No. 12-60031

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

D.R. HORTON, INC.,
Petitioner/Cross-Respondent,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent/Cross-Petitioner.

ON PETITION FOR REVIEW FROM THE DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD, BOARD CASE NO. 12-CA-25764

REPLY BRIEF FOR PETITIONER/CROSS-RESPONDENT, D.R. HORTON, INC.

RON CHAPMAN, JR.
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C
8117 Preston Road, Ste. 500
Preston Commons West
Dallas, Texas 75225
(214) 987-3800

MICHAEL M. SHETTERLY
MARK. M. STUBLEY
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, PC
300 N. Main Street, Suite 500
Greenville, South Carolina 29601
(864) 271-1300

BERNARD P. JEWELER
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
1909 K. Street, N.W., Ste. 1000
Washington D.C. 20006
(202) 263-0248

CHRISTOPHER C. MURRAY
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
111 Monument Cir., Ste. 4600
Indianapolis, Indiana 46204
(317) 916-1300

Attorneys for Petitioner/Cross-Respondent

CERTIFICATE OF INTERESTED PERSONS AND ENTITIES
No. 12-60031
D.R. Horton, Inc. v. National Labor Relations Board

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

D.R. Horton, Inc.
Petitioner/Cross-Respondent

National Labor Relations Board
Respondent/Cross-Petitioner

Ron Chapman, Jr.
Bernard P. Jeweler
Michael M. Shetterly
Mark M. Stubley
Christopher C. Murray
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
Counsel for Petitioner/Cross-Respondent

Lafe S. Solomon
Celeste J. Mattina
John H. Ferguson
Linda Dreeben
Ruth E. Burdick
Kira Dellinger Vol
NATIONAL LABOR RELATIONS BOARD
Counsel for Respondent/Cross-Petitioner

Stuart F. Delery
Beth S. Brinkmann
Scott R. McIntosh
Sarang V. Damle
Melissa N. Patterson
Benjamin M. Shultz
U.S. DEPARTMENT OF JUSTICE
Counsel for Respondent/Cross-Petitioner

William J. Emanuel
Vartan Serge Madoyan
LITTLER MENDELSON, P.C.
Suite 500, 2049 Century Park, E.
Los Angeles, CA 90067
Counsel for Amicus
Coalition for a Democratic Workplace

Henry David Lederman
Alexa L. Woerner
LITTLER MENDELSON, P.C.
Suite 600, 1255 Treat Blvd.
Treat Towers
Walnut Creek, CA 94597
Counsel for Amicus
Coalition for a Democratic Workplace

Catherine M. Masters
SCHIFF HARDIN, L.L. P.
Suite 6600, 233 S. Wacker Drive
Sears Tower
Chicago, IL 60606
Counsel for Amicus
National Retail Federation

Paul William Cane, Jr.
PAUL HASTINGS, L.L.P.
24th Floor, 55 2nd Street
San Francisco, CA 94105-0000
Counsel for Amicus
National Association of Manufacturers

Rae Thiesfield Vann, General Counsel
NORRIS, TYSSE, LAMPLEY & LAKIS, L.L.P.
Suite 400 1501 M Street, N.W.
Washington, DC 20005
Counsel for Amicus
Equal Employment Advisory Council

Howard Marc Radzely
MORGAN, LEWIS, & BOCKUS, L.L.P.
1111 Pennsylvania Avenue N.W.
Washington, DC 20004
Counsel for Amicus
Council on Labor Law Equality

Matthew Walter Ray
JONES DAY
2727 N. Harwood Street
Dallas, TX 75201-1515
Counsel for Amici
Society for Human Resource Management
Human Resource Policy Association

Charles C. High, Jr.
Clara Beth Burns
Jose Abelardo Howard-Gonzalez
KEMP SMITH, L.L.P.
Suite 1700, 221 N. Kansas Street
El Paso, TX 79901
Counsel for Amicus
Texas Association of Business

Marshal Bruce Babson
SEYFARTH SHAW, L.L.P.
33rd Floor, 620 8th Avenue
New York, NY 10018-1405
Counsel for Amicus
Chamber of Commerce of the United States of America

Deborah J. LaFetra
PACIFIC LEGAL FOUNDATION
930 G. Street
Sacramento, CA 95814
Counsel for Amici
Pacific Legal Foundation
National Federal of Independent Business Small Business Legal Center

Hal K. Gillespie
Joseph Halcut Gillespie
Yona Rozen
GILLESPIE, ROZEN & WATSKY, P.C.
Suite 200, 3402 Oak Grove Avenue
Dallas, TX 75204
Counsel for Amici
National Employment Lawyers Association
The Employee Rights Advocacy Institute for Law & Policy
Asian American Justice Center
Asian Law Caucus
Asian Pacific American Legal Center
California Rural Legal Assistance Foundation
El Comité de Apoyo a Los Trabajadores Agrícolas
D.C. Employment Justice Center
Equal Justice Center
Equal Rights Advocates
Friends of Farmworkers, Inc.
Lawyers' Committee for Civil Rights Under Law
Lawyers' Committee for Civil Rights of the San Francisco Bay Area
The Legal Aid Society
Low Wage Workers Legal Network
National Employment Law Project
National Lawyers Guild and Labor and Employment Committee
National Partnership for Women & Families
National Whistleblowers Center
National Women's Law Center
North Carolina Justice Center
Northwest Workers' Justice Project
Public Justice Center
Maurice & Jane Sugar Law Center for Economic & Social Justice
University of Texas Law School-Transnational Worker Rights Clinic

Michael C. Subit
FRANK FREED SUBIT & THOMAS LLP
705 Second Avenue, Suite 1200
Seattle, WA 98104
Counsel for Amici
National Employment Lawyers Association et al.

Frank Paul Bland, Jr.
PUBLIC JUSTICE, P.C.
Suite 200, 1825 K Street, N.W.
Washington, DC 20006
Counsel for Amici
Public Justice
Public Citizen, Inc.

Cliff Palefsky
MCGUINN, HILLSMAN & PALEFSKY
535 Pacific Avenue
San Francisco, CA 94133
Counsel for Amicus
Alton J. Sanders

Michael Rubin
Peter J. Thoreen
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108
Counsel for Amici
Service Employees International Union ("SEIU") and American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO")

Lynn K. Rhinehart
AFL-CIO
815 Sixteenth Street, N.W.
Washington, D.C. 20006
Counsel for Amicus
AFL-CIO

Judith A. Scott
SERVICE EMPLOYEES INTERNATIONAL UNION
1800 Massachusetts Ave. NW
Washington, DD 20036
Counsel for Amicus
SEIU

s/ Ron Chapman, Jr.
Attorney for Petitioner/Cross-Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

ARGUMENT

In its opening brief, D.R. Horton showed the panel's decision violates the FAA and is contrary to the Supreme Court's decisions in *Gilmer*, *Concepcion*, and *CompuCredit*. It also showed the panel's decision mandating that NLRA-covered employees have access to class and joinder procedures in litigating employment-related claims exceeds the NLRB's authority, conflicting with the Rules Enabling Act, the Federal Rules of Civil Procedure, and the Fair Labor Standards Act, among other law. The NLRB's response brief merely repeats the panel's errors.

I. The NLRB ignores the mounting case law rejecting the panel's decision.

D.R. Horton's opening brief cited nine decisions by federal district courts rejecting the panel's decision. (Opening Br. 13-14) Since then, nine more federal district and state appellate courts have followed suit. *See Carey v. 24 Hour Fitness USA, Inc.*, 2012 WL 4754726, at *2 (S.D. Tex. Oct. 4, 2012) ("The *Horton* decision is neither binding nor subject to deference, and is inconsistent with Fifth Circuit and Supreme Court authority."); *Tenet HealthSystem Phila., Inc. v. Rooney*, 2012 WL 3550496, at *4 (E.D. Pa. Aug. 17, 2012) (rejecting *D.R. Horton* because "the NLRB has no special competence or experience interpreting the FAA" and many district courts "have declined to adopt its rationale altogether in the face of conflicting Supreme Court precedent, statutory schemes, and questions over its precedential value"); *Reyes v. Liberman Broad., Inc.*, 146 Cal. Rptr. 3d 616, 635

(Cal. Ct. App. Aug. 31, 2012) ("California authority finds *D.R. Horton* . . . unpersuasive."); *Truly Nolen of Am. v. Superior Court*, 145 Cal. Rptr. 3d 432, 452 (Cal. Ct. App. Aug. 9, 2012) ("[W]e find the NLRB's conclusion on the [FAA] preemption issue to be unpersuasive and we decline to follow it."); *Delock v. Securitas Sec. Servs. USA, Inc.*, 2012 WL 3150391, at **2-6 (E.D. Ark. Aug. 1, 2012) (under *CompuCredit* and *Gilmer*, *D.R. Horton* is contrary to the FAA); *Luchini v. Carmax, Inc.*, 2012 WL 2995483, at *7 (E.D. Cal. July 23, 2012) (plaintiff "points to no pertinent authority that the NLRA . . . establish[es] a nonwaivable right to class litigation"), *perm. app. denied*, 2012 WL 3862150 (E.D. Cal. Sept. 5, 2012); *Nelsen v. Legacy Partners Residential, Inc.*, 144 Cal. Rptr. 3d 198, 213 (Cal. Ct. App. July 18, 2012) (*D.R. Horton* is unpersuasive because "[o]nly two Board members subscribed to it," the "subject matter of the decision – the interplay of class action litigation, the FAA, and section 7 of the NLRA – falls well outside the Board's core expertise," and the decision "reflects a novel interpretation of section 7 and the FAA"); *Spears v. Mid-America Waffles, Inc.*, 2012 WL 2568157, at *2 (D. Kan. July 2, 2012) (*D.R. Horton* is contrary to *Concepcion*); *Iskanian v. CLS Transp. Los Angeles, LLC*, 142 Cal. Rptr. 3d 372, 382 (Cal. Ct. App. June 4, 2012) (*D.R. Horton* "does not withstand scrutiny in light of *Concepcion* and *CompuCredit*.").

The NLRB simply ignores these decisions, as though the overwhelming judicial consensus counts for nothing.[1] Like these courts from Texas, California, Pennsylvania, Arkansas, Kansas, Florida, Georgia, and New York, this Court should hold that the panel's decision violates the FAA and exceeds the NLRB's authority.

II. The NLRB is not authorized to dictate the procedures courts and arbitrators must use to adjudicate employees' employment-related claims.

The NLRB concedes the NLRA does not grant it authority to regulate the procedures available in federal and state courts and arbitral forums for adjudicating employees' claims. It also concedes (1) procedures for jointly or collectively adjudicating claims are concerned with matters such as due process and judicial efficiency that are unrelated to federal labor policy, and (2) such procedures are determined by Congress, the Supreme Court under the Rules Enabling Act, state rule-making authorities, and the parties to arbitration agreements. (Opening Br. 41-47)

The NLRB contends that the NLRA nevertheless grants employees "the right to *pursue* employment-related claims concertedly." (NLRB Br. 7) (emphasis added) However, by a right to "pursue" claims concertedly, the NLRB here means

[1] In *Owen v. Bristol Care, Inc.*, 2012 WL 1192005 (W.D. Mo. Feb. 28, 2012), a district court denied a motion to compel arbitration, relying on *D.R. Horton*. This outlier decision is on appeal to the Eighth Circuit as Case Number 12-1719.

employees have a substantive, non-waivable right under the NLRA to seek a collective *adjudication* of their employment-related claims. This position has no basis in the NLRA's text or purpose.

A. The NLRB fails to support its naked assertion that Section 7 gives employees a right to have their claims adjudicated collectively.

No authority has ever held Section 7 of the NLRA grants employees the right to have their employment-related legal claims adjudicated collectively. Rather, Section 7 is concerned with the bargaining process between employers and employees with respect to the terms and conditions of employment. *See, e.g.*, *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 845 (1984) ("[I]n enacting § 7 of the NLRA, Congress sought generally to equalize the bargaining power of the employee with that of his employer by allowing employees to band together in confronting an employer regarding the terms and conditions of their employment."). The adjudication of claims by courts and arbitrators is an entirely different process from bargaining between employers and employees and well outside Section 7's scope.

The decisions cited by the NLRB merely demonstrate the unremarkable proposition that Section 7 protects employees from retaliation for banding together to *assert* their legal rights.[2] The NLRB continues to misrepresent these decisions

[2] *See Mohave Elec. Co-op, Inc. v. NLRB*, 206 F.3d 1183 (D.C. Cir. 2000) (employer violated NLRA by discharging employee for filing petition jointly with co-worker); *Brad Snodgrass, Inc.*,

as holding Section 7 also grants employees a right to seek a collective *adjudication* of their employment-related legal claims. (NLRB Br. 13-15) They simply do not.

To the contrary, *Salt River Valley* – relied on heavily by the NLRB (R. 548 & n.3; NLRB Br. 14) – makes clear employees can assert legal rights concertedly regardless of whether they seek a collective adjudication of their legal claims. It shows at most that employees' concerted *assertion* of legal rights may be protected under Section 7 as a form of bargaining over the terms and conditions of employment. *See Salt River Valley Water Users' Ass'n v. NLRB*, 206 F.2d 325, 328 (9th Cir. 1953). That case also demonstrates employees' concerted assertion of legal rights is neither equivalent to, nor dependent on, their seeking a collective adjudication of their legal claims. Indeed, the NLRB continues to ignore the key

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338 NLRB 917 (2003) (employer violated NLRA by laying off employees in retaliation for union's filing grievances on their behalf); *Le Madri Rest.*, 331 NLRB 269 (2000) (employer violated NLRA by discharging two employees who were named plaintiffs in lawsuit against employer); *Uforma/Shelby Bus. Forms*, 320 NLRB 71 (1985) (employer violated NLRA by eliminating third shift in retaliation for union's pursuit of a grievance); *United Parcel Serv., Inc.*, 252 NLRB 1015 (1980) (employer violated NLRA by discharging employee for initiating class action lawsuit, circulating petition among employees, and collecting money for retainer, among other activities); *Clara Barton Terrace Convalescent Ctr.*, 225 NLRB 1028 (1976) (employer violated NLRA by suspending employee without pay for submitting letter to management complaining on behalf of other employees about job assignments); *Trinity Trucking & Materials Corp.*, 221 NLRB 364 (1975) (alleging employer violated NLRA by discharging three employees who had filed suit against employer); *El Dorado Club*, 220 NLRB 886 (1975) (employer violated NLRA by discharging employee in retaliation for testifying at fellow employee's arbitration hearing); *Spandsco Oil & Royalty Co.*, 42 NLRB 942 (1942) (employer violated NLRA by discharging three union members for filing a lawsuit); *see also Brady v. Nat'l Football League*, 644 F.3d 661 (8th Cir. 2011) (noting in *dicta* that filing lawsuit concerning terms and conditions of employment was protected activity).

fact that the employees in *Salt River Valley* never initiated a lawsuit in asserting their legal rights, let alone sought a collective adjudication of their claims; they simply circulated a petition.

No case cited by the NLRB suggests employees have a right under the NLRA to seek a collective adjudication of their legal claims. This is unsurprising because the adjudication of legal claims is not a bargaining process; it is "[t]he legal process of resolving a dispute; the process of judicially deciding a case." Black's Law Dictionary (9th ed. 2009), adjudication; *see also Shady Grove Orthopedic Assocs. P.A. v. Allstate Ins., Co.*, 559 U.S. ___, 130 S. Ct. 1431, 1443 (2010) (plurality opinion) ("A class action, no less than traditional joinder (of which it is a species), merely enables a federal court to adjudicate claims of multiple parties at once, instead of in separate suits. And like traditional joinder, it leaves the parties' legal rights and duties intact and the rules of decision unchanged."). The processes by which judges and arbitrators adjudicate legal claims are unrelated to Section 7's concern with equalizing bargaining power, and adjudicatory procedures like those under Rule 23, which serve other purposes and are subject to other concerns, are beyond the NLRB's limited authority.

In short, the NLRB fails to recognize that employees' act of filing a class action complaint differs from a judge or arbitrator's act of collectively adjudicating legal claims. The cases cited by the NLRB say nothing about the adjudication of

claims; they show only that jointly filing a legal complaint is one way employees can concertedly assert legal rights and thus employees who do so may be protected from retaliation under the NLRA.

Additionally, these cases certainly do *not* prohibit the waiver of collective adjudication. Indeed, the NLRB's General Counsel in the GC Memo and its Acting General Counsel in his briefing to the NLRB below both concluded employers can require employees to waive the right to invoke class procedures even though they cannot retaliate against employees for filing class action complaints. (Opening Br. 3-4) The NLRB entirely ignores the GC Memo and the Acting General Counsel's position.

Moreover, there are many ways for employees to assert legal rights concertedly, as *Salt River Valley* itself suggests. Employees can do so through conversations and meetings with their employers, internal complaints and grievances, correspondence, petitions, postings, demonstrations, administrative charges, and settlement demands, among others. They also can do so by working together in filing multiple individual lawsuits or arbitration demands. All of these activities allow employees to attempt to gain the advantages of solidarity for purposes of exerting group pressure on their employer and increasing their bargaining power.

An individual arbitration agreement does not violate the NLRA simply because it may deter employees from filing a class action complaint as one means of asserting concertedly their legal rights in light of the many other means available to them. As the NLRB concedes, it is well established that limiting one of multiple means of engaging in the same protected activity does not violate Section 7. (NLRB Br. 21; Opening Br. 49-50) *See also NLRB v. Steelworkers (Nutone)*, 357 U.S. 357, 363–64 (1958); *Guardian Indus. Corp. v. NLRB*, 49 F.3d 317, 318 (7th Cir. 1995) ("Section 7 of the Act protects organizational rights . . . rather than particular means by which employees may seek to communicate.").

B. The NLRB wrongly contends the MAA prohibits "every form of concerted pursuit of employment-related claims."

The NLRB baldly declares that the Mutual Arbitration Agreement ("MAA") prohibits "every form of concerted pursuit of employment-related claims" because it waives a judicial forum and limits arbitrators to adjudicating claims in individual proceedings. (NLRB Br. 10) However, the NLRB fails to identify a single specific concerted activity for mutual aid or protection that it contends employees lose under the MAA.

The NLRB argues generally that "concerted legal action may 'aid or protect' employees in various ways, including financial support, group power in negotiations, shared information, the impression of safety in numbers, and – sometimes – anonymity." (NLRB Br. 13-14) It further notes that a "particular

advantage" to the concerted assertion of legal rights is "the ability to exert 'group pressure upon [the employer] in regard to possible negotiation and settlement of the [employees' legal] claims.'" (NLRB Br. 14) Finally, the NLRB observes that Section 7 protects employees' "participation in the adjudication" of one another's legal claims "from attending hearings, to providing affidavits, to testifying." (NLRB Br. 16)

Strikingly, the NLRB's own account of "concerted legal action" refutes its contention that the MAA "expressly and categorically" bars employees' "concerted pursuit of claims." (NLRB Br. 7) ***The MAA permits every single one of the activities cited by the NLRB as an example of "concerted legal action."***

The MAA allows employees to work together in asserting their common legal rights by pooling their finances, negotiating as a group, sharing information, and seeking safety in numbers. In addition, the MAA permits employees to solicit other employees to assert the same alleged legal rights, act in concert to initiate multiple individual arbitrations alleging the same legal claims, and coordinate the litigation of those claims by obtaining common representation, jointly investigating their claims, and developing common legal theories and strategies. The MAA also permits employees to testify on behalf of one another in their arbitration proceedings, attend one another's proceedings, and provide affidavits in those proceedings. In short, the MAA permits employees to do everything they can to

lend one another "mutual aid and protection" in asserting their alleged legal rights against their employer. *Cf.* Kenneth T. Lopatka, "A Critical Perspective on the Interplay Between Our Federal Labor and Arbitration Laws," 63 S.C. L. Rev. 43, 92 (Autumn 2011) ("[A]n agreement to arbitrate rather than litigate, and to arbitrate only on an individual basis, does not mean that employees cannot act in concert with their coworkers when they pursue individual grievances. Rather, it limits only the scope of discovery, the hearing, the remedy, and the employee population bound by an adverse decision on the merits.").

Nevertheless, the NLRB claims the MAA "blocks concerted action as basic as two coworkers jointly seeking redress, in arbitration, of an injury stemming from an incident involving both of them." (NLRB Br. 20) This is simply wrong. Under the MAA, the two hypothetical coworkers could retain the same counsel, concertedly assert their legal rights, and jointly attempt to negotiate a settlement of their claims. Absent settlement, the two coworkers could coordinate their demands for arbitration, share discovery costs, jointly investigate their claims, appear as witnesses for one another, and generally lend one another full support.

Indeed, the NLRB observes that Cuda's attorneys sent letters to D.R. Horton stating they were also representing other employees making similar claims. (NLRB Br. 5) The NLRB fails to note these letters did not state the other employees sought to join Cuda's action. To the contrary, the letters stated the

other employees were initiating *their own actions*. (*See* Joint Exs. 5, 6 & 7) Assuming Cuda worked in concert with these other employees (of which there is no evidence), the record thus shows the MAA allowed employees to assert their legal rights concertedly, including retaining the same counsel to make coordinated demands to exert group pressure, all while seeking to have their claims adjudicated separately.

The NLRB also does not – and could not – contend employees' individual claims are stronger when they are decided collectively in a single proceeding.[3] An employee who asserts his or her claim as a member of a 1,000-person class has no greater right under the FLSA or any other law than when he or she asserts the claim individually. Nor is an employee more likely to receive an adverse judgment when he or she seeks an adjudication of the claim in an individual proceeding. Judges and arbitrators must adjudicate each party's claims based on the law and facts, irrespective of the parties' power. *See, e.g.*, 28 U.S.C. § 453 (requiring each judge or justice of the United States to swear he or she "will administer justice without respect to persons, and do equal right to the poor and to the rich"). Thus, Section 7's concern with protecting ways for employees to equalize their power

[3] Although the NLRB misleadingly claims the MAA bans "every form of collective legal claim" (NLRB Br. 20), there is no dispute any employment-related claims would be individual. The question is not whether employees have a Section 7 right to pursue "collective legal claim[s]," but rather whether there is a Section 7 right to seek a collective adjudication of common questions of law or fact relating to their *individual* claims. *See, e.g.*, Fed. R. Civ. P. 20(a)(1)(b); 23(a)(2) & (b)(3).

with their employers' has nothing to do with courts and arbitrators' impartial adjudication of employees' legal claims.

C. Employees do not have a right under Section 7 to use class certification as an economic weapon against their employers.

Ultimately, the NLRB identifies only one potential advantage to employee-plaintiffs of invoking class action procedures that they would not have in individual proceedings: class certification may force defendant-employers to settle cases they might not otherwise settle. (NLRB Br. 14 n.20) However, the NLRB lacks authority to grant employees a right to invoke class procedures as an economic weapon.

First, as the NLRB concedes, most class procedures at issue were developed after Congress first enacted the NLRA. (Opening Br. 46, 48; NLRB Br. 16) While the NLRB may have the responsibility to "adapt" its "interpretation" of the NLRA to "changing patterns of industrial life" (NLRB Br. 16-17), that is a far cry from inventing new substantive rights to procedures that did not exist at the NLRA's enactment – which, in any event, would violate the Rules Enabling Act. (Opening Br. 42)

Second, as D.R. Horton noted, class certification can impose on defendants disproportionate costs and the risk of financial ruin in the event of an erroneous judgment, thereby compelling them to settle certified class actions irrespective of the merits of the underlying claims. (Opening Br. 52) Commentators and courts

have recognized this problem with class action procedures. Indeed, the Federal Rules were amended in 1998 to allow interlocutory appeals from class certification decisions, in part because "[a]n order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability." *See* Fed. R. Civ. P. 23(f) advisory committee's note (1998 Amendments); *see also In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1016 (7th Cir. 2002).

Concerning the potential advantage class certification might give plaintiff-employees, the NLRB explains:

> Horton's (Br. 52) and its amici's suggestion that some class plaintiffs may invoke the class-action procedure in order to 'force' employers to settle, if true, illustrates the greater power wielded by a group of employees compared to a lone employee proceeding independently, *consistent with the federal labor policy of equalizing bargaining power between employees and employers*.

(NLRB Br. 14 n.20) (emphasis added)

Remarkably, the NLRB thus treats what commentators and courts consider a *problem* with class action procedures – their imposing such substantial costs and risks on a defendant that they effectively prevent the adjudication of the underlying claims – as a *benefit* to which employees are somehow entitled to equalize their "bargaining power." This is absurd.

First, equal bargaining power in negotiating legal claims comes from the prospects of a ruling by a court or arbitrator on the merits based on the law and

facts, not from the imposition of expenses and risks that compel settlement regardless of the merits. That is "judicial blackmail," not bargaining. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996).

Second, any increase in "bargaining power" that class certification might give plaintiff-employees does not result from those employees' group activity; rather, it is a byproduct of court procedures imposing on defendants grossly disproportionate costs and risks. Class certification does not allow employee-plaintiffs just to "equalize" their bargaining power with their defendant-employers' but to far exceed it, irrespective of the merits of their claims. In these circumstances, employees' invocation of class procedures is not a means of engaging in concerted activity for mutual aid and protection but rather the wielding of an economic weapon to attempt to force acceptance of their economic demands.

The panel's attempt to grant employees a substantive right under the NLRA to deploy judicial procedures as an economic weapon – a use that has nothing to do with the intended purposes of those procedures – is beyond the NLRB's authority. So, too, is the panel's attempt to bar employers from using individual arbitration agreements, consistent with the FAA, simply because they may have the effect of blunting that economic weapon. *See, e.g.*, *Am. Ship Bldg. Co. v. NLRB*, 380 U.S. 300, 318 (1965) ("Sections 8(a)(1) and (3) do not give the Board a general authority to assess the relative economic power of the adversaries in the bargaining

process and to deny weapons to one party or the other because of its assessment of that party's bargaining power."); *NLRB v. Brown*, 380 U.S. 278, 283 (1965) ("[T]here are many economic weapons which an employer may use that . . . interfere in some measure with concerted employee activities . . . and yet the use of such economic weapons does not constitute conduct that is within the prohibition of either § 8(a)(1) or § 8(a)(3). Even the Board concedes that an employer may legitimately blunt the effectiveness of an anticipated strike by stockpiling inventories, readjusting contract schedules, or transferring work from one plant to another, even if he thereby makes himself 'virtually strikeproof.'"); *NLRB v. Ins. Agents' Int'l Union*, 361 U.S. 477, 499-500 (1960) ("[W]hen the Board moves in this area . . . it is functioning as an arbiter of the sort of economic weapons the parties can use in seeking to gain acceptance of their bargaining demands. . . . [T]his amounts to the Board's entrance into the substantive aspects of the bargaining process to an extent Congress has not countenanced."). Just as the NLRA permits employers to blunt the effectiveness of an employee strike, so, too, must it permit an employer to implement an arbitration agreement consistent with the FAA even though it may blunt employees' ability to impose higher litigation costs on the employer to extort higher cost-of-defense settlements.

D. The NLRB fails to show that the MAA violates Section 8(a)(1).

Because the MAA does not impair any Section 7 rights, it does not violate Section 8(a)(1). Indeed, there is no precedent for holding an arbitration agreement like the MAA unenforceable under the NLRA. (Opening Br. 27-30) In response, the NLRB fails to identify a single case so holding.

In its effort to establish such precedent for the first time, the NLRB continues to mischaracterize the MAA as a "rule" that expressly prohibits conduct allegedly protected under Section 7. (NLRB Br. 18-19) Among other errors, the NLRB fails to recognize the fundamental distinction between (1) agreements like the MAA, and (2) unilaterally imposed "rules" or other types of agreements required as a condition of employment: arbitration agreements like the MAA are covered by the FAA.

This difference is significant for two reasons: (1) federal policy strongly favors arbitration, and (2) the consequences to an employee of entering an arbitration agreement under the FAA are solely procedural. When an employee violates a workplace rule or breaches another type of contract, he or she may be subject to discipline, including having his or her employment terminated. In contrast, if an employee files a lawsuit in breach of an arbitration agreement, like the MAA, the employer simply will move for an order compelling arbitration under the FAA. *See* 9 U.S.C. § 4. Because an employee's breach of an arbitration

agreement has no effect on his or her employment, such agreements are not analogous to workplace "rules" subject to the test of *Lutheran Heritage.* (*Cf.* R. 550)

The NLRB also continues to argue the MAA is like those unenforceable individual contracts that impeded collective bargaining rights in the early 1940s. (NLRB Br. 22-28) However, those cases all involved agreements that sought to waive or interfere with employees' Section 7 right to unionize and bargain collectively.[4] The NLRB contends the same principle applies here and allows it to nullify agreements that require employees "prospectively to waive their right to act in concert with coworkers in disputes with their employer." (NLRB Br. 22-23)

To try to make this analogy, the NLRB fundamentally mischaracterizes the MAA as an agreement that requires employees "to forego collective action" (NLRB Br. 23) and as an "express restriction of their Section [sic] concerted-

[4] *See, e.g.*, *Western Cartridge Co. v. NLRB*, 134 F.2d 240, 244 (7th Cir. 1943) (individual agreements served "to forestall union activity" and "create a permanent barrier to union organization"); *NLRB v. Adel Clay Prods. Co.*, 134 F.2d 342, 345 (8th Cir. 1943) (individual contracts served "as a means of defeating unionization and discouraging collective bargaining"); *NLRB v. Stone*, 125 F.2d 752, 756 (7th Cir. 1942) (under individual employment agreements, "the employee not only waived his right to collective bargaining but his right to strike or otherwise protest on the failure to obtain redress through arbitration"); *NLRB v. Jahn & Ollier Engraving Co.*, 123 F.2d 589, 593 (7th Cir. 1941) (individual contracts were unlawful where they waived employees' right to bargain collectively for a period of two years and were "adopted to eliminate the Union as the collective bargaining agency" of employees); *NLRB v. Superior Tanning Co.*, 117 F.2d 881, 888-91 (7th Cir. 1941) (individual contracts were part of employer's plan to discourage unionization); *NLRB v. Vincennes Steel Corp.*, 117 F.2d 169 (7th Cir. 1941) (individual employment agreements were promulgated to circumvent union and required each employee to refrain from requesting a raise in wages, which "deprive[d] the employee of the right to designate an agent to bargain with reference thereto").

activity rights." (NLRB Br. 31) However, the MAA does not categorically waive employees' Section 7 right to engage in concerted activities for their mutual aid or protection. To the contrary, as explained above, employees subject to the MAA can engage in every form of protected concerted activity, including every form of concerted activity in asserting their legal rights that the NLRB has identified. The NLRB's attempted analogy fails.

E. The NLRB fails to show the panel's decision lies within its authority to define the scope of Section 7.

Ultimately, the NLRB defends the panel's decision that Section 7 grants employees a non-waivable right to invoke class procedures on the ground that "the task of defining the scope of § 7 'is for the Board to perform in the first instance . . . .'" (NLRB Br. 9) The NLRB's "because I said so" rationale is not a permissible interpretation of Section 7 because the panel's decision (1) purports to grant employees a substantive, non-waivable right under the NLRA to judicial procedures created by other lawmaking authorities for other purposes and deemed by those authorities to be waivable and non-substantive, and (2) prohibits employers and employees from fully exercising their rights under the FAA to choose what procedures will govern the arbitration of their disputes. (Opening Br. 41-47)

Thus, the panel's decision improperly creates conflicts between the NLRA and other bodies of law outside the NLRB's jurisdiction, including the FAA, the

Rules Enabling Act, the Federal Rules, and the FLSA. (*Id.* 42-47) *See generally Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 144 (2002) ("[W]e have . . . never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA."); *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 47 (1942) ("[T]he Board has not been commissioned to effectuate the policies of the [NLRA] so single-mindedly that it may wholly ignore other and equally important Congressional objectives."). The NLRB does not dispute the existence of these conflicts; it just ignores them. (NLRB Br. 17-18)

III. The NLRB fails to show the panel's decision is consistent with the FAA.

A. The NLRB fails to follow *Concepcion*.

The NLRB does not attempt to explain how its categorical ban on arbitration agreements like the MAA could fail to "stand as an obstacle to the accomplishment of the FAA's objectives." *AT&T Mobility LLC v. Concepcion*, __ U.S. __, 131 S. Ct. 1740, 1748 (2011). The NLRB instead argues that it has a "favorable attitude towards arbitration" and thus the panel's invalidation of the MAA should not be construed as "emanat[ing] from any sort of hostility towards arbitration." (NLRB Br. 31-32) However, the NLRB's general attitude towards arbitration is irrelevant. Under *Concepcion*'s test, the panel's rule – which requires parties to permit class arbitration or abandon the arbitral forum altogether to litigate class claims in court

– plainly interferes with, and creates a scheme contrary to, the FAA's purposes. (*See* Opening Br. 15-16)

B. The NLRB fails to follow *Gilmer* and *CompuCredit.*

The NLRB also cannot justify the panel's failure to apply *Gilmer*'s test, recently re-affirmed in *CompuCredit*, to determine whether Congress intended the NLRA to trump the FAA's mandate that arbitration agreements be enforced according to their terms. (Opening Br. 20-22) The NLRB abandons the panel's conclusion that employees purportedly have a substantive statutory right under the NLRA "to take the collective action inherent in seeking class certification." (*Compare* R. 556 *with* NLRB Br. 38) Such an alleged right would make no sense. (Opening Br. 40-41) In its place, the NLRB now argues for the first time that Section 7 grants employees a substantive "right to take collective action in order to ensure that employment statutes are widely enforced among employees generally." (NLRB Br. 38) Under its latest position, the NLRB contends it is not dispositive that an individual employee can effectively "vindicate his own defined rights through individual action, whether in arbitration or litigation." (*Id.*) According to the NLRB, each employee also has a right under the NLRA "to subordinate personal advantage (such as expeditious resolution of his own claim) to achieve benefits for a greater number of employees." (*Id.*) The NLRB now argues the MAA violates the NLRA by allegedly depriving employees "of an opportunity to

prosecute their statutory employment rights" on behalf of others, irrespective of whether they can vindicate their *own* federal statutory rights effectively in individual arbitration. (*Id.*)

The NLRB's latest explanation of why the NLRA supposedly mandates class action procedures irrespective of the FAA should be rejected for at least three reasons. First, its new view is entitled to no deference because – in addition to all of the other reasons identified (Opening Br. 8-10, 38-40) – it differs from the interpretation articulated by the panel. *Cf. Christopher v. Smithkline Beecham Corp*., 567 U.S. ___, ___, 132 S. Ct. 2156, 2165-66, 2168-69 (2012) (declining to defer to agency's interpretation of regulation on appeal where agency advanced different interpretation below); *id*. at 2175 (Breyer, J., dissenting) (same).

Second, the NLRB does not cite any authority to support its novel theory that Section 7 grants each individual employee a non-waivable right to act as a type of private attorney general enforcing claims on behalf of other employees.

Third, the NLRB fails to show that "the FAA's mandate [that arbitration agreements be enforced according to their terms] has been 'overridden by a contrary congressional command'" in the NLRA that employees retain an alleged right to prosecute claims in a single proceeding in a representative capacity on behalf of other employees, regardless of whether they can effectively vindicate their own rights individually. *Cf. CompuCredit Corp. v. Greenwood*, 565 U.S.

___, 132 S. Ct. 665, 672 (2012). The NLRB thus continues to turn *Gilmer* on its head by deeming arbitration agreements unenforceable solely because the procedures available under them differ from court procedures. (Opening Br. 18-20)[5] Try as it might, the NLRB cannot just ignore Supreme Court precedent.

C. The NLRB fails to justify the panel's use of a public policy balancing test to hold the MAA unenforceable.

D.R. Horton showed the panel's attempt to use a common-law public policy balancing test to hold the MAA unenforceable under Section 2 of the FAA failed, among other reasons, because the panel could not identify any strong, well-defined public policies to which the MAA was allegedly contrary. (Opening Br. 24-26) While the NLRB continues to cite *Kaiser Steel Corp. v. Mullins* in response, it fails to show that case supports the panel's decision. (NLRB Br. 41-42) There, the Court held a provision in a collective bargaining agreement violated Section 8(e) of the NLRA, which expressly voids agreements between unions and employers requiring one employer to cease doing business with another. *Kaiser Steel Corp. v.*

[5] *Amici* National Employment Lawyers Association *et al.* ("NELA") also argues "no rational person" would pursue small wage claims unless part of a class or collective action because the potential recovery "may be so small." (NELA Br. 7-8) This argument does not rely on the NLRA and is outside the NLRB's jurisdiction. In addition, the decision NELA cites is unpersuasive, and a petition for a writ of certiorari is pending. *In re Am. Exp. Merchants Litig.*, 634 F.3d 187 (2d Cir. 2011), *adhered to on reh'g*, 681 F.3d 139 (2d Cir. 2012), *reh'g en banc denied*, 681 F.3d 139 (2d Cir. 2012), *pet. writ. cert. filed*, No. 12-133 (Jul. 30, 2012). Moreover, neither NELA, nor the NLRB, denies that most employment statutes award prevailing plaintiffs their full attorneys' fees and costs regardless of the size of their claims. Finally, NELA overlooks the fact that no rational defendant would incur defense costs greatly exceeding the value of a small claim instead of settling it. Indeed, because defendants typically are not awarded their costs and fees when they prevail, it often makes more economic sense to settle even meritless small claims rather than litigate them.

Mullins, 455 U.S. 72, 78-79 (1982). *Kaiser Steel* did not apply a public policy balancing test to void the agreement, let alone rely on any purported general policy of "protecting employees' right to engage in protected concerted action."

The NLRB also argues the highly generalized policy it invoked to void the MAA is "no less 'defined' because Congress left to the Board the duty of interpreting the fine contours of concerted mutual protection." (NLRB Br. 41) However, by defining the public policy underlying Section 7 broadly as "protecting employees' right to engage in protected concerted action" and claiming the power to void agreements contrary to it, the NLRB could nullify any individual employment agreement entered by an NLRA-covered employee. Every agreement between an individual employee and an employer required as a condition of employment could be deemed to waive the employee's right to engage in concerted action in negotiating the terms covered by that individual agreement. Thus, the NLRB could void routine individual employment agreements such as non-competition agreements, non-solicitation agreements, and confidentiality agreements. Indeed, under the panel's view that non-unionized employees' right to engage in concerted activity with respect to the terms and conditions of their employment is non-waivable, no individual employment agreements required as a condition of employment would be enforceable.

There is no hint in the NLRA that Congress granted the NLRB such authority to nullify individual employment contracts. Nor is there any hint Congress intended Section 2 of the FAA to make the enforceability of individual employment arbitration agreements contingent on the NLRB's unilateral approval. The NLRB's "power grab" does not withstand scrutiny.

D. The panel's decision would destroy employment arbitration.

The NLRB repeats the panel's erroneous claim that its "holding is limited." (NLRB Br. 43) In fact, the panel's decision threatens to destroy arbitration as an effective tool for achieving relatively quick and inexpensive adjudications of employment claims. *Cf. Delock*, 2012 WL 3150391, at **5-6 (*D.R. Horton* improperly favors litigation over arbitration and "would be a sweeping change in the law").

The NLRB concludes that the "vice of the MAA" is waiving both a judicial forum and class action and joinder procedures in arbitration so as to allegedly "deny Cuda and his fellow employees *any* forum in which they can pursue their FLSA claims concertedly." (NLRB Br. 44) Under this reasoning, most employment arbitration agreements would be unenforceable. The default position in interpreting arbitration agreements that are silent as to class arbitration is to construe them as *not* permitting it. *See Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. ___, 130 S. Ct. 1758, 1775 (2010). Few, if any, employment

arbitration agreements expressly allow parties to pursue class and joint claims in a judicial forum as an alternative to arbitration. Thus, under *Stolt-Nielsen*, most employment arbitration agreements – even if they lack an express class action waiver and are merely silent regarding class arbitration – would suffer from the same alleged "vice" the NLRB identifies here: they would not allow any forum in which an employee could invoke class action procedures. *See, e.g.*, *Reed v. Fla. Metro. Univ., Inc.*, 681 F.3d 630, 644 (5th Cir. 2012); *Reyes*, 146 Cal. Rptr. 3d at 623 (under *Stolt-Nielsen*, "an arbitration agreement silent on the issue of class arbitration may have the same effect as an express class waiver"). Under the panel's decision, and in light of *Stolt-Nielsen*, arbitration agreements that do not expressly *allow* for class arbitration or litigation – that is, the vast majority of employment arbitration agreements – would be void.

In addition, if the panel's decision stands, many employers would modify their arbitration agreements to allow class claims to proceed in a judicial forum rather than in arbitration. As a result, any employee-plaintiff who preferred a judicial forum simply could include class allegations in his or her complaint. The individual plaintiff could pursue the case in court for so long as he or she found it beneficial – for example, to obtain more extensive discovery than might be allowed in arbitration or to impose greater litigation costs on the defendant to try to extract a higher cost-of-defense settlement – and then dismiss the class allegations and

"remand" the case to an arbitral forum to proceed individually. By that point, the benefit of arbitration will have been lost, the court burdened with needless proceedings, and the purposes of the FAA defeated.

E. The NLRB fails to show the MAA prohibits employees from filing unfair labor practice charges.

D.R. Horton showed that no reasonable employee would misinterpret the MAA as prohibiting the filing of an unfair labor practice charge with the NLRB. (Opening Br. 56-59) In response, the NLRB fails to cite any evidence of any employee ever misconstruing language such as that used in the MAA, which refers to court actions, lawsuits, and civil proceedings, as barring unfair labor practice charges. Such charges – which are a form of complaint to a governmental policing authority – are unlikely to be confused with the bi-lateral civil lawsuits covered by the MAA. The NLRB's willful misinterpretation of the MAA suggests the only arbitration agreement the NLRB would ever approve would be one expressly notifying employees they may go to the NLRB, turning arbitration agreements into a form of generalized notice to employees of their NLRA rights. By invalidating arbitration agreements lacking such an express notice, the NLRB is attempting not only to evade the FAA's mandate that arbitration agreements be enforced but also evade the limitation on its own authority to require employers to disseminate notice of NLRA rights. *See Chamber of Commerce v. NLRB*, 856 F.Supp.2d 778, 797 (D.S.C. Apr. 13, 2012) (NLRB lacks authority to promulgate rule requiring

employers to post notices informing employees of their rights under the NLRA) (pending on appeal to the Fourth Circuit as Case Number 12-1757).

The MAA does not prohibit employees from filing unfair labor practice charges. It also does not threaten employees with any discipline, and there is not even an allegation of such discipline in the present case. The panel's order that D.R. Horton rescind the MAA because a hypothetical unreasonable employee might conceivably misconstrue it is contrary to the FAA. It is also contrary to the evidence in the record because Cuda filed an unfair labor practice charge.

IV. The NLRB fails to show the panel had a quorum.

Finally, the NLRB fails to demonstrate the panel constituted a quorum authorized to issue its decision below. For the panel to have been authorized, the NLRB must have delegated its authority to a "group" of three board members under 29 U.S.C. § 153(b). (Opening Br. 60)

The NLRB does not dispute it never delegated its authority to the panel. Instead, the NLRB appears to argue a delegation to a three-member group is not required when the full Board has only three members. (NLRB Br. 53-54) According to the NLRB, a three-member Board automatically constitutes a delegated panel, and two members thus automatically constitute a quorum of that *de facto* panel. (NLRB Br. 53-54) The NLRB fails to cite any basis in the NLRA making delegation unnecessary in such circumstances, and the plain language of

29 U.S.C. § 153(b) states otherwise. Moreover, the NLRB's practice has been to delegate authority to panels when the full Board consists of only three members, at least in cases like this one where one of the three members will be recused. "[W]hen the Board's membership has fallen to three members, the Board has developed a practice of designating those members as a 'group' in cases where one member will be disqualified." Quorum Requirements, Office of Legal Counsel Memorandum Opinion for the Solicitor NLRB, at 4 (Mar. 4, 2003) (available at: http://www.justice.gov/olc/2003/nlrb_quorum_03042003.pdf). In the present case, the NLRB failed to follow this practice.

CONCLUSION

D.R. Horton requests that this Court decline to enforce the Board's decision and order and that it award any further relief to which D.R. Horton may be entitled.

Respectfully submitted,

by: s/Ron Chapman, Jr.

Ron Chapman, Jr.
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
8117 Preston Road, Ste. 500
Preston Commons West
Dallas, Texas 75225
Tel: 214-987-3800
Fax: 214-987-3927
ron.chapman@ogletreedeakins.com

Bernard P. Jeweler
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
1909 K Street, N.W., Ste. 1000
Washington, DC 20006
Tel: 202-263-0248
Fax: 202-887-0866
bernard.jeweler@ogletreedeakins.com

Michael M. Shetterly
Mark M. Stubley
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
300 N. Main Street, Ste. 500
Ogletree Building
Greenville, South Carolina 29601
Tel: 864-271-1300
Fax: 864-235-4754
mike.shetterly@ogletreedeakins.com
mark.stubley@odnss.com

Christopher C. Murray
OGLETREE, DEAKINS, NASH,
SMOAK & STEWART, P.C.
111 Monument Cir., Ste. 4600
Indianapolis, Indiana 46204
Tel: 317-916-1300
Fax: 317-916-9076
christopher.murray@ogletreedeakins.com

Attorneys for Petitioner/Cross-Respondent

CERTIFICATE OF SERVICE

I certify that on this 12th day of October, 2012, I caused this REPLY BRIEF FOR PETITIONER/CROSS-RESPONDENT, D.R. HORTON, INC. to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Linda Dreeben, Deputy Associate General Counsel
Ruth E. Burdick
Kira Dellinger Vol
Appellate Court Branch, Ste. 808
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

William J. Emanuel
Vartan Serge Madoyan
LITTLER MENDELSON, P.C.
Suite 500, 2049 Century Park, E.
Los Angeles, CA 90067

Henry David Lederman
Alexa L. Woerner
LITTLER MENDELSON, P.C.
Suite 600, 1255 Treat Blvd.
Treat Towers
Walnut Creek, CA 94597

Catherine M. Masters
SCHIFF HARDIN, L.L. P.
Suite 6600, 233 S. Wacker Drive
Sears Tower
Chicago, IL 60606

Paul William Cane, Jr.
PAUL HASTINGS, L.L.P.
24th Floor, 55 2nd Street
San Francisco, CA 94105-0000

Rae Thiesfield Vann, General Counsel
NORRIS, TYSSE, LAMPLEY & LAKIS, L.L. P.
Suite 400 1501 M Street, N.W.
Washington, DC 20005

Howard Marc Radzely
MORGAN, LEWIS, & BOCKUS, L.L.P.
1111 Pennsylvania Avenue N.W.
Washington, DC 20004

Matthew Walter Ray
JONES DAY
2727 N. Harwood Street
Dallas, TX 75201-1515

Charles C. High, Jr.
Clara Beth Burns
Jose Abelardo Howard-Gonzalez
KEMP SMITH, L.L.P.
Suite 1700, 221 N. Kansas Street
El Paso, TX 79901

Marshal Bruce Babson
SEYFARTH SHAW, L.L.P.
33rd Floor, 620 8th Avenue
New York, NY 10018-1405

Deborah J. LaFetra
PACIFIC LEGAL FOUNDATION
930 G. Street
Sacramento, CA 95814

Hal K. Gillespie
Joseph Halcut Gillespie
Yona Rozen
GILLESPIE, ROZEN & WATSKY, P.C.
Suite 200, 3402 Oak Grove Avenue
Dallas, TX 75204

Frank Paul Bland, Jr.
PUBLIC JUSTICE, P.C.
Suite 200, 1825 K Street, N.W.
Washington, DC 20006

Michael Rubin
Peter J. Thoreen
ALTSHULER BERZON LLP
177 Post Street, Suite 300
San Francisco, CA 94108

Lynn K. Rhinehart
AFL-CIO
815 Sixteenth Street, N.W.
Washington, D.C. 20006

Judith A. Scott
SERVICE EMPLOYEES INTERNATIONAL UNION
1800 Massachusetts Ave. NW
Washington, DD 20036

In addition, I certify that on this 12th day of October, 2012, I caused this REPLY BRIEF FOR PETITIONER/CROSS-RESPONDENT, D.R. HORTON, INC. to be served by third-party commercial carrier for delivery within 3 days on the following:

Cliff Palefsky
McGUINN, HILLSMAN & PALEFSKY
535 Pacific Avenue
San Francisco, CA 94133

s/ Ron Chapman, Jr.
Ron Chapman, Jr.

CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 32(a)(7)(C) and 5TH CIR. R. 32.3, I certify that this Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this Brief contains 6,906 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this Brief has been prepared using Times New Roman 14-point font, a proportionately spaced typeface.

Dated this 12th day of October, 2012.

OGLETREE, DEAKINS, NASH, SMOAK, & STEWART P.C.

s/ Ron Chapman, Jr.
Ron Chapman, Jr.