arbitration As Opposed To Potential Protections Against Discipline For Seeking To Collectively Litigate.**

The outcome of this case is predicated on the ALJ's reliance on the *D.R. Horton* Board's mistaken conclusion that Section 7 creates a substantive right for employees to maintain a class or collective action, particularly when employee claims are premised upon rights not contained in the NLRA itself. In reaching its conclusion, the *D.R. Horton* Board relied on cases in which the Board ruled that the NLRA prohibits an employer from taking an adverse employment action against an employee in retaliation for the employee bringing a good faith or non-malicious lawsuit or administrative complaint against the employer, whether individually or in concert with other employees. See, e.g., *Harco Trucking, LLC*, 344 NLRB 478, 482 (2005); *Le Madri Restaurant*, 331 NLRB 269, 275-78 (2000); *Mojave Elec. Coop.*, 327 NLRB 13, 18 (1998);

*United Parcel Service*, 252 NLRB 1015, 1018, 1022 fn. 26 (1980); *Trinity Trucking & Materials Corp.*, 221 NLRB 364, 365 (1975); *Spandsco Oil & Royalty Co.*, 42 NLRB 942, 948–49 (1942).

The Company does not dispute that Section 7 prohibits employers from disciplining or retaliating against employees who knowingly, voluntarily, and affirmatively wish to engage in legal process to act concertedly. However, Section 7 does not and cannot reach into the judicial system to regulate the procedural manner in which such an action shall be litigated. Nor does Section 7 prevent an employee from accepting the benefits of a neutral individual arbitration system that replaces access to the judicial system and its procedural mechanisms, including class actions. None of the Board’s “seven decades” of pre-*D.R. Horton* authority supports the conclusion that the procedural right to bring or participate in a class or collective action is protected under Section 7.<sup>4</sup> The *D.R. Horton* Board erred by expanding Section 7 to protect not only an employee’s right to seek redress through judicial or administrative process, but also the form in which such relief may be adjudicated.

## **2. *D.R. Horton* Is Contrary To The Commands Of The FAA.**

*D.R. Horton* conflicts with the FAA’s requirement that courts “enforce agreements to arbitrate according to their terms . . . even when the claims at issue are federal statutory claims, unless the FAA’s mandate has been overridden by a contrary congressional command.” *See, e.g., CompuCredit v. Geenwood*, 132 S.Ct. 665, 669 (2012). Contrary to Sanders’s argument, the directive of *CompuCredit* is not limited to the issue as to whether a particular federal statute precludes arbitration. Virtually every court confronted with the issue has accepted *CompuCredit*

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<sup>4</sup> In fact, the previous General Counsel of the Board issued a July 16, 2010 memorandum concluding that that employers may require individual employees to sign a waiver of their right to file a class or collective claim as part of an agreement to arbitrate all claims without *per se* violating the Act. (General Counsel Memorandum GC 10-06.) The memo carefully draws a distinction between prohibited employer discipline for seeking collective litigation and the employers’ right to seek court enforcement of individual arbitration agreements, including a class action waiver. *Id.*

as confirmation that the FAA requires arbitration agreements to be enforced according to their terms, absent a contrary congressional command requiring a different outcome.<sup>5</sup> *See, e.g., Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013); *Morvant v. P.F. Chang's China Bistro, Inc.*, 870 F. Supp. 2d 831, 845 (N.D. Cal. 2012); *Jasso v. Money Mart Express, Inc.*, 879 F. Supp. 2d 1038 (N.D. Cal. 2012); *Reyes v. Liberman Broadcasting, Inc.*, 208 Cal. App. 4th 1537, 1560 (2012). As nearly every court that has been asked to consider *D.R. Horton* since January 2012 has determined, an otherwise valid arbitration agreement between an employer and employee that includes a class action waiver must be enforced according to its terms because, in passing the NLRA, Congress did not intend to create a limitation upon the right to enforce private arbitration agreements including the manner in which such cases would be conducted. *Id.*; *see also* Respondent's Exceptions Brief, p. 32, n. 10.

Sanders's contention that the FAA must yield to any purported conflict with the NLRA is incorrect. As explained by the court in *Morvant*, “[the *D.R. Horton* Board's] reasoning does not overcome the direct, controlling authority holding that arbitration agreements, including class action waivers contained therein, must be enforced according to their terms.” *Morvant*, 870 F.Supp.2d at 845. *See also Delock v. Securitas Sec. Servs. USA*, 2012 U.S. Dist. LEXIS 107117 at \*15 (E.D. Ark. August 1, 2012) (“For several reasons, the Court concludes that the NLRA bends to the FAA.”). There is no “contrary Congressional command” in Section 7 of the NLRA

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<sup>5</sup> Since Respondent submitted its Exceptions Brief, at least four other courts – including the Eighth Circuit Court of Appeals – have declined to follow *D.R. Horton*. *See Owen*, 702 F.3d 1050; *Noffsinger-Harrison v. LP Spring City LLC*, 2013 U.S. Dist. LEXIS 16442 at \*15-16 (E.D. Tenn. Feb. 7, 2013); *Miguel v. JPMorgan Chase Bank, N.A.*, 2013 U.S. Dist. LEXIS 16865 at \*23-25 (C.D. Cal. Feb. 5, 2013); *Long v. BDP Int'l, Inc.*, 2013 U.S. Dist. LEXIS 9104 at \*46, n. 11 (S.D. Tex. Jan. 22, 2013). Sanders, the AGC, and Respondent have extensively cited non-Board authority. This is especially relevant to the current case because the Board and the courts have concurrent jurisdiction for the enforcement of contracts consistent with the Act. *See, e.g., Smith v. Evening News Ass'n*, 371 U.S. 195 (1962).

– or anywhere else in the Act – that requires the Board to abrogate otherwise lawful and enforceable arbitration agreements that contain class or collective action waivers. *See, e.g., Delock*, 2012 U.S. Dist. LEXIS 107117 at \*14; *Jasso*, 879 F.Supp. 1038 (“Because Congress did not expressly provide that it was overriding any provision in the FAA, the Court cannot read such a provision into the NLRA and is constrained by *Concepcion* to enforce the instant agreement [with the class action waiver] according to its terms”); *Iskanian v. CLS Transportation Los Angeles, LLC*, 206 Cal. App. 4th 949, 963 (2012) (“The *D. R. Horton* decision identified no ‘congressional command’ in the NLRA prohibiting enforcement of an arbitration agreement pursuant to its terms. *D. R. Horton*’s holding—that employment-related class claims are “concerted activities for the purpose of collective bargaining or other mutual aid or protection” protected by section 7 of the NLRA, so that the FAA does not apply—elevates the NLRB’s interpretation of the NLRA over section 2 of the FAA. This holding does not withstand scrutiny in light of *Concepcion* and *CompuCredit*.)

The Board must also reject Sanders’s argument that the NLRA should be construed to override the FAA because the NLRA was purportedly enacted after the FAA. The NLRA cannot possibly be determined to preempt the FAA’s directives on the basis of the sequence of enactment because the FAA was reenacted in 1947 – twelve years after the enactment of the NLRA. As explained by the Eighth Circuit, “[t]he decision to reenact the FAA suggests that Congress intended its arbitration protections to remain intact even in light of the earlier passage of three major labor relations statutes [*i.e.*, the NLRA, the Norris-LaGuardia Act, and the Fair Labor Standards Act].” *Owen*, 702 F.3d 1050.

**B. 24 Hour Fitness’s Voluntary Arbitration Agreement Is Lawful, *D.R. Horton* Notwithstanding.**

Even applying *D.R. Horton*, the Agreement does not run afoul of the NLRA. As explained in Respondent’s Exceptions Brief, since 2007, the Agreement has permitted Team Members who wish to preserve their right to bring or participate in class or collective actions to do so. It is undisputed that newly hired 24 Hour Fitness Team Members can opt out of the Agreement within their first thirty days of employment, with an assurance that Team Members will not be subject to retaliation regardless of their choice. It is further undisputed that the Agreement leaves open the option of joinder of claims.<sup>6</sup>

Sanders incorrectly argues that Team Members are bound to arbitrate any claims and waive the right to bring or participate in a class action immediately upon hiring. This argument is based on the mistaken premise that only after Team Members are already initially bound by the Agreement does 24 Hour Fitness allow Team Members to take affirmative steps to remove themselves from coverage under the Agreement. Such a position is inconsistent with the plain language of the Agreement and the evidence in the record. Every version of the Handbook Receipt Acknowledgement, which each new Team Member received, stated that only *if* a Team Member does not opt out, *then* any disputes “arising out of or related to my employment will be resolved under the ‘Arbitration of Disputes’ policy.” (Jt. Exh. 5.) Similarly, the Applicant’s Certification that Sanders signed manifested the parties’ intent that the Agreement was not binding unless he did not opt out:

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<sup>6</sup> As explained in Respondent’s Reply Brief to the ACG, the availability of joinder is a sufficient procedural safeguard to class or collective actions. Contrary to Sander’s claim, these are not two categories of alleged concerted activity. Class actions and joinder are both procedural mechanisms designed for judicial efficiency when multiple related parties assert common claims. Fed. R. Civ. P. 20; Fed. R. Civ. P. 23; *Deposit Guaranty Nat’l Bank v. Roper*, 445 U.S. 326, 332 (1980); *Mosley v. General Motors Corp.*, 497 F.2d 1330, 1332 (8th Cir. 1974).

I understand that I may opt out of the arbitration procedure, within a specified period of time, as the procedure provides. 24 Hour Fitness and I also understand that *if I am offered employment and I do not opt out, we both will submit exclusively to final and binding arbitration all disputes arising out of or relating to my employment.* (Resp. Exh. 1) (emphasis added).

The plain meaning of the Applicant's Certification and the Handbook Receipt Acknowledgement confirms that Team Members are not bound by the Agreement within their first thirty days of employment. No examples of attempted enforcement of the Agreement during the first thirty days of employment were offered. Thus, Sanders's argument that the Agreement applies before a Team Member has the ability to opt-out is not supported by the record.

Recognizing that the record contains no evidence of any interference, restraint or coercion, Sanders argues that the Agreement inherently chills Team Members' Section 7 rights and puts Team Members at risk of retaliation. This contention is baseless. The Agreement itself assures Team Members that they will not be subject to retaliation regardless of whether they choose to be bound by the Agreement. Team Members can request the Opt-Out Form by calling the Legal Department (or, prior to 2010, the employee hotline), and return the completed Opt-Out Form via interoffice mail, rather than to a supervisor or a manager. Supervisors and managers at the Company are thus shielded from discovering whether a particular Team Member has requested an Opt-Out Form, or whether the Team Member opted out, because the supervisors and managers have no role in the opt-out process. Only designated Team Members in the Employer's Legal or Human Resources departments have access to information regarding which Team Members opted out.<sup>7</sup>

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<sup>7</sup> Sanders attacks the Agreement on the basis that Team Members are required to disclose their identities when they opt out of the Agreement and argues that the opt-out process should be completely anonymous. This argument calls for an unworkable solution. Of course, Team Members who choose to opt out must identify themselves so that in the event of a dispute, the Company's Legal department knows the forum in which the Team Member desires to resolve the

The Company's opt-out process is not only confidential, it is effective. The Opt-Out Information Sheet provided to the Team Members expressly informs Team Members they may contact Human Resources or the employee hotline with any questions. (Resp. Exhs. 2(A) 2(B); Jt. Exhs. 10(A), 10(B).) Sanders refers to two incidents in which 24 Hour Team Members claimed they were unable to connect with a Company representative through the employee hotline, but neglects to add that in both instances the Team Members were able to opt out of the Agreement. (G.C. Exhs. 4(a)-(e), 5(a)-(g); Tr. 50:5-51:22, 52:8-54:4.) Sanders's assertion that others may have had trouble opting out and abandoned the effort is unjustified speculation. In every situation of a reported problem, the Team Member successfully opted out.

The opt-out process can in no sense be deemed to constitute unlawful "polling" even if reserving the right to participate in a class action is protected under Section 7. Team Members are not required to make any public declaration as to whether they wish to be bound by the Agreement, and thus, the cases cited by Sanders regarding employer interrogation and/or polling are inapposite. *See, e.g., Allegheny Ludlum Co.*, 333 NLRB 734 (2001) (holding that employer's instruction that employees advise the employer of any objection they had to appearing in an employer-sponsored union campaign video constituted an unlawful poll).

The Agreement includes abundant safeguards against retaliation. The plain language of the Agreement unequivocally assures Team Members that they will not be retaliated against. The Handbook Acknowledgement provision stating "I understand that my decision to opt out or not opt out will not be used as a basis for the Company taking retaliatory action against me"

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dispute. No list of opt-outs is maintained and a hand search of each confidential personnel file is required, which explains why the parties to this action stipulated to a range of between 35 and 70 opt-outs. (Jt. Exh. 1, ¶ 24.) Sanders provides no suggestion as to how 24 Hour Fitness can better protect Team Member anonymity, while at the same time be able to determine whether a Team Member commencing litigation has opted out of the Agreement.

assures Team Members that the Company will respect their decision. There is no basis for Sanders's unfounded assertion that this wording is convoluted and "more likely designed to plan the fear of retaliation in an employee's mind." As explained by the District Court in *Carey v. 24 Hour Fitness USA, Inc.*, 2012 U.S. Dist. LEXIS 143879 (S.D. Tex. Oct. 12, 2012), the Agreement "is written clearly and in a non-confusing manner." *Id.* at \*7. Sanders himself offered no testimony that he found the language confusing or that he in anyway feared retaliation if he opted out.

### III. CONCLUSION

For the foregoing reasons and based on the record evidence and the arguments set forth in Respondent's Exceptions Brief, 24 Hour Fitness again respectfully requests that the Board reject those portions of the ALJ's Decision excepted to by the Employer.<sup>8</sup>

Respectfully submitted,

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<sup>8</sup> As explained in Respondent's Reply Brief to the Acting General Counsel's Answering Brief and in Respondent's Answering Brief to the Cross-Exceptions, the remedy ordered by the ALJ is impermissible.

## 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 February 21, 2013, I served the within document(s):

1. EMPLOYER'S COMBINED ANSWERING BRIEF TO ACTING GENERAL COUNSEL'S AND CHARGING PARTY'S CROSS-EXCEPTIONS;
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3. EMPLOYER'S REPLY BRIEF IN SUPPORT OF EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND IN RESPONSE TO CHARGING PARTY ALTON SANDERS'S AND AMICUS SEIU'S ANSWERING BRIEF.



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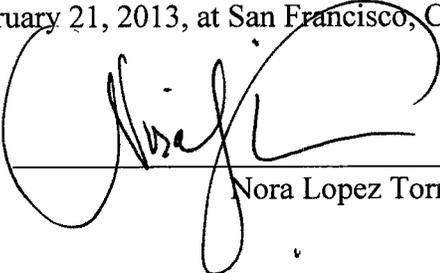
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