JD(SF)–42–13
Sacramento, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

GAMESTOP CORP., GAMESTOP INC., SUNRISE PUBLICATIONS, INC., AND GAMESTOP TEXAS LTD. (L.P.), Respondent,

and **Case 20-CA-080497**

MICHELLE KRECZ-GONDOR, an Individual

Joseph D. Richardson,
for the Acting General Counsel.
Ross Friedman (Morgan, Lewis & Bockius LLP),
For the Respondent.
Christian Schreiber (Chavez & Gertler LLP),
for the Charging Party.

DECISION

STATEMENT OF THE CASE

GERALD M. ETCHINGHAM, Administrative Law Judge. This is yet another case raising issues concerning arbitration policies that effect collective bargaining and representative rights related to *D.R. Horton, Inc*., 357 NLRB No. 184 (Jan, 2012), petition to review filed 12-60031 (5th Cir. Jan. 13, 2012), and the limits of the Federal Arbitration Act (FAA) to change the status quo if it overlaps the later-enacted National Labor Relations Act (the Act or NLRA)[1]. This case was tried based on a joint motion and stipulation of facts approved by me on May 1, 2013. Charging Party, Michelle Krecz-Gondor (Krecz-Gondor or Charging Party) filed the initial charge on May 7, 2012[2], with amendments on January 17, 2013 and February 25, 2013, respectively, and the Acting General Counsel issued his initial complaint on February 27, 2013, and his amended complaint on March 25, 2013 (collectively the complaint). The Respondents, GameStop Corp., GameStop, Inc., Sunrise Publications, Inc. and GameStop Texas Ltd. (L.P.) (collectively Respondents or the Company), filed timely answers to the complaint on March 13

[1] The FAA was enacted in 1925, the Norris-LaGuardia Act (NLA) was enacted in 1932 and the NLRA was enacted in 1935. The FAA, however, was pro forma reenacted in 1947 without substantive amendment. See *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961); see also H.R. Rep. No. 80-251 (1947), *reprinted in* 1947 U.S.C.C.A.N. 1511 (expressly stating that the 1947 bill made "no attempt" to amend the existing FAA); H.R. Rep. No. 80-225 (1947), *reprinted in* 1947 U.S.C.C.A.N. 1515 (same).

[2] All dates are in 2012 unless otherwise indicated.

and April 8, 2013, respectively, denying all material allegations and setting forth affirmative defenses.

The complaint alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining a policy and/or requiring a rule of its employees which interferes with, restrains, and coerces employees in the exercise of their rights as guaranteed in Section 7 of the Act.

On the entire record and after considering the briefs filed by Acting General Counsel and the Respondent, I make the following:

FINDINGS OF FACT

I. Jurisdiction

At all times material, Respondent GameStop Corp., a Delaware corporation with offices and places of business throughout the State of California and the United States, including one in Sacramento, California, has been engaged in business as a videogame retailer. Respondent GameStop Corp. admits, and I find, that during the calendar year ending December 31, GameStop Corp., in conducting its business operations described above derived gross revenues in excess of $500,000 and sold and shipped from its California facilities products valued in excess of $5,000 directly to points outside the State of California. Respondent GameStop Corp. admits, and I find, that it is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act. (Stips. 2(a)-(b); 3(g).)

Also at all times material, Respondent GameStop, Inc., a Minnesota corporation and a wholly-owned subsidiary of GameStop Corp., maintains offices and places of business throughout the State of California and the United States, including one in Sacramento, California, and has been engaged in business as a videogame retailer. Respondent GameStop, Inc. admits, and I find, that during the calendar year ending December 31, GameStop, Inc., in conducting its business operations described above derived gross revenues in excess of $500,000 and sold and shipped from its California facilities products valued in excess of $5,000 directly to points outside the State of California. Respondent GameStop, Inc. admits, and I find, that it is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act. (Stips. 3(a)-(b); 3(g).)

Further, at all times material, Respondent Sunrise Publications, Inc., a Minnesota corporation and a wholly-owned subsidiary of GameStop, Inc., maintains offices and places of business throughout the United States, including its principal offices in Minneapolis, Minnesota, and has been engaged in business as a publisher of print and online magazines. Respondent Sunrise Publications, Inc. admits, and I find, that during the calendar year ending December 31, Sunrise Publications, Inc., in conducting its business operations described above derived gross revenues in excess of $500,000 and sold and shipped from its Minneapolis, Minnesota facility products valued in excess of $5,000 directly to points outside the State of Minnesota. Respondent Sunrise Publications, Inc. admits, and I find, that it is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act. (Stips. 3(c)-(d); 3(g).)

In addition, at all times material, Respondent GameStop Texas Ltd. (L.P.), a Delaware corporation and a wholly-owned subsidiary of GameStop, Inc., maintains offices and places of business throughout the United States, including its principal offices in Grapevine, Texas, and has been engaged in business as a videogame retailer. Respondent GameStop Texas Ltd. (L.P.) admits, and I find, that during the calendar year ending December 31, GameStop Texas Ltd. (L.P.), in conducting its business operations described above derived gross revenues in excess of $500,000 and sold and shipped from its Grapevine, Texas facility products valued in excess of $5,000 directly to points outside the State of Texas. Respondent GameStop Texas Ltd. (L.P.) admits, and I find, that it is an employer engaged in commerce within the meaning of Sections 2(2), (6), and (7) of the Act. (Stips. 3(e)-(g).)

In 2007, Respondents implemented the GameStop Concerned Associates Reaching Equitable Solutions mandatory Arbitration Program (collectively known as the "GameStop C.A.R.E.S." or simply the "Program" or "Program Rules") for all employees at all their facilities throughout the United States and Puerto Rico. (Stip. 4.) Respondents' employees are distributed information concerning the Program through three interrelated documents: (1) The 16-page Program Rules (Jt. Exh "M"); (2) The Program Brochure (Jt. Exh. "N"); and (3) Acknowledgement (Jt. Exh. "O").

Among other things, the Respondents' Program Rules provide as follows:

SUMMARY DESCRIPTION

> It is our goal that your workplace disputes or claims be handled responsibly and on a prompt basis. In furtherance of this goal, GameStop has established an internal dispute resolution program, GameStop C.A.R.E.S. ….
>
> The goal of GameStop C.A.R.E.S. is always to resolve workplace disputes or claims on a fair and prompt basis. GameStop C.A.R.E.S. does not change any substantive rights, but simply moves the venue for the dispute out of the courtroom and into arbitration. GameStop believes that GameStop C.A.R.E.S. will benefit employees and management alike by encouraging prompt, fair and cost-effective solutions to workplace issues.

SCOPE OF GAMESTOP C.A.R.E.S.

> GameStop C.A.R.E.S. covers all GameStop employees in the U.S. and Puerto Rico, including employees of GameStop, Inc., GameStop Texas, L.P. and Sunrise Publications, Inc.
>
> **[p.2]** These [Rules] govern procedures for the resolution and arbitration of all workplace disputes or claims. The Rules are a mutual agreement to arbitrate Covered Claims (as defined below). The Company and you agree that the procedures provided in these Rules will be the sole method used to resolve any Covered Claim as of the Effective Date of the Rules, regardless of when the dispute or claim arose. The Company and you agree to accept an arbitrator's award as the final, binding and exclusive determination of all Covered Claims. These Rules do not preclude any employee from filing a charge with the state,

local or federal administrative agency such as the Equal Employment Opportunity Commission.

GameStop C.A.R.E.S. is an agreement to arbitrate pursuant to the Federal Arbitration Act, 9 U.S.C. Sections 1-14, or if the Act is held to be inapplicable for any reason, the arbitration law in the state of Texas will apply. The parties acknowledge that the Company is engaged in transactions involving interstate commerce.

NO COVERED CLAIM MAY BE INITIATED OR MAINTAINED ON A CLASS, COLLECTIVE OR REPRESENTATIVE BASIS EITHER IN COURT OR UNDER THESE RULES, INCLUDING ARBITRATION. ANY COVERED CLAIM PURPORTING TO BE BROUGHT AS A CLASS ACTION, COLLECTIVE ACTION OR REPRESENTATIVE ACTION WILL BE DECIDED UNDER THESE RULES AS AN INDIVIDUAL CLAIM. THE EXCLUSIVE PROCEDURE FOR THE RESOLUTION OF ALL CLAIMS THAT MAY OTHERWISE BE BROUGHT ON A CLASS, COLLECTIVE OR REPRESENTATIVE ACTION BASIS WHETHER PARTICIPATION IS ON AN OPT-IN OR OPT-OUT BASIS, IS THROUGH THESE RULES, INCLUDING FINAL AND BINDING ARBITRATION, ON AN INDIVIDUAL BASIS. A PERSON COVERED BY THESE RULES MAY NOT PARTICIPATE AS A CLASS OR COLECTIVE ACTION REPRESENTATIVE OR A CLASS, COLLECTIVE OR REPRESENTATIVE ACTION MEMBER OR BE ENTITLED TO A RECOVERY FROM A CLASS, COLLECTIVE OR REPRESENTATIVE ACTION. ANY ISSUE CONCERNING THE VALIDITY OF THIS CLASS ACTION, COLLECTIVE ACTION AND REPRESENTATIVE ACTION WAIVER MUST BE DECIDED BY A COURT, AND AN ARBITRATOR DOES NOT HAVE AUTHORITY TO CONSIDER THE ISSUE OF THE VALIDITY OF THIS WAIVER. IF FOR ANY REASON THIS CLASS, COLLECTIVE OR REPRESENTATIVE ACTION WAIVER IS FOUND TO BE UNENFORCEABLE THE CLASS, COLLECTIVE AND REPRESENTATIVE CLAIM MAY ONLY BE HEARD IN COURT AND MAY NOT BE ARBITRATED UNDER THESE RULES. AN ARBITRATOR APPOINTED UNDER THESE RULES SHALL NOT CONDUCT A CLASS, COLLECTIVE OR REPRESENTATIVE ACTION ARBITRATION AND SHALL NOT ALLOW YOU TO SERVE AS A REPRESENTATIVE OF OTHERS IN AN ARBITRATION CONDUCTED UNDER THESE RULES. [Emphasis in original.]

If any court of competent jurisdiction declares that any part of GameStop C.A.R.E.S., including these Rules, is invalid, illegal or unenforceable (other than as noted for the class action, collective action and representative action waiver above), such declaration will not effect the legality, validity, or enforceability of the remaining parts, and each provision of GameStop C.A.R.E.S. will be valid, legal and enforceable to the fullest extent permitted by law.

….

WHAT IS A COVERED CLAIM?

[**p.3**] Arbitration applies to any "Covered Claim" whether arising before or after the Effective Date of the Rules. A Covered Claim is any claim asserting the violation or infringement of a legally protected right, whether based on statutory or common law, brought by an existing or former employee or job applicant, arising out of or in any way relating to the employee's employment, the terms or conditions of employment, or an application for employment, including the denial of employment; unless specifically excluded as noted in "What is Not a Covered Claim" below. Covered Claims include:

- Discrimination or harassment on the basis of race, sex, religion, national origin, age, disability or other unlawful basis (for example, in some jurisdictions protected categories include sexual orientation, familial status, etc.).
- Retaliation for complaining about discrimination or harassment.
- Violations of any common law or constitutional provision, federal, state, county, municipal or other governmental statute, ordinance, regulation or public policy. The following list reflects examples of some, but not all such laws. This list is not intended to be all inclusive but simply representative: Consolidated Omnibus Budget Reconciliation Act (COBRA), Davis Bacon Act, Drug Free Workplace Act of 1988, Electronic Communications Privacy Act of 1986, Employee Polygraph Protection Act of 1988, Fair Credit Reporting Act, Fair Labor Standards Act, Family and Medical Leave Act of 1993, Federal Omnibus Crime Control and Safe Streets Act of 1968, the Hate Crimes Prevention Act of 1999, The Occupational Safety and Health Act, Omnibus Transportation Employee Testing Act of 1991, Privacy Act of 1993, Portal to Portal Act, The Taft-Hartley Act, Veterans Reemployment Rights Act, Worker Adjustment and Retraining Notification Act (WARN).
- [**p.4**] - Personal injuries except those covered by workers' compensation or those covered by an employee welfare benefit plan, pension plan, or retirement plan which are subject to the Employee Retirement Security Act of 1974 (ERISA) other than claims for breach of fiduciary duty (which shall be arbitrable).
- Retaliation for filing a protected claim for benefits (such as workers' compensation) or exercising your protected rights under any statute.
- Breach of any express or implied contract, breach of a covenant of good faith and fair dealing, and claims of wrongful termination or constructive discharge.
- Exceptions to the employment-at-will doctrine under applicable law.
- Breach of any common law duty of loyalty, or its equivalent.
- …
- Any common law claim, including but not limited to defamation, tortious interference, intentional infliction of emotional distress or "whistleblowing".

WHAT IS NOT A COVERED CLAIM?

- Claims for workers' compensation benefits, except for claims of retaliation.
- Claims for benefits under a written employee pension or welfare benefit plan, including claims covered by ERISA.
- Claims for unemployment compensations benefits.
- Criminal charges.
- Matters within the jurisdiction of the National Labor Relations Board.

….

GAMESTOP C.A.R.E.S. PROCEDURES

Any Covered Claim between the Company and you must be resolved through procedures described in the following steps.

STEP 1: OPEN DOOR POLICY

If you have a workplace dispute or claim arising out of or in any way related with your employment or application for employment with the Company, you may, but do not have to, begin the dispute resolution process by reviewing the dispute with your supervisor. GameStop encourages employees to initiate the discussion of all workplace issues with their supervisor in an open and frank discussion of the situation. You are free to contact and involve your Human Resource representative at this stage as well. Most all workplace issues [**p.5**] are usually resolved in this manner. Applicants should contact the Human Resources representative for the location where they applied.

STEP 2: INTERNAL REVIEW

If you have a workplace dispute or claim arising out of or in any way related with your employment or application for employment with the Company and Step 1, which is optional, did not resolve it, you must proceed through the resolution process of GameStop C.A.R.E.S.by requesting Internal Review. Step 2 Internal Review is a mandatory step prior to arbitration of a Covered Claim….

You should receive the ERO's [The Company's Executive Review Officer's] decision within 30 days of the date the Internal Review Request form was received. For Covered Claims, if no decision is received within 30 days or if the dispute is not resolved to your satisfaction in Step 2, you must submit the Covered Claim to Step 3, Binding Arbitration, if you wish to pursue it further. For all other claims, the decision from Step 2, Internal Review, is final for purposes of the GameStop C.A.R.E.S. dispute resolution procedure.

…

Charges Filed with the EEOC or State Agency

Some Covered Claims are claims that may be filed with the Equal Employment Opportunity Commission (EEOC) or an equivalent state agency, such as a claim

for discrimination or harassment. For these Covered Claims, you may either file a complaint with these agencies or proceed to use GameStop C.A.R.E.S. If you choose to proceed directly to the GameStop [**p.6**] C.A.R.E.S. steps of internal review and arbitration, you will be asked to sign a voluntary waiver of the right to file charges with an agency…..

STEP 3: ARBITRATION AND OPTIONAL NON-BINDING MEDIATION

If you are dissatisfied with the results of the Internal Review and the claim is a Covered Claim, you must initiate arbitration in order to pursue the matter further….

2. Submit One Copy of the Notice of Intent to Arbitrate Form to the American Arbitration Association (the "AAA") along with a check in the amount of $125 (your share of the arbitration service cost) …

[**p.8**] - **MEDIATION AND ARBITRATION PROCEDURES**

Arbitration Procedures

….

[p.12] 16. Confidentiality.

The parties will have access throughout the arbitration proceedings to information that may be sensitive to the other party. Information disclosed by the parties or witnesses shall remain confidential. All records, reports or other documents disclosed by either party shall be confidential. The results of the arbitration, including any award, are confidential.

….

19. Optional Expenses and Refund of Fee.

If the arbitrator finds totally in your favor, the Company will reimburse the $125 arbitration fee to you. In addition to the arbitration fee, you [**p. 13**] may also have expenses which are your responsibility to pay, but only if you decide to incur the costs. Examples include:

- Your own attorney fees, if you choose to have legal representation,
- Any costs for witnesses you decide to call (other than Company management witnesses),
- Any costs to produce evidence that you request, or
- A stenographic record of the proceedings.

If the arbitrator rules in your favor on a claim under which fees and costs can be granted under law, then the arbitrator has the same authority as a judge to award reasonable attorneys' fees and other costs to you. Likewise, if the arbitrator rules in the Company's favor on a claim under which fees and costs can be granted

> under law, then the arbitrator has the same authority as a judge to award reasonable attorneys' fees and other costs to the Company.
>
> [**p.14**] **CALIFORNIA EMPLOYEES**
>
> GameStop employees in California have the option to forgo the benefits of the GameStop C.A.R.E.S. Rules if they so choose. In order to opt out of the Rules, California employees must send notice to GameStop within sixty (60) days of the Effective Date of the program or, for employees hired after the Effective Date of the Rules, within sixty (60) days of the start of their employment, that they do not want to be covered by the Rules. Notice must be sent by certified mail to GameStop C.A.R.E.S. ERO, 625 Westport Parkway, Grapevine, Texas 76051.
>
> ….
>
> **DEFINITIONS.**
>
> …
>
> The "employee" or "you" means any employee, former employee, or applicant for employment, of the Company in the U.S. and Puerto Rico on or after the Effective Date.
>
> ….

(Jt. Exh. M.)

The Program Brochure (the Brochure), among other things, provides that the Program is the result of Respondent's "philosophy of treating associates fairly and respectfully." (Jt.Exh. 1 at 2.) The Brochure goes on to state that "[b]oth associates and management benefit from programs that offer prompt, economical and responsible solutions to problems." Id. It further discloses that the Respondent's Program "is designed as a user-friendly way to resolve disputes with all of the remedies of litigation, but without the delays and cost." Id. It goes on to state that the neutral arbitrator will make a final decision and can award the same remedies as a court and that the Program "reduces legal costs for everyone." Id. The Brochure also provides that "Covered Claims are most legal issues and are defined in the Rules" and concludes by pointing out that by accepting an offer of employment or by continuing employment with Respondent and its affiliates, the employee agrees to use the Program and resolve workplace disputes and claims, including legal and statutory claims, arising out of the employee's employment regardless of the date such dispute or claim arose, and to accept an arbitrator's award as the final, binding and exclusive determination of all claims. The Brochure does not mention the Opt-Out option for California employees or the exclusion from Covered Claims of matters within the jurisdiction of the National Labor Relations Board. The Brochure further provides that if there are any differences between the Brochure and the Program Rules, the Rules shall control. (Jt.Exh. "N" at 3.)

All individuals employed by Respondents since November 7, 2011, have received a copy of the C.A.R.E.S. Program, including the Program Brochure. (Stip. 5; Jt. Exh. N.)

At all material times, Respondents have required employees employed at facilities located in all fifty U.S. states, the District of Columbia, and Puerto Rico, as a condition of employment, to execute a written acknowledgment of receipt for the C.A.R.E.S. Program

(Acknowledgment), although Respondents' California-based employees could opt out of the C.A.R.E.S. Program by following the procedure specified therein at page 14 of the Program Rules. (Stip. 7.)

On April 1, 2010, Charging Party signed the Acknowledgment which was retained by Respondents. (Stip. 6; Jt. Exh. O.) The Acknowledgment also reads as follows:

> I acknowledge that I have received a copy of the GameStop Store Associate Handbook, including the GameStop's procedure for resolving workplace disputes ending in final and binding arbitration. The Handbook summarizes certain information about my job and company policies, procedures and practices. I understand that it is my responsibility to read and familiarize myself with the information contained in the Handbook. I agree that all workplace disputes or claims will be resolved under the GameStop C.A.R.E.S. program rather than in court. This includes legal and statutory claims, and class or collective action claims in which I might be included. I understand that at any time and for any reason, GameStop may make changes to the Store Associate Handbook, except for the Rules, without prior notice. I understand that my employment with GameStop is "at will," and that either I or GameStop may end my employment at any time and for any reason.

No evidence was provided showing that Charging Party opted out of the Program within 60 days of the Effective Date of the program in 2007 or, within 60 days of the start of her employment. In addition, no evidence was provided showing that Charging Party ever affirmatively gave notice to Respondents that she did not want to be covered by the Rules or that she sent notice by certified mail to Respondents address of 625 Westport Parkway, Grapevine, Texas 76051. Thus, I find that Charging Party did not opt out of the Program as a California employee within 60 days of signing the Acknowledgment.

II. Issues

1. Whether the GameStop C.A.R.E.S. Program maintained by Respondents, which permits California-based employees such as the Charging Party to opt-out of the C.A.R.E.S. Program, requires employees, as a condition of employment, to waive their right to resolution of employment-related disputes by collective or class action in violation of Section 8(a)(1) of the Act?

2. Whether the GameStop C.A.R.E.S. Program maintained by Respondents would reasonably be read by employees to prohibit them from filing unfair labor practice charges with the Board in violation of Section 8(a)(1) of the Act?

III. Analysis

A. Section 10(b) Does not Bar a Finding as to the Validity of Respondents' Program.

Respondents argue that the Board lacks jurisdiction over the unfair labor practice claims alleged here because they are barred by Section 10(b) of the Act since the Charging Party signed the Acknowledgement and Program agreement on April 1, 2010 outside the 6-month 10(b) period of filing her charge on May 7, 2012. (R.Br. at 16-18.) Acting General Counsel responds

that the 2007 implementation date for the Program is irrelevant as its continued application to all of Respondents' employees makes the continuing rule subject to an ongoing violation within the 10(b) period.

The complaint alleges that the Respondents maintain the Program which permits California-based employees such as the Charging Party to opt-out of it and requires employees, as a condition of employment, to waive their right to resolution of employment-related disputes by collective or class action in violation of Section 8(a)(1) of the Act. I find that the alleged unlawfulness of the Program here is not related solely to circumstances existing on a date in 2007 when the Program was implemented or on the date that the Charging Party signed the Acknowledgment in April 2010. Instead, at issue is the legality of Respondents' continued maintenance of its Program. Since the complaint here alleges that the Program is unlawful and the Respondents' continued maintenance of it is violative under the Act, I find that the allegations are not barred by the statute of limitations set for in Section 10(b) of the Act as the alleged violation is not "based upon" or "inescapably grounded on" events outside the 6-month 10(b) period. See *Control Services, Inc*., 305 NLRB 435, 435 n. 2, 442 (1991)(Section 10(b) does not bar finding of violation of continually maintained rules.).

B. The Respondents' Arbitration Program as Applied to Respondents' Employees, Violates Section 8(a)(1) of the Act as a Reasonable Employee would Read the Program to be Mandatory Waiver under *D.R. Horton*.

The first issue, set forth in stipulation 1 and paragraphs 3(a), 4 and 5 of the complaint, is whether in view of the Board's decision in *D.R. Horton,* the Respondents' maintenance of the Program, as a condition of employment which contains provisions requiring employees to resolve employment-related disputes exclusively through individual arbitration proceedings, and to relinquish any right to resolve such disputes through collective, representative, or class action, violates Section 8(a)(1) of the Act by precluding employees from acting collectively or as a class or otherwise exercising their Section 7 rights under the Act.[3]

[3] As has been argued frequently over the past year, the Respondents also argue that *D.R. Horton*, discussed herein, is void because the Board lacked a quorum when it issued the decision. This argument derives from the D.C. Circuit's decision in *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), which the Board has rejected and so must I. See, e.g., *Bloomingdale's Inc*., 359 NLRB No. 113 (2013); *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. at fn.1 (2013). Though the Fourth Circuit recently agreed with *Noel Canning* when it decided *NLRB v. Enterprise Leasing Co. Southeast, LLC*, Nos. 12–1514, 12–2000, 12–2065, 2013 WL 3722388 (4th Cir. 2013), the Board has noted that at least three courts of appeals have reached a different conclusion on similar facts. *Bloomingdales,* supra, (citing *Evans v. Stephens*, 387 F.3d 1220 (11th Cir. 2004), cert. denied 544 U.S. 942 (2005); *U.S. v. Woodley*, 751 F.2d 1008 (9th Cir. 1985); *U.S. v. Allocco*, 305 F.2d 704 (2d Cir. 1962)). Earlier in this case, I rejected the same argument by Respondents and I ruled in my April 9, 2013 Order Denying Respondents' Motion to Stay this proceeding, citing many of the same cases. Consistent with Board precedent, the Respondents' defense based on *Noel Canning* and a lack of quorum fails. Also, Respondents additionally or alternatively argue that *D.R. Horton* was wrongly decided, noting that the Eighth Circuit and lower courts have declined to follow it to date in matters, I note, are unrelated to the NLRA. See, e.g., *Owen v. Bristol Care, Inc.*, 702 F.3d 1050 (8th Cir. 2013). However, I reject any claim that the *D.R. Horton* decision was wrongly decided as I am bound by Board precedent unless and until it is reversed by the Board itself or the Supreme Court. See *Pathmark Stores, Inc*., 342 NLRB 378 fn. 1 (2004).

In *D.R. Horton*, slip op. at 1, the Board explained that an employer violates Section 8(a)(1) of the Act by imposing, as a condition of employment, a mandatory arbitration agreement that precludes employees from "filing joint, class, or collective claims addressing their wages, hours, or other working conditions against the employer in any forum, arbitral or judicial." Citing to *Spandsco Oil & Royalty Co*., 42 NLRB 942, 948-949 (1942), *Salt River Valley Water Users Ass'n*, 99 NLRB 849, 853-854 (1952), enfd. 206 F.2d 325 (9th Cir. 1953), and a string of other cases, the Board noted that concerted legal action addressing wages, hours, and working conditions has consistently fallen within Section 7's protections. *D.R. Horton* at fn. 4. The Board stopped short of requiring employers to permit both class-wide arbitration and class-wide suits in a court or administrative forum, finding that "[s]o long as the employer leaves open a judicial forum for class and collective claims, employees' NLRA rights are preserved without requiring the availability of class-wide arbitration." Id. at 12.

1. The Program as Applied to Respondents' Non-California Employees Is Mandatory and Unlawful Under *D.R. Horton*

In the instant case, there is no dispute that the Program is a condition of employment. It is self-executing upon implementation of the Program in 2007 or accepting and continuing employment. The Program is also a mandatory condition of employment because it is a term of employment to which all non-California employees are bound at the beginning of their employment with Respondents and continuing thereafter.

It is likewise clear that the Program prohibits collective and representative actions entirely. With regard to collective or representative arbitration, the scope of the Program states at page 2:

> NO COVERED CLAIM MAY BE INITIATED OR MAINTAINED ON A CLASS, COLLECTIVE OR REPRESENTATIVE BASIS EITHER IN COURT OR UNDER THESE RULES, INCLUDING ARBITRATION. ANY COVERED CLAIM PURPORTING TO BE BROUGHT AS A CLASS ACTION, COLLECTIVE ACTION OR REPRESENTATIVE ACTION WILL BE DECIDED UNDER THESE RULES AS AN INDIVIDUAL CLAIM. THE EXCLUSIVE PROCEDURE FOR THE RESOLUTION OF ALL CLAIMS THAT MAY OTHERWISE BE BROUGHT ON A CLASS, COLLECTIVE OR REPRESENTATIVE ACTION BASIS WHETHER PARTICIPATION IS ON AN OPT-IN OR OPT-OUT BASIS, IS THROUGH THESE RULES, INCLUDING FINAL AND BINDING ARBITRATION, ON AN INDIVIDUAL BASIS. A PERSON COVERED BY THESE RULES MAY NOT PARTICIPATE AS A CLASS, COLLECTIVE OR REPRESENTATIVE ACTION MEMBER OR BE ENTITLED TO A RECOVERY FROM A CLASS, COLLECTIVE OR REPRESENTATIVE ACTION.

Here, as in *D.R. Horton*, the Program also precludes an arbitrator from awarding any class, collective, or representative remedy. The exclusive procedure for the resolution of all claims that may otherwise be brought on a class, collective or representative action basis whether participation is on an opt-in or opt-out basis, is through the Program Rules, including final and binding arbitration, on an individual basis. Because the Respondents' Program compels its employees to waive their rights to pursue class, collective or representative actions in court or

arbitrations as a condition of employment, I find *D.R. Horton* is directly applicable and the Program unlawful. Id. at 12.

Respondents argue that the excepted language of "matters within the jurisdiction of the [NLRB]" distinguishes this case from the facts in *D.R. Horton* to save the Program. For the same reasons articulated by my colleague, Administrative Law Judge Steven Fish, in his recent decision styled *JP Morgan Chase & Co*., JD(NY) 40-13, 2913 WL _____ (August 21, 2013), I reject Respondents' argument and for the same reasons in Judge Fish' case involving identical exclusion language for any claims under the NLRA. I also find the Program here is unlawful "[n]ot because it restricts or bars filing of NLRB charges," but because it interferes with and restricts employees engaging in protected concerted conduct. See *JP Morgan Chase & Co.*, supra at 10. Furthermore, I also agree with ALJ Fish that "this distinction between *D.R. Horton* is insignificant, and the inclusion of the clause concerning the right to file NLRB charges in no way effects the violation of the Act encompassed by the complaint that employees are precluded from pursuing class or collective actions in all forums, whether arbitral or judicial." Id.

Respondents also cite various Supreme Court cases both pre-dating and post-dating *D.R. Horton* to argue that either *D.R. Horton* was wrongly decided or will soon be overruled. As referenced in footnote 3 above, I am bound by the Board's decision in *D.R. Horton* until the Board or the Supreme Court does something to change its current holding. To the extent the Respondents' Supreme Court cases pre-date *D.R. Horton*, I also find that the Board considered these arguments and precedents in *D.R. Horton* to support a different conclusion, by which I am bound.

As for the Supreme Court cases that post-date *D.R. Horton*, I find them distinguishable and not controlling as they do not address fundamental substantive federal labor rights established by congressional legislation as is involved in this case. Here, the Program restrains and interferes with the Respondents' employees and illegally prevents them from engaging in protected concerted activity by pursuing class or collective actions in all forums as guaranteed under the NLRA. Unlike other federal statutes, the NLRA is built and based upon collective action procedures to protect substantive rights including a right to assemble, pursue claims, and seek remedies in a collective manner. I further find that the NLRA precludes a waiver of substantive collective or representative actions in all forums.

Therefore, I find that the Program is a condition of employment for non-California employees that unlawfully requires employees to waive their right to resolution of all employment-related disputes by collective, representative, or class action in violation of Section 8(a)(1) of the Act. The *D.R. Horton* case remains controlling Board law and requires a finding that Respondents have violated the Act as alleged as to it non-California employees.

2. <u>The Program, as Applied to Respondents' California Employees, Is Also Mandatory and Unlawful</u>

The Program defines Respondents' employees to be "any employee, former employee, or applicant for employment, of the Company in the U.S. and Puerto Rico on or after the Effective Date." (Jt. Exh. "M" at 14.) It does not specifically exclude their California employees from the mandatory terms of the Program except finally embedded at the end of the Program Rules at page 14 one finds the opt-out right available only to California employees if they take

affirmative action to give notice to the Respondents via certified mail. Therefore, if a California employee does nothing under the Program Rules, he or she defaults to the mandatory arbitration terms and forgoes any right to engage in protected concerted conduct and pursue a collective or representative claim or seek collective remedies at the NLRB.

Moreover, neither the Brochure nor the Acknowledgment clearly informs the Charging Party or other California employees that they are eligible to opt-out of Respondent's Program as California employees. (Jt. Exh. "O".) The documents also do not clearly state that California employees are reserved the right to engage in protected concerted conduct in a collective or representative action at the NLRB as part of the Program. Once again, buried at page 14 of the Program Rules is there language about a California employee's opt-out right. Consequently, I find that the Acknowledgment and Brochure are ambiguous and do not clearly inform California employees like Charging Party here that they can opt-out of the Program. As a result, I further find that due to this ambiguity as to a California employee's opt-out rights and an employee's continued ability to retain their Section 7 rights as part of the Program, the Program, as a term and condition of employment, is a form of mandatory arbitration that is unlawful under *D.R. Horton* even for California employees like the Charging Party.

Therefore, I find that the Respondents have violated Section 8(a)(1) of the Act by maintaining and distributing the overbroad Program documents including the Rules, Brochure, and Acknowledgment documents, as alleged. I further find that the Program is unlawful for California employees the same as it is for non-California employees and it unlawfully requires employees to waive their right to resolution of all employment-related disputes by collective, representative, or class action in violation of Section 8(a)(1) of the Act. The *D.R. Horton* case remains controlling Board law and requires a finding that Respondents have violated the Act also as alleged as to its California employees.

3. Respondents' Arbitration Program, as Applied to California Employees, Also Violates Section 8(a)(1) of the Act as the Opt-Out Language and Confidentiality Provisions Make It Involuntary and in Violation of Public Policy.

Alternatively, if there is no ambiguity and the current language of Respondents' Program is clear and not overly broad that California employees are given clear notice that they are required to opt-out of the Program by taking affirmative action detailed in the Program Rules, I must analyze whether the opt-out provision here is lawful and voluntary under the Act with the Program's confidentiality provisions.

I further find that it is unlawful to force employees to take affirmative involuntary actions just to maintain the status quo to retain the same substantive Section 7 rights that each California employee had *before* enactment of the Program. It is a fallacy to believe there is any value or benefit received by Respondents' California employees to prospectively waive their substantive Section 7 rights to engage in protected concerted conduct in exchange for utilizing the FAA to pursue a single individual work-related action. In addition, I further find that a reasonable employee would interpret the Program's confidentiality provision as an unlawful instruction not to talk about their working conditions as even employees who opt-out of the Program are prevented from acting concertedly with employees who opt-into the Program. Consequently, I further find that the Respondents' Program violates Section 8(a)(1) of the Act for these reasons and those that follow.

(a) The Status Quo

First of all, one must understand that there has been an influx in analogous opt-out or waiver provisions in connection with company-imposed arbitration programs where the challenged practice involves employees being required to take affirmative actions, through a form of "notice" rule, by mailing to the employer via certified mail, a written notice that they are opting out of the mandatory arbitration program, just to maintain the "status quo" that has existed to them for decades – the substantive rights under Sections 7 and 8(a)(1) of the Act to engage in protected concerted conduct for the purpose of collective bargaining or other mutual aid or protection without employer interference, restraint, or coercion.

Under the status quo, a charging party can file a charge with the NLRB at no cost to the charging party. If the charge is deemed to have merit by the agency's Office of the General Counsel, a complaint is issued on behalf of the charging party, a hearing is noticed approximately 30-60 days down the road, and most cases get prosecuted as a collective or representative action in a timely manner. In limited situations, if the company is able to prevail in the case, the company recovers against the government and *not* the charging party.

In contrast, under Respondents' Program, the charging party must pay $125 to initiate arbitration if the labor dispute is not worked out in-house and individually within the Company in the first 2 steps where the charging party is either alone or must pay for a lawyer to proceed. (Jt. Exh. "M" at 4-6.) In addition, under the Respondents' Program, the charging party is liable for the Respondents' attorney fees and costs if the Company prevails under certain conditions. (Jt. Exh. "M", at 12.) Finally, under the Respondents' Program, the charging party is subject to three steps or proceedings, possibly 4, if either party elects to pursue non-binding mediation. (Jt. Exh. "M" at 4-6.)

Thus, ignoring the validity of the Program under the Act, given the choice between the status quo and Respondents' Program, it is less expensive, more efficient, and more feasible for a charging party to proceed with his or her work-related claim under the status quo than in the Program. Consequently, I find that Respondents' California employees do not gain any benefit or advantage pursuing their work-related claims individually in mandatory arbitration under the Program rather than through the status quo of protected concerted conduct through a collective or representative action at the NLRB.

This case is similar to other recent cases decided by other administrative law judges, but not yet addressed by the Board, that have decided whether an employer's mandatory arbitration program with an opt-out provision is truly voluntary on employees who must take affirmative action to opt-out or, instead, a form of involuntary interference on an employee's ability to participate in protected activities under the Act. Therefore, this case is different and distinguishable from the *D.R. Horton* case referenced above. See, i.e., *24 Hour Fitness USA, Inc*., JD(SF) 51-12, 2012 WL 5495007 (Nov. 6, 2012), respondent's exceptions filed Jan. 3, 2013; *Mastec Services*, JD(NY) 25-13, 2013 WL 2409181, (June 3, 2013), respondent's exceptions filed June 28, 2013; and *Bloomingdales, Inc*., JD(SF) 29-13, 2013 WL _____ (June 25, 2013), respondent's exceptions filed Aug. 12 and general counsel's exceptions filed Aug. 13, 2013. I agree with the legal analysis applied by my colleagues in the *24 Hour Fitness,*

Inc. and *Mastec Services* cases and respectfully disagree with my colleague in the *Bloomingdales, Inc.* case as explained hereafter.

(b) General Policy Behind the Act and NLA

Section 7 of the Act guarantees employees the right to invoke procedures generally available under state or federal law for concertedly pursuing employment-related legal claims without employer coercion, restraint, or interference. *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), slip op. at 10; see also *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567-68 (1978). By imposing on employees, as a condition of employment, a policy that precludes collective, representative, and class-wide actions and compels them to affirmatively send a notice via certified mail just to maintain the status quo, Respondents have unlawfully denied employees their right to act collectively and voluntarily. Section 8(a)(1) prohibits employers from compelling individual employees, as a condition of employment, to waive their Section 7 substantive right to protected concerted conduct for mutual aid and protection triggered by workplace terms and conditions.

The NLA and the NLRA were enacted to level the playing field between employers on one side and their unsophisticated, powerless, unaware, and/or otherwise vulnerable employees, on the other side. See 29 U.S.C. Section 151; *24 Hour Fitness USA, Inc., supra* at 15 (The case describes the public policy declarations in the NLA and the NLRA.) The fact that the NLA and the NLRA were enacted *after* the FAA brings the FAA's savings clause into play to limit the FAA if it conflicts or interferes with the NLA or the NLRA. See *9 U.S.C. Section 2* ("A written provision in … a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.").

Given the purposes and public policy behind the NLA and NLRA to protect those individual employees having less bargaining power than their employers, collective and representative claims require multiple parties prosecuting an action given the long history of abuse by employers over their less powerful employees. Strength in numbers is more than a colloquialism when an individual employee faces or dares to engage in protected concerted conduct with his or her more powerful employer. Finally, for matters under the NLRA, the individual action has never been an option as stated herein the purpose and goal of the NLRA is to instill by way of collective action substantive rights upon employees to proceed with their work-related claims without interference, coercion, or restraint. See Section 7 of the Act.

The Program here imposes a waiver of Section 7 rights at a time when employees are unlikely to have any awareness of employment issues that may be resolved most effectively by collective legal action, or of any other employees' efforts to act concertedly to redress issues of common concern. The Program's confidentiality clause prevents all employees from discussing with other employees the arbitration process or the results of arbitration. Moreover, the Program here imposes a waiver in circumstances where employees have no notice of their Section 7 rights to engage in class or collective legal activity or that a prohibition of such activity violates Section 8(a)(1) of the Act. As noted by the Supreme Court:

> [C]oncerted activity rights] are not viable in a vacuum; their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others.

Central Hardware Co. v. NLRB, 407 U.S. 539, 543 (1972).

(c) The NLRA vs. the FAA

While in recent cases, the Supreme Court has found the FAA to be the Swiss Army knife of the dispute resolution world for large complex commercial cases, large class action consumer lawsuits, and to preempt various proceedings involving state laws, there is a limit to the FAA's utility when it effects collective or representative claims under the NLRA. See *Kilgore v. KeyBank, N.A.*, 673 F3d 947, 955 (9th Cir. 2012)(Congress intended to keep claims under the NLRA out of arbitration proceedings.).[4] While the FAA may be a favored benefit for some types of litigation, it is not favored or beneficial to an unaware and less powerful individual charging party versus their employer engaging in protected concerted conduct. Respondents' Program, even if employees entered into by choice, unlawfully "[s]eeks to erect 'a dam at the source of supply' of potential, protected activity" and "therefore interfere[s] with employees' exercise of their Section 7 rights." *Parexel International*, 356 NLRB No. 82, slip op. at 4 (2011), quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185 (1941).

As an appointed judicial officer at this agency, I am empowered to protect the NLRA from attack be it from an overextended FAA or otherwise. To maintain the status quo, the FAA should not trump the NLA or the NLRA. See *Sullivan & Glyn*, "Horton Hatches the Egg: Concerted Action Includes Concerted Dispute Resolution", 64 Ala. L. Rev. 1013, 1015, 1020, 1034-1054 (2013). Also as the Board emphasized in *D.R. Horton*, "the intent of the FAA was to leave substantive rights undisturbed." *D.R. Horton*, supra at 11. As stated above, the Program here is unlawful because it compels Respondents' employees to waive their substantive right to pursue work-related claims in a collective or class action, a Program that forbids class or collective actions in any forum. See *D.R. Horton*, supra at 10-11. As such, the Program is unlawful and violates public policy because it requires employees to waive the rights guaranteed under the NLRA as a condition of employment.

Moreover, the Program is unlawful on public policy grounds because it operates as a prospective waiver of the Respondents' employees' right to pursue future protected concerted conduct in the form of collective or representative actions or seek remedies provided by the NLRA such as cease and desist orders and notice provisions to fellow employees. Respondents' employees cannot be lawfully compelled to affirmatively act (opt-out, via certified mail, within

[4] Generally speaking under established precedent, the Board finds deferral to arbitration appropriate when the following conditions are met: the parties' dispute arises within the confines of a long and productive collective-bargaining relationship; there is no claim of animosity to employees' exercise of Section 7 rights; the parties' agreement provides for arbitration in a broad range of disputes; the parties' arbitration clause clearly encompasses the dispute at issue; the party seeking deferral has asserted its willingness to utilize arbitration to resolve the dispute; and the dispute is well suited to resolution by arbitration. See *Sheet Metal Workers*, *Local 18 (Everbrite, Inc.)*, 359 NLRB No. 121 (May 13, 2013) citing *United Technologies*, 268 NLRB 557, 558 (1984); accord: *Collyer Insulated Wire*, 192 NLRB 837, 842 (1971).

60 days of signing the Acknowledgment) in order to maintain the status quo - their substantive statutory rights under Section 7 of the Act. See *Ishikawa Gasket America, Inc*., 337 NLRB 175, 175-176 (2001), enfd. 354 F.3d 534 (6th Cir. 2004)(Future rights of employees as well as the rights of the public may not be traded away in a settlement agreement for monetary consideration.); see also *Mastec Services*, supra at 5-6 (same). Stated differently, the requirement that Respondents' employees must affirmatively act to preserve rights already protected by Section 7 of the Act and return to the status quo through the opt-out process is an unlawful burden on the substantive right of employees to engage in protected concerted conduct through collective or representative litigation that may arise in the future. See *24 Hour Fitness, Inc*., supra at 16. Moreover, the opt-out language is unlawful because it forces Respondents' employees to prospectively waive their Section 7 right to participate in class or collective actions.

To allow the FAA to trump or somehow overrule the NLA and NLRA would be to take us back to the oppressive work conditions of the late 1920's. Employees today remain reluctant to pursue individual labor claims against their employer because they remain unsophisticated, powerless, unaware, and/or vulnerable on their own. Employees are reluctant to give affirmative notice and bring attention to themselves just to make noise and jump through hoops solely to maintain the status quo of having free and quick access to litigate their collective and representative claims and engage in protected concerted conduct at the NLRB. I find that there is no consideration for an employee's promise to forgo future unfair labor practice collective or representative claims at the NLRB in exchange for the being forced to arbitrate these same claims solely on an individual basis.

(d) The Opt-Out Requirement is Unlawful

Charging Party and other California employees under the Respondents' opt-out Program, must either affirmatively opt-out of the Program within 60 days of the effective date in 2007 or within 60 days of the start of their employment by mailing notice via certified mail to an address deeply embedded at page 14 of the Rules. (Jt. Exh. "M" at 14.) Respondents argue that Charging Party did not choose to opt-out of the Program, "instead opting to continue to voluntarily participate in the [P]rogram." (R.Br. at 5.)

Giving California employees this limited opportunity to opt out of the Program during their first 60 days of employment while they may be on probation or simply unaware or afraid to act or proceed more than individually does not adequately protect employees' Section 7 rights and does not make the program voluntary. Cf., e.g., *Williams v. Securitas Sec. Servs*, 2011 WL 2713741, at *2 (E.D. Pa. 2011)("[the employer] intends to bind its employees unless they opt out by calling a phone number deeply embedded in the 'agreement' within 30 days even though the employee never signs the document. Quite simply, this Agreement stands the concept of fair dealing on its head").

I further find that the Respondents' opt-out policy would have a reasonable tendency to chill employees from exercising their statutory rights because Respondents' employees are required to take affirmative action that draws attention to themselves such as sending notice that they are opting out of the Program via certified mail to Respondents. In addition, Respondents' requirement that their California employees affirmatively opt-out of the Program to preserve their Section 7 rights is an unlawful burden on the employees' right to engage in collective

litigation. Respondents do not cite any cases on point that hold differently or address employees' Section 7 right to act concertedly, including their substantive statutory right to bring collective or class claims, or whether that right can be irrevocably waived with respect to all future claims. I find that by imposing the immediate and affirmative requirement on employees to maintain their Section 7 rights, or lose them entirely, Respondents interfere with their employees' exercise of those statutory rights.

The Act protects "concerted activity" such as the right to strike and, similarly, the filing and pursuit of collective, representative, and class-wide work-related claims, because Congress believed that, individually, employees could not and would not effectively protect their legitimate interests. A notice rule, applied to concerted activity, requires that each individual inform the employer of his or her intention to engage in concerted activity in order for the activity to be protected. *Special Touch Home Care Services*, 357 NLRB No. 2 at 7 (2011). The Board, through: (1) the premises of the Act; (2) Congress' decision to impose a duty to give notice *only* on unions; and (3) its own experience with labor-management relations, "all suggest that permitting an employer to compel employees to provide individual notice of participation in collective action would impose a significant burden on the right to strike, both as to individual employees and employees as a group." Id.; *D.R. Horton*, supra at 3 (quoting same). Just the same here, a significant burden exists on the right to engage in protected concerted conduct through a collective or representative action, both to individual employees and employees as a group who are compelled to provide individual opt-out notice of participation in the protected right to the employer.

> Not only would individual employees be faced with the potentially intimidating prospect of telling their employer that they intend to take action that the employer might view unfavorably, but the ability of employees as a group to mount an effective strike would also depend on the willingness of individual employees to so notify the employer.

Special Touch Home Care Services, supra at 7. As stated above, I find that the same significant burden, and intimidation fear applies to the Respondents' opt-out notice rule interfering with their California employees' rights to engage in protected concerted conduct such as pursuing a collective or representative work-related action as it does to a notice rule compelling the same interferes with an employee's to the right to strike. Both the right to engage in collective or representative actions and a right to strike are equally viewed a protected concerted conduct.

I further find that the opt-out policy is unconscionable as it provides Respondents' California employees something (the compelled opt-out requirement) that has no value. It involuntarily forces employees to bring attention to their actions by affirmatively opting out through the compelled use and burdensome procedure and expense of certified mail to the Company just to return to the status quo – proceeding unabated, at present or in the future, in a collective and representative manner to engage in protected concerted conduct before the NLRB under the NLRA.

(e) The Program's Confidentiality Language

Finally, the Acting General Counsel raises further challenges the legality of the Program's confidentiality provisions and points out that "even for employees who avail themselves to the opt-out provision, the . . . Rules substantially interfere with Section 7 activity

by interfering with concerted activity between opting-out and non-opting out employees." (AGC Br. at 8.) In addition, the Acting General Counsel later argues that because an employee who proceeds to arbitration may not disclose any information obtained during that proceeding, or the results of the arbitration, this would presumably prevent non-opting-out employees who had prevailed in arbitration from advising their co-workers with regard to similar work-related claims, including employees who had opted opted-out. (AGC Br. at 10.)

The Board has consistently held that a confidentiality provision which expressly prohibits employees from discussing among themselves, or sharing with others, information relating to wages, hours, or working conditions, or other terms and conditions of employment violates Section 8(a)(1) even if it was never enforced and was not unlawfully motivated. See, e.g., *Double Eagle Hotel & Casino*, 341 NLRB 112, 115 (2004).

The relevant Program provision states:

> The parties will have access throughout the arbitration proceedings to information that may be sensitive to the other party. Information disclosed by the parties or witnesses shall remain confidential. All records, reports or other documents disclosed by either party shall be confidential. The results of the arbitration, including any award, are confidential.

I find this provision would reasonably restrict employees from disclosing to other employees information about any employment disputes subject to the Program. Employees would reasonably construe this provision as barring them from discussing the substance and outcome of an arbitration regarding their terms or conditions of employment, and it is therefore overly-broad. Moreover, the effect of this prohibition as applied to arbitrations concerning wages, hours and working conditions would be to create an unlawful barrier to group action. Under the Program, employees are not only precluded from proceeding together in arbitration, they are precluded by the confidentiality provision from discussing any aspect of the arbitration including information disclosed in the proceeding, all records, reports, or other documents, as well as all results, decision, and award from the arbitration proceedings. As Acting General Counsel accurately points out, the Program substantially interferes with Section 7 activity by preventing protected concerted conduct between opting-out and opting-in employees.

Accordingly, because a reasonable employee would interpret the Program's confidentiality provision as an unlawful instruction not to talk about their working conditions, I find that by maintaining the Program as a condition of employment as alleged, it violates Section 8(a)(1) of the Act. Furthermore, I also find that the Program is a condition of employment that requires employees to waive their right to maintain class, collective, or representative actions in all forums, whether arbitral or judicial, in violation of Section 8(a)(1) of the Act. Finally, for the reasons stated above, I further find that the Program unlawful under Section 8(a)(1) of the Act and in violation of public policy because Respondents cannot lawfully require its employees to affirmatively act or opt-out via certified mail within 60 days of signing the Acknowledgment just to maintain the status quo of Section 7 under the Act. This illegal opt-out requirement is not voluntary, chills an employee's ability to maintain his or her rights under the Act, and restrains or interferes with employees' substantive rights under Section 7 to engage in protected concerted conduct.

4. Respondents' Employees Would Reasonably Read the Arbitration Program to Prohibit Them from Filing Unfair Labor Practice Charges with the Board in Violation of Section 8(a)(1) of the Act.

Paragraphs 3(b), 4 and 5 of the complaint allege that at all material times since 2007, employees would reasonably conclude that the Program, as a condition of employment, precludes them from filing unfair labor practice charges with the Board as well as from engaging in conduct protected by Section 7 of the Act.

The Acting General Counsel, however, asserts that the Program precludes employees from filing unfair labor practice charges with the Board. On the other hand, the Respondents argue that the Program does not and could not reasonably be read to prohibit employees from filing charges with the Board.

The Program is imposed on all employees as a condition of hiring or continued employment by Respondents, and it is therefore treated in the same manner as other unilaterally implemented workplace rules. When evaluating whether a rule, including a mandatory arbitration policy, violates Section 8(a)(1), the Board applies the test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). See *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), enfd. 255 Fed.Appx. 527 (D.C. Cir. 2007); *D.R. Horton*, supra at 4-6. Under *Lutheran Heritage*, the first inquiry is whether the rule explicitly restricts activities protected by Section 7. If it does, the rule is unlawful. If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage* at 647.

In the instant case, I find that the Program is unlawful on its face as it interferes with and restricts Respondents' employees from engaging in protected concerted conduct under Section 7 of the Act and explicitly precludes them from pursuing class, collective, or representative actions in all forums.

Alternatively, as stated above, in evaluating the impact of a rule on employees, the inquiry is whether the rule would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998), *enfd* 203 F.3d 52 (D.C. Cir. 1999). A rule does not violate the Act if a reasonable employee merely *could* conceivably read it as barring Section 7 activity. Rather, the inquiry is whether a reasonable employee *would* read the rule as prohibiting Section 7 activity. *Lutheran Heritage,* supra. The Board must give the rule under consideration a reasonable reading and ambiguities are construed against its promulgator. *Lutheran Heritage*, supra at 647; citing *Lafayette Park Hotel*, 326 NLRB at 828. Moreover, the Board must "refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights." *Lutheran Heritage,* supra at 646.

Looking at the Program as a whole, I find the Rules to be overbroad, confusing, and ambiguous so that a reasonable employee would read them as prohibiting him or her from filing unfair labor practice charges with the Board. For example, as pointed out by the Acting General Counsel, page 2 of the Rules provides that they "govern procedures for the resolution and arbitration of all workplace disputes or claims," and that all "Covered Claims" must be arbitrated. (Jt. Exh. "M" at 2.) Covered claims under the Rules include "any claim asserting the

violation or infringement of a legally protected right, whether based in statutory or common law … arising out of or in any way relating to the employee's employment …, unless specifically excluded as noted in "What is Not a Covered Claim' below." Id at 3-4. Examples of "Covered Claims," include many of the same things that make up unfair labor practice claims under the Act such as "Discrimination or harassment on [an] unlawful basis," "Retaliation for complaining about discrimination or harassment," "[v]iolations of any … federal … statute," including "the Taft-Hartley Act …, [r]etaliation for … exercising your protected rights under any statute," and "claims of wrongful termination or constructive discharge." Id.

As stated above, many of the Respondents' "Covered Claims" are interchangeable examples of unfair labor practice claims. Moreover, unlawful discrimination and retaliation based on activity protected by Section 7 of the Act likewise could be considered a "Covered Claim" under the Rules. At this point, any possible reading leads to the conclusion that arbitration would be the employee's sole and exclusive remedy for an unfair labor practice dispute.

It is not until page 4 of the Rules that the Program first lists "Matters within the jurisdiction of the National Labor Relations Board" as part of a short list of "What is Not a Covered Claim." Id at 4. Even the meaning of this statement is unclear as it finally comes after mentioning that many potential NLRA disputes must be arbitrated as individual claims. Moreover, while the Rules state on page 2 that they "do not preclude any employee from filing a charge with a state, local, or federal administrative agency such as the Equal Employment Opportunity Commission," any reading of this provision to apply to the NLRB is undercut by the contrary statements that come both before and after it.

The Respondents place strong reliance on this single sentence to argue that such explicit language "obviously and explicitly permits employees to access the Board." (R. Br. at 1, 11-15.) As just discussed, however, this sentence is illusory, because when this single sentence is read in conjunction with the "Covered Claim" language through numerous examples of the types of claims that fall within the NLRB's jurisdiction, the picture is confusing at best. This is particularly true since nowhere in the Program are disputes forming the basis for an NLRB charge defined, either by plain terms or by way of example, as "What is Not a Covered Claim."

I find the Program language is overly broad and that most non-lawyer employees would not be familiar with such intricacies, nuances, or differences between claims within NLRB jurisdiction and the Program's Covered Claims. I further find that an employee would easily construe the Program to require arbitration of claimed violations of the Act, a federal statute, and such common claims before the NLRB as those involving retaliation allegations for filing a claim under the Act and frequent claims of wrongful termination and constructive discharge – claims defined as Covered Claims in the Program.[5]

[5] The Respondents' clever packaged Program refers to its 20-something videogame enthusiast employees as "associates" and misleads them by selling the Program as "GameStop C.A.R.E.S." and the Program "does not change any substantive rights but simply moves the venue for the dispute out of the courtroom and into arbitration", "GameStop C.A.R.E.S. is designed as a user-friendly way to resolve disputes with all of the remedies of litigation, but without the delays and cost" and "[t]he arbitrator can award the same remedies as a court." Jt. Exh. "M" at 1, Jt. Exh. "N" at 2. As explained above, instead of treating its employees fairly and responsibly, Respondents' Program restrains and interferes with its

Finally, while Respondents' Program Rules exclude matters within the jurisdiction of the NLRB from arbitration, the exclusion is not mentioned at all in Respondents' Brochure or Program Acknowledgment that every employee must sign when hired. As a result, there is a conflict between the Program Rules and the Brochure and Acknowledgment form language that creates an ambiguity that would reasonably lead employees to believe that their right to file unfair labor practice claims with the Board is prohibited or restricted.

Considering that ambiguities must be construed against the employer, I find the Program violates section 8(a)(1) because it explicitly interferes with rights protected by Section 7, and it would cause employees to reasonably believe that filing charges with the Board are either prohibited or would be futile.

CONCLUSIONS OF LAW

(1) The Respondents, GameStop Corp., GameStop, Inc., Sunrise Publications, Inc. and GameStop Texas Ltd. (L.P.) (collectively Respondents or the Company), are employers within the meaning of Section 2(6) and (7) of the Act.

(2) The Respondents violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory and binding arbitration policy which required employees to resolve employment-related disputes exclusively through individual arbitration proceedings and to relinquish any right they have to resolve such disputes through collective or class action.

(3) The Respondents violated Section 8(a)(1) of the Act by maintaining a mandatory and binding arbitration policy that restricts employees' protected activity or that employees reasonably would believe bars or restricts their right to engage in protected activity and/or file charges with the National Labor Relations Board.

(4) The Respondents violated Section 8(a)(1) of the Act by requiring employees to maintain the confidentiality of the existence, content, and outcome of all arbitration proceedings.

(5) Respondents' conduct found above affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

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employees' Section 7 rights to engage in protected concerted conduct through collective or representative actions with collective remedies. The Program's misleading language is akin to the slick advertising campaign of the 1960's and 1970's where a cigarette manufacturer targeted teenagers with a trendy cartoon camel.

In accord with the request of the Acting General Counsel, my recommended order will also require Respondents to notify "all judicial and arbitral forums wherein (the Program) has been enforced that it no longer opposes the seeking of collective or class action type relief." This will include a requirement that Respondent: (1) withdraw any pending motion for individual arbitration, and (2) request any appropriate court to vacate its order for individual arbitration granted at Respondents' request if a motion to vacate can still be timely filed.

As I have concluded that the C.A.R.E.S. Arbitration Program including its Rules, Brochure, and Acknowledgment documents is unlawful, the recommended order requires that the Respondents revise or rescind it, and advise their employees in writing that said rule has been so revised or rescinded. Because the Respondents utilized the C.A.R.E.S. Arbitration Program including its Rules, Brochure, and Acknowledgment documents on a corporate-wide basis, the Respondents shall post a notice at all locations where the C.A.R.E.S. Arbitration Program including its Rules, Brochure, and Acknowledgment documents was in effect. See, e.g., *U-Haul Co. of California*, supra, n.2 (2006); *D.R. Horton,* supra, slip op. at 17.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondents, GameStop Corp., GameStop, Inc., Sunrise Publications, Inc. and GameStop Texas Ltd. (L.P.) (collectively "Respondents"), their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining any provision in the arbitration of disputes section of its C.A.R.E.S. Arbitration Program including its Rules, Brochure, and Acknowledgment documents that prohibits its employees or would reasonably lead 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.

(b) Enforcing, or seeking to enforce, any provision in the C.A.R.E.S. Arbitration Program including its Rules, Brochure, and Acknowledgment documents that prohibits employees or would reasonably lead 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.

(c) Maintaining a mandatory and binding arbitration policy that restricts employees' protected concerted activity or that employees reasonably would believe bars or restricts their right to engage in protected concerted activity and/or file charges with the National Labor Relations Board.

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Maintaining a policy requiring employees to maintain the confidentiality of the content and outcome of all arbitration proceedings.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Remove from the C.A.R.E.S. Arbitration Program including its Rules, Brochure, and Acknowledgment documents any prohibition against 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.

(b) Rescind or revise the C.A.R.E.S. Arbitration Program including its Rules, Brochure, and Acknowledgment documents to make it clear to employees that the agreement does not constitute a waiver in all forums of their right to maintain employment-related class or collective actions, does not restrict employees' right to file charges with the National Labor Relations Board or engage in protected activity, and does not require employees to keep information regarding their Section 7 activity confidential.

(c) Notify present and future employees individually that the existing prohibition against bringing or participating in class or collective actions in any arbitral or judicial forum that relates to their wages, hours, or other terms and conditions of employment currently contained it the C.A.R.E.S. Arbitration Program including its Rules, Brochure, and Acknowledgment documents will be given no effect and that the provision will be removed from subsequent editions of the C.A.R.E.S. Arbitration Program including its Rules, Brochure, and Acknowledgment documents.

(d) Notify 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 of its employees since April 1, 2010, that it desires to withdrawal any such motion or request, and that it no longer objects to it employees bringing or participating in such class or collective actions.

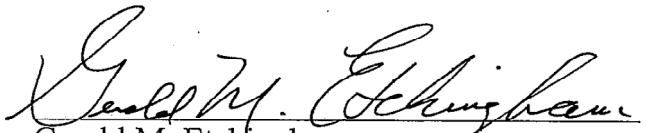
(e) Within 14 days after service by the Region, post at all of its facilities located in the United States and its territories copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 20 after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, inasmuch as Respondents customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the posted hard

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

copy notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since April 1, 2010.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. August 29, 2013



Gerald M. Etchingham
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law by maintaining and enforcing certain provisions of our C.A.R.E.S. Arbitration Program including its Rules, Brochure, and Acknowledgment documents and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT maintain or enforce a mandatory and binding arbitration policy that waives the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT maintain a mandatory and binding arbitration policy that restricts employees' protected concerted activity or that employees reasonably would believe bars or restricts their right to engage in protected concerted activity and/or file charges with the National Labor Relations Board.

WE WILL NOT maintain a policy requiring employees to maintain the confidentiality of the content and outcome of all arbitration proceedings.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Federal labor law.

WE WILL rescind or revise the C.A.R.E.S. Arbitration Program and all related documents to make it clear to employees that the agreement does not constitute a waiver of their right in all forums to maintain class or collective actions, does not restrict employees' right to file charges with the National Labor Relations Board or engage in other protected activity, and does not require employees to keep information regarding their Section 7 activity confidential.

WE WILL remove the opt-out provision for California employees from the C.A.R.E.S. Arbitration Program and all related future documents any prohibition against you from bringing or participating in class or collective actions relates to your wages, hours, or other terms and conditions of employment brought in any arbitral or judicial forum.

WE WILL remove from the C.A.R.E.S. Arbitration Program and all related future documents any prohibition against you from disclosing the content or results of any arbitration conducted under that policy

WE WILL notify present and future employees individually that our existing prohibition against bringing or participating in class or collective actions in any arbitral or judicial forum that relate to their wages, hours, or other terms and conditions of employment currently contained in the C.A.R.E.S. Arbitration

Program and all related documents will be given no effect and that the provision will be removed from subsequent editions of the C.A.R.E.S. Program.

WE WILL notify present and future employees individually that our existing prohibition against disclosing the content or results of any arbitration conducted under our C.A.R.E.S. Arbitration Program and all related documents will be given no effect and that the provision will be removed from subsequent editions of our C.A.R.E.S. Program.

WE WILL notify any arbitral or judicial tribunal where we have pursued the enforcement of our prohibition against bringing or participating in class or collective actions that relate to the wages, hours, or other terms and conditions of employment of our employees since April 1, 2010, that we desire to withdrawal any such motion or request, and that **WE WILL** no longer object to our employees bringing or participating in such class or collective actions.

GameStop Corp., GameStop, Inc., Sunrise Publications, Inc. and GameStop Texas Ltd. (L.P.) (collectively "Respondents")

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

901 Market St., Suite 400
San Francisco, CA 94103-1735
Hours: 8:30 a.m. to 5:00p.m.
(415) 356-5130.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (415) 356-5130.